

**Wrongful Convictions: The Effect of Tunnel Vision and
Predisposing Circumstances
in the Criminal Justice System**

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Part I: Introduction

Anglo-based criminal justice systems arguably have more safeguards against wrongful conviction than any other justice systems in the world. An accused person is presumed innocent throughout. The prosecution must prove the charges beyond a reasonable doubt. There is a right to counsel, to present evidence, and to make submissions to the trier of fact. Accused persons have the right to be tried by a jury of their peers, at least in the most serious of cases. A labyrinth of evidentiary rules exclude irrelevant or prejudicial information, and, at least in Canada and the United States, the Constitution guarantees a significant number of rights to accused persons, and the courts vigorously enforce those rights through exclusionary orders and other remedies including judicial termination of the case. In the event of a conviction after trial, appeals may be made to a Court of Appeal and after that, with permission, to the Supreme Court of Canada.

Despite these safeguards, international attention has recently focused on the repeated discovery of persons convicted by the courts when they were, in fact, innocent of the charges. Confirmed cases of wrongful conviction have emerged in a very public and visible

way over the past two decades in Canada, as well as in the United States, the United Kingdom, Australia, and New Zealand.¹

Public confidence in the criminal justice systems in these countries has been shaken because wrongful convictions represent a triple failure of justice: an innocent person has been convicted and imprisoned; the truly guilty person was allowed to go free and, potentially, commit further crimes; and, finally, the victim's family, who had a sense of closure with the conviction, has been re-victimized by opening an emotional wound, which, with an increasingly cold evidentiary trail, may never be healed. Some wrongful convictions involve accidents where no crime has been committed. Wrongful convictions in baby death cases can also result in the re-victimization of a family that has just lost a child.

The impact of wrongful convictions in Canada has reached through to the Supreme Court of Canada. In three recent decisions that court has noted that both substantive criminal law and the law of evidence must take into account the reality of wrongful convictions when courts are called upon to shape (or reshape) Canadian law. No longer, it seems, is it enough

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¹ Generally, see Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Manitoba Law Journal 403. In Canada, six Royal Commissions of Inquiry have been called on the subject, and one further inquiry is pending. In the Commonwealth, the United Kingdom has conducted several reviews, and the Mallard Inquiry is presently underway in Australia. In the United States, over 220 persons have been exonerated through DNA evidence during the past decade.

for a court to consider the law, the Constitution, and admissible evidence in a particular case: the judiciary must, in addition, consider whether existing or proposed principles of law, rules of evidence, criminal practice, or investigative procedures may increase the risk of wrongful conviction to an unacceptable level.²

A significant number of studies on wrongful convictions have been done during the past two decades. They were undertaken in distinct and diverse legal, political, and social environments in Canada, the United States, and other Commonwealth countries. Despite that diversity, the similarity in causal patterns and trends is at the same time both chilling and disconcerting.

In this paper, I will discuss two critical factors that have arisen in all jurisdictions: First, the existence of environmental factors or “predisposing circumstances” that foster wrongful convictions to occur in the first place, including so called “noble cause corruption,” an ends-based police and prosecutorial culture that masks misconduct as legitimate on the basis that the guilty must be brought successfully to justice. Second, I will examine “tunnel vision,” which leads justice system participants to focus prematurely on a single suspect. At the end of the paper, I will discuss lessons learned in the criminal justice system, and how they may apply to the field of forensic pathology in society’s quest to eliminate the spectre of convicting the innocent.

² *U.S. v. Burns*, [2001] 1 S.C.R. 283; *R v. Trochym*, 2007 SCC 6; *Hill v. Hamilton-Wentworth Regional Police*, 2007 SCC 41, including the authorities referred to at para. 36.

Part II: “Predisposing Circumstances” in the Criminal Justice System

Criminal investigations and trials take place in the context of the social, political, and economic conditions of the time. In theory, criminal investigations and trials involve an objective pursuit of the truth, but in practice there are many subjective factors that influence the course of events. “Justice” may be blind, but in reality the various players making up the justice system are very human and they bring their own perspective, experiences, biases, aspirations, and fears to the decisions they make.

Much has been written about the causes of wrongful convictions. Scholars have tended to focus on reforms concerning “immediate” causes at the front end of the system—such as eyewitness misidentification, lack of Crown disclosure, police or prosecutorial misconduct, and the inducement of false confessions. Certainly, those factors, either singly or in combination, have been the causes of wrongful convictions in a significant number of cases throughout the Commonwealth.

I propose, however, to examine several much more fundamental—and less visible—environmental or “predisposing” circumstances that foster wrongful convictions. These predisposing circumstances are often below the criminal justice system’s radar screen, and for that reason they are much more difficult to deal with. Typically, they can be found within one or more of the following institutional or social contexts, or a combination of them:

- a) public and media pressure on law enforcement agencies to solve a crime and successfully prosecute the perpetrator, especially in cases of horrific violence where the public has been outraged by its commission;
- b) cases where the public reacts to the *background* or circumstances surrounding the alleged offender, especially when he or she is perceived as being an “outsider” or a person originating from an unpopular, disadvantaged, or minority group linked to criminal activity generally;
- c) so-called “noble cause corruption,” which for our purposes may be described as an ends-based culture that encourages investigators to blind themselves to their own inappropriate conduct, and to perceive that conduct as legitimate in the belief that they are pursuing an important public interest; and
- d) an investigative environment that allows if not encourages the provision and acceptance of pre-analysis and pre-decision-making information that may be irrelevant, speculative, incomplete, out of context, or simply wrong.

There are at least two principal themes that underlie these predisposing circumstances. The first concerns the reaction of the public to a case, particularly where it involves horrific violence directed toward a child or woman, or the death of a child in tragic circumstances. The second involves the reaction of justice system participants to public and media perceptions of the case, with resulting feelings of pressure to solve the case and provide assurances of public safety, and with speed becoming the overarching objective. In the following pages, I will expand on the predisposing circumstances that have been identified in the criminal justice system, illustrating each with case examples.

A. *Public and media pressure on law enforcement agencies*

High-profile criminal cases, particularly those involving gruesome facts, tend to inflame community passions and create intense, almost hydraulic, pressure³ on investigators to solve what happened and arrest those responsible, and on prosecuting authorities to successfully convict those charged. Public and media pressure probably forms the most intense predisposing circumstance, and poses the greatest risk for distorting normal decision making in the criminal justice system.

An early United States study on wrongful convictions, perhaps the first in the world, emphasized the role that public and media pressure has on the investigative process. Edwin Borchard, a professor of law at Yale University, published *Convicting the Innocent* in 1932.⁴ It identified a total of 65 American and British cases in which the factual innocence of convicted persons was established where: (a) the allegedly murdered person subsequently turned up alive, so no crime was even committed; (b) the real culprit was subsequently arrested and convicted; or (c) the discovery of new evidence demonstrated innocence through a new trial or to the satisfaction of the State Governor or the President of the United States.

Significantly, Borchard described several *environmental* factors that allowed wrongful convictions to occur. The first involved public pressure to solve horrific crimes:

³ To adopt that wonderful phrase developed by Oliver Wendell Holmes in his dissenting judgment in *Northern Securities Co. v. U.S.*, 193 U.S. 197 at 400–401 (1904), adopted in *Payne v. Tennessee*, 501 U.S. 808 at 868 (1991).

⁴ Edwin M. Borchard, *Convicting the Innocent* (Yale University Press: New Haven, 1932).

(I)t is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except in the very few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an indiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon a person accused.

Borchard framed the issue in these terms:

Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In 14 of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious. This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked.

Borchard's study is significant because, seven decades ago, he described the causes of and circumstances surrounding wrongful convictions in a way that resonates even today. In 13 of the 65 cases, no crime was even committed. Some of the cases involved perjured evidence, or a circumstantial case for the prosecution that was later shown to be totally without foundation. In some, the person alleged to have been murdered "turned up hail and hearty" well after the supposed murderer had been imprisoned.⁵ Two of these cases deserve comment.

An Alabama farmer named Bill Wilson was about 20 years of age when he married Jenny Wade in 1900. They raised three children, and in 1907, Jenny left her husband, taking the last-born, a baby of 19 months. Jenny subsequently disappeared without a trace, and with no explanation.

Four years later, a local father and son were fishing when they discovered what appeared to be human bones near their fishing site. The bones were in an advanced state of decomposition, but the pair concluded that they represented two skeletons—an adult and a child. News of the discovery spread rapidly in the community, and one Jim House, who used to work for Bill Wilson, started a rumour that the bones were that of Jenny and her baby. Repetition of the rumour started to give it credence. The local prosecutor indicted Wilson, and prosecuted the trial.

At trial, the prosecutor called a local physician who said it was doubtful that the bones could have decomposed to such an extent in only four years. House took the stand and implicated Wilson. The prosecutor then called a “cell mate,” whom we would now call a “jailhouse informant,” who likewise implicated Wilson. The defence presented expert medical evidence that supported the view that the bones would have required at least 10 years to reach that state of decomposition. Wilson was convicted despite the contradictory medical evidence.

Doubts respecting guilt started to rise when the Curator of Physical Anthropology at the Smithsonian Institute concluded that the bones actually represented four or five separate skeletons, and probably came from an ancient Indian burial site. The prosecutor, however, continued to block attempts to pardon Wilson.

⁵ *Ibid.* at pp. 368–372.

Jenny Wilson was eventually found, alive and well in another state, married to another man. Bill Wilson was immediately granted a full pardon after spending three and a half years in jail. No crime had been committed by anyone. Of this, Borchard said:⁶

Again we have an illustration of the frailty of juries and of the fact that a prosecuting attorney's persuasion, backed by individual and community emotions of revenge, desire for a victim, and public sentiment, combined with accidents and misfortune, may bring to the penitentiary a perfectly innocent man.

In the second case, police officers in the Harlem vice squad in New York City were on a mission. They wanted to clean up prostitution in their district, and used highly questionable strategies to achieve that end. Today, we would probably say that they suffered from “noble cause corruption,” an ends-based police culture that I will describe in greater detail later on. In any event, police officers entered the apartment of Miss Icie Sands and arrested her for vagrancy. At trial, police testified that they had seen a male enter her apartment, and 10 minutes later, officers found both Miss Sands and the male “in compromising circumstances.” The male was an “unknown.” Miss Sands was found guilty and sentenced to a jail term.

A subsequent judicial investigation into the police department yielded startling results. Some officers were sending informants to prostitutes, then catching them at appropriate moments, only to either charge the women or obtain money from them. The informant was invariably allowed to “escape” without being charged. Over the next several years, the courts struggled with what to do with police officers who had themselves committed

⁶ *Ibid.* at p. 309.

criminal acts, and convicted innocent persons on perjured evidence. Of the social issue that prompted police to go on this “mission,” Borchard said:⁷

The condition of affairs disclosed by these cases is an illustration of the corruption that necessarily follows a wholly erroneous method of dealing with a recognized social problem ... but it is disconcerting in a high degree to find that certain members of the police, who on the whole are probably efficient, are themselves contaminated by the faulty system of law enforcement, if it may be called law enforcement. The law is as misconceived as the enforcement is efficient, making criminals out of non-criminals.

What lessons emerged from Borchard’s analysis? First, local pressures and emotions can lead to an almost irresistible desire to find a “viable perpetrator.” As he observed in relation to yet another wrongful conviction, “a community does not like to be baffled, and when some plausible culprit is caught in the toils, especially if his record is unsavory, social pressure demands a conviction.”⁸

Second, intense social, community, and political pressures can cause investigators to embark—consciously or unconsciously—on a “curative mission” that can result in the criminalization of innocent persons respecting something that may not even have been a crime to begin with. It is truly regrettable that the red flags raised by Borchard in 1932 were largely ignored for the next 70 years, and there is reason to believe that they continue to be ignored in some jurisdictions.

The 1935 trial of Bruno Hauptmann for the kidnapping of American hero Charles Lindbergh’s infant son was an international sensation. Media overwhelmed the trial proceedings, and the hearing became the first criminal trial witnessed nationally through

⁷ *Ibid.* at 349.

film and the newly emerging tabloid press. Hauptmann was convicted and executed but his innocence is still debated today, with a respectable view that he was innocent of the charges.⁹

The same can be said for the trial of Dr. Sam Sheppard, charged with murdering his wife, whose case went twice to the Supreme Court of the United States. Within days of the death of his wife, police, prosecutors, and the media went on the attack. An assistant prosecutor sharply criticized the refusal of the Sheppard family to permit immediate questioning of Dr. Sheppard. From then on, headline stories repeatedly stressed Sheppard's lack of cooperation with police. Media said he had refused to take a lie detector test. Newspapers played up "the protective ring" thrown up by his family.

Within two weeks of the murder, an "editorial artillery" opened fire with a front-page charge that somebody was "getting away with murder." A newspaper demanded an inquest, and one was called that same day. The inquest, held the following day in a school gym, was packed with reporters and photographers. The atmosphere was circus-like.

Public and media pressure intensified even further. Newspaper reports indicated that the police chief "urged Sheppard's arrest." Three weeks after the killing, a newspaper article demanded that Sheppard be taken to police headquarters. It used language that could only serve to inflame the public:

⁸ *Ibid.* at 119.

⁹ "Symposium: The Death Penalty and the Question of Actual Innocence" (2006) 42 *Tulsa Law Review* 403 at 412.

Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who had made monkeys out of police and authorities, carrying a gun part of the time, left free to do as he pleases....

Within hours of a front-page editorial headline “Why isn’t Sam Sheppard in jail?” he was arrested. The media barrage further intensified, with headlines such as “New murder evidence is found, police claim,” and “Dr. Sam faces quiz at jail on Marilyn’s fear of him.”

The trial lasted nine weeks. The media was in a feeding frenzy. The lawyers, judge, and jury were photographed and featured in the media almost every day. Witnesses’ testimony was printed verbatim in local newspapers. The names and addresses of the jurors were published, and each became a bit of local celebrity. Media headlines claimed: defence jury tampering; Sheppard was guilty because he had hired a well-known defence attorney; Sheppard had fathered an illegitimate child with a female inmate in New York city; and, significantly, during Sheppard’s own testimony before the jury, a police officer issued a press statement calling Sheppard a “bare-faced liar.”

Against such a backdrop, it is difficult to see how anyone could possibly receive a fair trial. On completion of the evidence, the jury deliberated for five days (an almost unprecedented length for that era), then found Sheppard guilty of second-degree murder. Subsequent appeals to the Supreme Court of the United States affirmed his conviction, although en route the Ohio Supreme Court said this:

Murder and mystery, society, sex and suspense were combined in this case in such a manor as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine week trial, circulation-conscious editors catered to the

insatiable interest of the American public in the bizarre.... In this atmosphere of a “Roman holiday” for the news media, Sam Sheppard stood trial for his life.

Ten years later, Sheppard again petitioned the Supreme Court of the United States, this time successfully. On behalf of the court, Justice Clark found that Sheppard had not received a fair trial because the “carnival atmosphere” that had pervaded his trial had not been controlled by the trial judge. He added: “[E]very court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.” A new trial was ordered, and this time Sheppard was acquitted. Sheppard subsequently became a severe alcoholic, and in 1970, at the age of 46, he died of alcohol poisoning.¹⁰

The hydraulic pressure of public opinion, and media commentaries, to charge swiftly and then secure a conviction, arise in all jurisdictions. During the 1970s bombing campaign waged by the IRA in the United Kingdom, the public saw the IRA as “public enemy number one,” and anyone of Irish descent was suspect. Resulting public pressure generated an atmosphere in which state authorities sought to convict despite the existence of ambiguous or contradictory evidence. It also caused scientists working in government-operated laboratories to feel aligned with the prosecution, resulting in a perception that their function was to support the theory of the police rather than to provide an impartial, scientifically based analysis. They had, as was later found by the courts, become partisan.¹¹

¹⁰ *Sheppard v. Ohio*, 352 U.S. 910 (1956); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Generally, see Bruce MacFarlane, above, footnote 1, at pages 479–483.

¹¹ *Ibid.* at footnote 80 and accompanying text.

Six Irish Catholic men, usually referred to as the “Birmingham Six,” were charged with 21 counts of murder, convicted by a jury, and spent 16 years in jail before being freed by the Court of Appeal in 1991. On behalf of the Court, Lloyd L.J. noted that while the case against the men was convincing, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the Court concluded, and several of the police investigators “were at least guilty of deceiving the court.”¹²

Science and expert testimony continued to come under the microscope in further IRA prosecutions that resulted in wrongful convictions. In the wake of a conviction reversal respecting the Maguire Seven, who had been accused of running an IRA bomb factory in North London, Brian Ford, a leading scientist, openly questioned whether there had been a closing of ranks, and expressed concern that the Crown’s scientists had been operating a state-run service to get convictions, rather than offering independent scientific expertise.¹³

Judicial condemnation continued of expert evidence used to support conviction of IRA members or those believed to be supporters of the IRA. Arguably, that criticism peaked in the conviction reversal of Judith Ward. In 1974, she had been convicted of 12 counts of murder and 3 charges of causing an explosion. Seventeen years later, the Home Secretary referred her case to the Court of Appeal for a reassessment. There, it was alleged that supposedly neutral scientists had deliberately supported the prosecution’s efforts to convict Ward. In the end, the conclusions of the Court of Appeal were even more serious than that.

¹² *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.).

¹³ Bruce MacFarlane, “Convicting the Innocent,” above at 419.

Glidewell J., on behalf of the unanimous court, concluded that three senior government scientists called as Crown witnesses at trial had deliberately misled the court; that they had done so in concert; and that they taken “the law into their own hands and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial.” His assessment of the conduct of these three scientists was searing:

For the future it is important to consider why scientists acted as they did. For lawyers, jurors and judges a forensic scientists congers up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a somber thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact the police seek their assistance may create a relationship between the police and the forensic scientist. And the adversarial character of the proceedings tend to promote this process. Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity. That is what must have happened in this case.¹⁴

Roger Cook, an English forensic scientist who later testified before a Royal Commission in Canada, noted that this case caused “tidal waves” in the international forensic community.¹⁵

It is now clear that distortion in normal investigative and prosecutorial decision-making processes in the cases of the Guildford Four , Birmingham Six, Maguire Seven, and Judith Ward led to terrible and notorious miscarriages of justice. While all of the defendants were ultimately released from jail, and, in the case of the Guildford Four and Maguire Seven, the Prime Minister issued a formal apology, emotional scarring was deep for all of them.¹⁶

¹⁴ *R. v. Ward*, [1993] 2 All E. R. 577 (C.A.).

¹⁵ The Commission on Proceedings Involving Guy Paul Morin, report, Vol. 1, at 268.

B. Public reaction to the background of an offender

The four “categories” of predisposing circumstances that I intend to discuss do not exist in isolated compartments. There is much overlap, and as I will show shortly, there is a very close linkage between distorted decision making flowing from public pressure, and distortions arising from the reality or perception that the defendant is an “outsider” or someone originating from an unpopular, disadvantaged, or visible minority group.

Even before evidence is presented at a criminal trial, members of a jury may see the accused in a negative light. The defendant, for instance, may be a member of a minority group, which, through myth, stereotype, or perception, is regularly linked to criminal activity. Historical examples include Blacks and Hispanics in the United States, Aboriginal persons in Canada, and the Irish in England. “Poor” people may experience this linkage as well. These perceptions can distort application of the presumption of innocence, and in extreme cases, the *practical* burden of proof at trial may actually shift from the Crown to the accused. The same can be said for those with an unusual political, religious, or social philosophy, where vulnerability to prosecution may increase the risk of wrongful conviction.

Donald Marshall Jr., a 17-year-old Nova Scotian Aboriginal, was wrongfully convicted of the murder of Sandy Seale, a 17-year-old Black man. A subsequent Royal Commission found that several factors had contributed to the miscarriage of justice that occurred in this case: An incompetent and seriously flawed police investigation; prosecutorial misconduct;

¹⁶ *Ibid.* at footnotes 65 and 466 and accompanying text.

a failure by defence counsel to provide an adequate defence at trial; and serious judicial errors in the management of the trial. More significantly, however, the three Commissioners unanimously concluded that “one reason Donald Marshall Jr. was convicted of and spent eleven years in jail for a crime he did not commit is because Marshall is an Indian.”¹⁷

Visiting “hippies” in small-town Canada during the 1960s were likewise suspect. On January 31, 1969, David Milgaard was in the wrong place at the wrong time. Stuck in the snow in Saskatoon, Saskatchewan, Milgaard, a drifting petty thief and drug user, was charged with the murder of Gail Miller, whose body was found near the location where Milgaard had become stuck. Convicted on dubious evidence, Milgaard spent 23 years behind bars before DNA evidence finally established his innocence, and pointed the finger conclusively at someone else.

Personal characteristics viewed as inappropriate or bizarre by investigators can lead police to focus on an individual and, worse still, charge them even where the evidence supporting guilt is wholly lacking. The case of Guy Paul Morin provides a good illustration. There, police established surveillance on the Morin residence five days after they were told by a member of the victim’s family that Guy Paul Morin played the clarinet and was a “weird-type guy.” Investigators and the Crown also believed that Morin’s failure to attend the funeral of the victim, Christine Jessop, as well as his failure to express his condolences to

¹⁷ Royal Commission on the Donald Marshall Jr. Prosecution, Commissioners Hickman, Poitras, and Evans (Nova Scotia, 1989), at p. 148.

the victim's family were indicative of his consciousness of guilt.¹⁸ Prematurely focusing on Morin, police arrested him on the basis of a paper-thin case later bolstered by false evidence provided by jailhouse informants. DNA evidence later established Morin's innocence conclusively. The real killer in the case has never been found.

But no case illustrates the plight of an "outsider" or an unpopular defendant better than that of Lindy Chamberlain, convicted in Australia for the 1980 killing of Lindy's nine-week old daughter, Azaria.¹⁹ The Crown's case lacked any evidence of motive or confession, and neither a murder weapon nor the body of the child was found. Mrs. Chamberlain contended that a dingo (a wild dog) had run off with the child. Australians closely followed Chamberlain's trial and appeal in the 1980s, and were split over whether to believe her story. Bumper stickers reading "The Dingo Did It" and "The Dingo Is Innocent" were often seen as the case progressed through the courts. After Mrs. Chamberlain had spent three and a half years in prison, a Royal Commission into the case concluded "that there are serious doubts and questions as to the Chamberlains' guilt and as to the evidence in the trial leading to their convictions." The Commissioner concluded that there was absolutely no evidence of human involvement in the child's disappearance and apparent death.

During the trial, membership of the Chamberlains in the Seventh-day Adventist Church was emphasized by many media outlets. The media had a field day in the case, stirring up suspicion against a couple whose demeanour in the face of tragedy they simply could not understand. As one Australian observer, Paul R. Wilson, put it, "[m]ost Australians

¹⁸ The Commission on Proceedings Involving Guy Paul Morin, above at 60 and 65.

¹⁹ For a discussion of this case, see Bruce MacFarlane, above at pp. 414–415.

perceive Adventists as an obscure and perhaps bizarre sect who do not eat meat but pray on Saturday—the day all ordinary Australians are watching football.” More seriously, it was suggested during the trial that the name “Azaria” was given to the child because it meant “sacrifice in the wilderness.” This rumour, perpetuated by some newspapers, persisted even though the Chamberlains steadfastly maintained that the name came from the Bible and meant “blessed of God.” Wilson summarized the point in this way:²⁰

Coupled with publicity regarding the name “Azaria,” the weird circumstances of the child’s disappearance and the emphasis on their religious background the media stereotyped Lindy Chamberlain in particular as a modern-day witch. A jury could not help but be influenced by this stigmatisation process.

Investigative and media theories that the death of a child amounts to murder can lead to a moral panic on the part of state authorities. Where that occurs, there is a danger that circumstances that might otherwise be seen as involving a natural (or least a non-culpable) death can be transformed into a case of culpable homicide. That heightens the need for clear institutional safeguards at the investigative and prosecutorial stages, something I will discuss and make recommendations on in Part IV of this paper.

C. Noble cause corruption

The phenomenon often referred to as “noble cause corruption” is an ends-based investigative culture that prompts investigators to blind themselves to their own inappropriate conduct, and to perceive that conduct as legitimate in the belief that they are pursuing an important public interest.

²⁰ *Ibid*, at page 439.

“Noble cause corruption” probably emerged publicly with the publication of Edwin Delattre’s influential book, *Character and Cops: Ethics in Policing*, released in 1989. The term, and a growing understanding of the problem, subsequently spread to Canada, the United States, and Australia.²¹

Noble cause corruption covers a broad range of investigative and testimonial conduct that masquerades as legitimate, including: the use of excessive force; racial profiling; suppressing adverse forensic reports; deceptive testimony in court; and the selective presentation of evidence in court.

So described, noble cause corruption gives great weight to the *end* to be achieved, compared to the *means* chosen to achieve that objective. Dr. David F. Sunohara, writing for the Canadian Police College in 2006, argued that investigators who engage in noble cause corruption “are motivated by their sense of mission.” He continued: “[T]he pursuit of ideals may help to explain the problem of noble cause corruption in policing.” Viewed in this light, noble cause corruption does not necessarily involve corruption in the classic “dirty cop accepts a bribe and lies in Court.” Rather, it is the sense of *mission*—the often dogged pursuit of a laudable goal in the public interest at the expense of professional ethics and personal morality—that sets it apart from the

²¹ Michael A. Caldero and John P. Crank, *Police Ethics: The Corruption of Noble Cause*, 2nd ed. (Mathew Bender and Co., a member of the Lexis Nexis group, 2004); Dianne L. Martin, “Lessons about Justice from the ‘Laboratory’ of Wrongful Convictions” (2002) 70 *University of Missouri-Kansas Law Review* 847; John Kleinig, “Rethinking Noble Cause Corruption” (2002) 4th *International Journal of Police Science and Management* 287; the Honourable Justice James Wood, Supreme Court New South Wales, “Royal

corrupt investigator who seeks a personal advantage by deliberately performing a criminal act in favour of a criminal justice system target.

This also explains why noble cause corruption is so difficult to discover. On the surface, the conduct seems lawful and appropriate: there is no paper trail evidencing corruption, and the “mission”—which invariably is in the public interest—lies deep in the psyche of the investigator. For this reason, it has the potential to affect if not infect the work of individual investigators, the work of investigative teams, and a significant number of cases over an extended period of time.

Indeed, some scholars have suggested that the term “noble cause corruption” is a bit misleading. There is merit to this suggestion. Corruption is not a necessary element here. We are not talking about corrupt investigators; rather, we are talking about investigators who truly believe that they are pursuing justice, but who adopt methods that are inappropriate if not, in some cases, unconstitutional or criminal. It is probably more a case of “noble cause distortion” than noble cause corruption. However, for ease of reference, I will continue to use the established term “noble term corruption” for the purpose of this paper.

There are clear dangers associated with this investigative philosophy, by whatever name it goes. Innocent persons can easily become enmeshed in public allegations or

Commission into the New South Wales Police Service,” 8th International Anti-corruption Conference (Lima, Peru, September, 1997).

court proceedings based on nothing more than a firmly held moral value or investigative theory.

In the context of the current Inquiry, it is significant to note that there is some Canadian research supporting the proposition that investigators dealing with child and elder abuse tend to be more tolerant of noble cause corruption in the workplace, and, more importantly, are probably more willing themselves to engage in noble cause corruption:²²

Frequent exposure to operational stressors such as conflict with the public, dealing with unsolvable problems and observing children and the elderly being victimized caused officers to become more tolerant of noble cause corruption. Over a third of the officers (36%) reported that they experienced these operational stressors daily. This figure rises to 58% when we examine the experience of constables, the officers most likely to experience such events. Officers with this kind of history were more disinclined to condemn the use of corrupt means than were officers less frequently exposed to operational stressors.

On the basis of this research, it would appear that those who are regularly exposed to the trauma if not horror of child deaths may be more vulnerable to noble cause corruption.

Finally, it should be observed that there is a close linkage between noble cause corruption and tunnel vision, a form of cognitive bias that can impede accuracy in what we perceive and how we interpret what we perceive. Investigators can become emotionally attached to their theory of the case, including which suspect is most likely

the offender. When that occurs, the object of the investigation often shifts from an open-ended search for the truth to proving that the theory of the case is accurate.²³ Tunnel vision and noble cause corruption become mutually reinforcing: once convinced that a suspect is the perpetrator, the investigator may decide to use questionable methods to further substantiate the operational theory, rationalizing these steps on the basis that they are “merely helping the truth along.”²⁴

Once again, the case of Guy Paul Morin provides a good illustration. Nine-year-old Christine Jessop had been brutally murdered in October 1984. The prosecution relied on hair and fibre evidence to demonstrate that there had been physical contact between the victim and the accused prior to Christine’s death. The evidence was critical because it tended to refute the accused’s assertion that he had never had physical contact with Christine. Two forensic analysts made the link at trial, although their testimony was laced with curious if not misleading phrases such as: “*X matched Y*”; *X was consistent with coming from the same source as Y*”; and “*X could have come from the same source as Y.*” “Properly understood,” Commissioner Kaufman later concluded, “the hair comparison evidence had little or no probative value in proving Mr. Morin’s guilt.”

Matters got worse. The key analyst did not properly communicate the limitations on her evidence to police or prosecutors. A hastily developed pre-arrest preliminary opinion on the comparisons was overstated, and “left the officers with the understanding that

²² Sunohara, above at pp. 2–3.

²³ Keith A. Findley and Michael S. Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases” (2006) *Wisconsin Law Review* 291 at 326. This article provides an exceptionally helpful insight into tunnel vision as it occurs in the criminal justice system, and I have drawn heavily from it.

the comparison yielded important evidence implicating Mr. Morin.” Contamination of the evidence, known to the analysts, was deliberately withheld from police, perhaps to avoid embarrassment. The Commissioner concluded that while the precise time of the contamination could not be established, it may have tainted even the earliest of the analyst’s conclusions, which had led to Morin’s arrest.

The Commissioner concluded that had the limitations on the analyst’s earliest findings been clear, Morin may never have even been arrested. But he was. And it became even worse after the arrest. Awaiting trial in prison, two thoroughly disreputable jailhouse informants came forward and claimed that Morin had admitted his role in the crime to them. Prosecutors failed to evaluate this claim objectively, tunnel vision set in, and, in the case of the lead prosecutor, it remained in place “in the most staggering proportions” well past the trial, resulting appeals, and into the public inquiry.²⁵

In the result, the failure to follow basic procedures, mixed with carelessness and a bit of partisanship, led to a high-profile arrest and the development of a state team that understandably wanted to hold someone accountable for an horrific crime against a young child.

Police officers are caught amid the harsh world of operational police work, a legal and constitutional framework that seems to protect those targeted by the state, and a police

²⁴ *Ibid.* at pp. 327–328, including footnote 255.

²⁵ The Commission on Proceedings Involving Guy Paul Morin, Executive Summary and Recommendations, the Honourable Fred Kaufman, 1998, at pp. 5–9.

subculture that underscores the importance of bringing “truly guilty” persons to justice. Each of these elements shapes the emotions and attitudes of individual police officers, and each can, regrettably, contribute to various forms of unethical and unprofessional behaviour on the part of individual officers, as well as investigative teams and, potentially, an entire police service.

D. Distortions due to extraneous influences

Even the most sincere and honest investigators, and in this respect I most certainly include forensic scientists and pathologists, can reach a conclusion that is distorted due to reliance on pre-analysis and pre-decision-making information that is irrelevant, speculative, incomplete, out of context, or simply wrong.

How can this happen? First, and perhaps most importantly, it is clear that investigators generally want *all* information about the case.²⁶ That is a normal desire, and for reasons that I will discuss in Part III, that is in many respects a laudable if not a desirable state of affairs, as it tends to reduce the risk of “tunnel vision” setting in. Yet, there are dangers.

²⁶ D. Michael Risinger, Michael J. Saks, William C. Thompson and Robert Rosenthal, “The Daubert/Khuno Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion” (2002) 90 California Law Review 1 at 32: “finally, the anecdotal evidence is extensive and uniform in indicting that extraneous information is rife in most, if not all, areas of forensic practice.”

First, there is a significant risk that an investigator will be unduly influenced by someone else's *expectation*—usually the police or the Crown. In fact, this has been described as “one of the three biggest dangers in forensic practice.”²⁷

There is also a risk that investigators will reach findings based on information that should be considered quite irrelevant. This is particularly the case where police arrive at a particular theory and convey it to the investigator. If the police theory is contrary to the findings of the investigator, there may be a temptation to revise or reinterpret the original analysis, resulting in sincerely believed but revised and potentially contaminated conclusions.²⁸ Risinger et al. give the following illustrations in the context of the forensic sciences.

In the investigation of the Lindberg kidnapping, two of the world's leading handwriting identification experts were drawn in for assistance by investigators. Initially, both experts doubted that Hauptmann's writings came from the same source as the ransom notes. According to recent analysts of the case, within an hour after having been informed of the discovery of the bulk of the ransom money in Hauptmann's garage, both experts came to the conclusion that Hauptmann did in fact write the ransom notes.²⁹

²⁷ *Ibid.*

²⁸ *Ibid.* at 38.

²⁹ *Ibid.* at 38–39.

Even more seriously, Dr. Peter R. DeForest, a professor of Criminalistics at the John Jay College of Criminal Justice and a former Commissioner with the Forensic Science Professional Accreditation Commission (who, coincidentally, was called as an expert at the Driskell Public Inquiry),³⁰ has described investigators who have responded to inconclusive results by saying to forensic examiners: “Would it help if I told you we know he is the guy who did it?”³¹

To avoid these dangers, Findley and Scott, writing in 2006 on the subject of tunnel vision in the criminal justice system, emphasized the importance of insulating laboratory analysts from all case investigative information that they don’t need to perform their analysis:³²

Thus, contrary to common current practice, laboratory analysts should be shielded from information about the detectives’ theory of the case, the nature of other evidence and other test results in the case, and the results police hope to obtain from the laboratory analyses. Only by insulating analysts in this way can the objectivity (and hence, reliability) of the analysts’ conclusions be assured. (footnotes deleted)

Risinger et al., writing in 2002 on the subject of forensic sciences, arrived at the same conclusion, but put the issue perhaps a bit more broadly: to guard against “self-deception,” they said, “a wall of separation must be created between forensic science examiners and any examination-irrelevant information about a case.”³³ Whether and to

³⁰ Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, the Honourable Patrick J. LeSage, Q.C. (Winnipeg, Queens Printer, 2007), at 157.

³¹ Risinger et al., above at 39.

³² Findley and Scott, above at 394.

³³ Risinger et al., above at 45.

what extent these sorts of double-blind procedures can be applied to forensic pathology as distinct from other forensic sciences is very much a live issue.

In summary, there are clear risks that “too much information” about a case can distort the conclusions reached by forensic experts. Once again, corruption is not a necessary component of the process; the distortion takes place at a deep psychological level, and is difficult to guard against. Protocols that describe the information that should be provided to the expert may help, yet an argument can be made that a fulsome approach to disclosure will protect against an equally invisible and just as insidious distorting phenomenon: tunnel vision, the subject of the next part of this paper.

Part III: Tunnel Vision in the Criminal Justice System

A. What is tunnel vision?

As noted earlier, the first systematic research on miscarriages of justice was published in 1932 by Professor Edwin M. Borchard at Yale University. In his classic work, Borchard examined the principal causes of wrongful conviction and, for the first time, suggested the existence of a link between public pressure to solve horrific crimes and the “pinning” of responsibility on a certain suspect:

Except in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the *environment in which they live with an indiscriminating public clamour for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon an accused person.* (p. 369; emphasis added)

The concept of “tunnel vision” in a criminal justice context can be traced, in a bit more detail, to the writings of Jerome Frank, a judge of the U.S. Circuit Court of Appeals. In *Not Guilty* (1957), Judge Frank explored the causes of wrongful conviction and examined 36 specific cases in which an innocent person had been convicted. He noted that prosecutors often have an “occupational disease” that prompts them to acquire a “bias in pre-trial investigations” which in turn leads to “a habit of drifting into a chronic spirit of hostility toward each new suspect” (p. 237).

According to Frank, distorted perceptions of this nature commonly reach into police investigations as well. Front-line investigators, faced with a seemingly insoluble crime, “rush to a conclusion, then stubbornly cling to it, disregarding all facts contradicting that conclusion.” He noted that this is especially the case where the public, in a state of fear over a horrific crime, clamour for the quick detection of a dangerous criminal. Under mounting pressure, the police themselves become impatient to solve the case, recognize the importance of making an arrest, and become increasingly less willing to admit that their proposed solution may be the wrong one. Frank outlined a scenario that repeats itself over and over again in a wide variety of investigative situations:

A bank has been robbed, its cashier murdered. A bystander reports to the police that he saw Williams Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together those clues and jump to the conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones’s guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed by prejudice against any other. Said former U.S. Attorney General Homer Cummings of a

famous case, “The police found their suspect and then proceeded to search for the facts to fit him.” (p. 66)

This was not intended by Frank as any sort of definition; rather, it was an illustration of an institutional phenomenon occurring within investigative services that commonly arises when there is intense public pressure to solve a serious crime, with speed becoming the overriding factor. It could affect a single investigator, or a group; and, as Judge Frank noted, this does not necessarily mean that the officer or officers are dishonest. It does, however, mean that wilful blindness has set in at an individual or institutional level, or both.

1. *Commissions of Inquiry in Canada and the United States*

a) *The Morin Public Inquiry*

In Canada, the concept of tunnel vision was discussed for the first time in the public inquiry into the wrongful conviction of Guy Paul Morin. Commissioner Kaufman arrived at the conclusion that one of three principal causes in the wrongful conviction of Morin was the existence of tunnel vision on the part of both the investigators and the prosecution. While this concept was relatively new, it is perhaps more accurate to say that it was an established cause of wrongful conviction that Justice Kaufman decided to examine from a new perspective. He defined tunnel vision as “*the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to that information*” (p. 1134 (emphasis added)). Commissioner Kaufman also noted that the causes of tunnel vision are systemic and structural, in the nature of a “mind set,” and that they had previously

arisen in both Australia and in Canada (p. 1137). Commissioner Kaufman also commented that tunnel vision on the part of investigators can lead to tunnel vision on the part of a witness. In the case under consideration, a Crown expert witness not only suffered from tunnel vision, but his conduct led all of the players in the case to proceed on a false premise in a way that is eerily reminiscent of what happened in the U.K. case of Judith Ward:³⁴

Mr. Reffner [defence expert] was cross-examined on a false factual premise, the prosecution made its submissions based on a false premise, and the trial judge charged the jury on a false premise. *Mr. Erickson [crown expert] bears the responsibility for this state of affairs. His failure to disclose demonstrates a misapprehension of his role as an independent, neutral scientist.* A scientist is not entitled to discount a potential defence position (or indeed a crown position) and then fail to disclose evidence which might bear upon that position. Indeed, here we have something worse—*Mr. Erickson did not make full disclosure.... [he was too easily prepared to discount evidence which could favour the defence.* (emphasis in original)

b) Commission of Inquiry into the Wrongful Conviction of Thomas Sophonow

The Cory Commission dealt with the wrongful imprisonment of Thomas Sophonow. Chillingly, Commissioner Cory again found that the causes of Sophonow's wrongful conviction mirrored the conclusions reached in earlier Royal Commissions in the United Kingdom, Australia, New Zealand, and Canada. Tunnel vision was one of the causes to emerge. Commissioner Cory said:

Tunnel vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.

c) Report of the Commission on Capital Punishment (Illinois)

³⁴ The Commission on Proceedings Involving Guy Paul Morin, report, Vol. 1 at 217–218.

Following the exoneration of 13 men on death row in Illinois, Governor George Ryan established a 17-person Commission to advise on the future of the criminal justice system in that state. Commissioners found “tunnel vision” or “confirmatory bias” in a number of cases involving the 13 exonerees, describing the phenomenon as “[a] belief that a particular suspect has committed a crime [that] obviates an objective evaluation of whether there might be others who are actually guilty.” Citing the Morin Inquiry in Canada, and quoting with approval the statement of Commissioner Cory noted above, the Commissioners added this:

Pressure always exists for a police department to solve a crime, particularly where that crime is a homicide. Law enforcement agencies very often undertake heroic efforts to bring the guilty to justice, and their efforts in this regard should be applauded and supported. In any investigation, danger exists that rather than keeping an open and objective mind during the investigatory phase, one may leap to a conclusion that the person who is a suspect is in fact the guilty party. Once that conclusion is made, investigative efforts often centre on marshalling facts and assembling evidence which will convict that suspect, rather than continuing the objective investigation of other possible suspects.

Significantly, the Commissioners observed that “the problem of confirmatory bias is not a problem associated with any one group of police officers or any one department. *It is a potential problem in all investigatory agencies*” (emphasis added).

d) The Lamer Commission of Inquiry

In the 2006 Commission of Inquiry into the cases of Ronald Dalton, Gregory Parsons, and Randy Druken, retired Chief Justice Antonio Lamer agreed with the Ryan Commission on this point, observing:³⁵

³⁵ The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken, by the Right Honourable Antonio Lamer (St. John’s, 2006), at p. 172.

Any system that depends on human beings is, by virtue of that very feature, fallible. This helps to explain why tunnel vision is seldom the result of personal malice ... and why wrongful convictions are not aberrational but are rooted in system problems.

2. Critical elements of tunnel vision

Existing authorities differ somewhat on the definition of tunnel vision in the criminal justice system, but tend to agree that the following are the principal elements in this recently discovered psychological phenomenon:

- a) Tunnel vision involves an overly narrow focus on a particular investigative or prosecutorial theory;
- b) This has the effect of colouring the evaluation of information received, and the investigative conduct in response to that information;
- c) The colouring process involves the unconscious filtering in of evidence that will “build a case” against a particular suspect, while ignoring or suppressing evidence respecting the same suspect that tends to point away from guilt.

Tunnel vision can affect a single investigator, or a team of investigators. It usually signals the need for a broader investigation to ensure that normal decision-making processes are not distorted. I will now deal with how that occurs.

B. How does tunnel vision occur?

Recent scholarly studies in the United States tend to agree with the elements of tunnel vision discussed above, but focus sharply on the psychological roots of cognitive bias,

institutional pressures, and enforcement policies that reinforce tunnel vision, rather than reduce its effect.

1. Psychological roots

The information selection and filtration process I discussed earlier in this section forms a core element of tunnel vision. But the roots of this phenomenon can be traced to cognitive biases, and are often magnified by institutional pressures and a public policy framework that is intended to guide the conduct of state officials. In my view, an understanding of the psychological origins of tunnel vision within the context of the criminal justice system may facilitate a broader discussion on whether and to what extent these factors can explain the conduct of key players in other disciplines of a similar nature, including forensic pathology.

In 2006, one group of authorities observed that tunnel vision often involves a commitment to the belief that a particular suspect has committed the crime, effectively masking the need for an objective evaluation of alternative suspects or theories.

Another group said this:

Tunnel vision is the product of a variety of cognitive distortions that can impede accuracy in what we perceive and in how we interpret what we perceive. Psychologists analyze tunnel vision as the product of various cognitive “biases,” such as confirmation bias, hindsight bias and outcome bias. These cognitive biases help explain how and why tunnel vision is so ubiquitous, even among well-meaning actors in the criminal justice system.

Keith Findley and Michael Scott, Professors of Law in Wisconsin, who in 2006 published a scholarly analysis of tunnel vision that is arguably the most extensive and persuasive study yet, outlined this particularly helpful summary of Canadian and U.S. thinking to date:

Tunnel vision is a natural human tendency that has particularly pernicious effects in the criminal justice system. By tunnel vision, we mean that “compendium of common heuristics and logical fallacies”, to which we are all susceptible, that lead actors in the criminal justice system to “focus on a suspect, select and filter the evidence that will “build a case” for conviction, while ignoring or suppressing evidence that points away from guilt.” This process leads investigators, prosecutors, judges and defence lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable. Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.

Although most of the literature discusses tunnel vision that focuses on a particular suspect, it is also possible that tunnel vision could lead to a premature conclusion that a crime has been committed and, with that, a single-minded focus on a particular suspect. Indeed, investigators who believe that they have a mission to discover and punish crime might through a process of noble cause corruption and tunnel vision be inclined to conclude that a crime has occurred when in reality no crime has occurred at all.

2. Tunnel vision as a function of cognitive biases

The human tendency toward tunnel vision is in large measure innate; it is a distinctive feature of our psychological makeup. Psychologists see tunnel vision as the product of various cognitive “biases.” Properly understood, these biases, individually or collectively, are capable of explaining how and why tunnel vision is so common, even among well-meaning and otherwise honest justice system participants.³⁶

³⁶ Findley and Scott, above at pp. 307–308.

Cognitive biases have been the subject of intensive study for years. What has been less visible, however, and therefore more difficult to understand, is the extent to which biases of this nature can influence human behaviour without any conscious recognition of what is going on, and without an understanding of the extent to which institutional and environment factors can intensify the effects of these biases.

On a practical level, cognitive biases may actually be seen as a natural means by which we can efficiently process the flood of information we are subjected to on a daily basis. Without some sort of filtration mechanism, information received may simply become a “blur.” But, given the human need to categorize, interpret, and give attention only a selective basis, we can err in our assessments:³⁷

The effects can be pernicious, whether the investigators involved are scientists or homicide detectives, unless the biasing tendencies are recognized and steps are taken to control or correct for them.

What, then, are these cognitive biases, and how exactly do they affect justice system participants?

3. Cognitive biases

a) Confirmation bias

Confirmation bias involves the tendency to seek or interpret information in ways that support existing beliefs, expectations, or hypotheses. In part, this bias reflects the reality

³⁷ *Ibid.* at 309.

that when testing a hypothesis or conclusion, people tend to look for information that confirms their view, avoiding or ignoring information that challenges it.³⁸

This also applies to the recollection of information: when endeavouring to revisit information previously obtained, people tend to focus on information that confirms their existing hypotheses or beliefs.³⁹

A subset of this bias involves “belief perseverance”: the tendency to resist changing one’s initial hypothesis, even in the face of new, dispositive evidence that undermines the initial theory. This bias causes even experienced professionals to question information that conflicts with their existing belief, and interpret new information in a way that supports their belief, rather than disconfirming it. This was painfully evident in the case of Guy Paul Morin, where even at the resulting public inquiry the lead prosecutor tenaciously clung to the view, in the face of overwhelming evidence to the contrary, that the jailhouse informants had told the truth—prompting Commissioner Kaufman to say that the prosecutor suffered from tunnel vision “in the most staggering proportions.”⁴⁰

In addition to seeking, interpreting, and recalling confirmatory information, people tend to give greater weight to information that supports their beliefs, and assign less weight to information that questions them. As Findlay and Scott have observed:⁴¹

[People] will search internally for material that refutes the disconfirming evidence, and, once that material is retrieved from memory, there will be a bias to judge the

³⁸ Findley and Scott, above at 309 (and the authorities relied upon there).

³⁹ *Ibid.*

⁴⁰ The Commission on Proceedings Involving Guy Paul Morin, report, Vol. 1, at 490.

⁴¹ Findley and Scott, above at 313.

disconfirming evidence as weak. In contrast, when presented with information that supports prior beliefs, people allocate fewer resources to scrutinizing the information and are more inclined to accept the information at face value.

Confirmation bias may help to explain what went wrong in several of Canada's most notorious wrongful convictions. For instance, in the 1989 Royal Commission on the Donald Marshall Jr. Prosecution, Commissioners Hickman, Poitras, and Evans concluded that the police investigation "seemed designed to seek out only evidence to support [the police] theory about the killing and to discount all evidence that challenged it."⁴²

In the public inquiry concerning Guy Paul Morin, Commissioner Kaufman found that forensic analysts had overstated their conclusions, suppressed information concerning contamination of exhibits, and used terms and phrases in their evidence that contributed to misunderstandings of the forensic findings, invariably in favour of finding guilt.⁴³

Further, Commissioner Kaufman found that the prosecutors at the second trial had not objectively assessed the rehabilitation of the two jailhouse informers, and that their views were "[n]o doubt coloured by their genuine views on Guy Paul Morin's guilt." As a result, evidence that undermined the informers was more easily discarded, and largely inconsequential evidence became confirmatory.

And in the case of James Driskell, Crown attorneys inexplicably concluded that there had been a fair trial in repeated post-conviction reviews, despite significant non-disclosure

⁴² Royal Commission on the Donald Marshall Jr. Prosecution, *Digest of Findings and Recommendations* (Nova Scotia, 1989), at 3.

⁴³ The Commission on Proceedings Involving Guy Paul Morin, above, *Executive Summary and Recommendations*, at p. 8.

issues that were apparent on the face of the Crown file—a reality confirmed in two subsequent, independent reviews of the case.⁴⁴

More broadly, a form of confirmation bias may assist in understanding why scientists in England, Australia, New Zealand, the United States, and Canada, working in government or police-operated laboratories, felt aligned with the prosecution, resulting in a perception that their mandate was to support the theory of the police. Wrongful convictions resulted in each country and in some instances multiple miscarriages of justice occurred. It is, to say the least, disconcerting that these inappropriate alignments arose in vastly different legal, social, and political contexts, again tending to support the view that the psychological forces at play lie deep in the psyche of otherwise decent people.⁴⁵

b) Hindsight bias

Studies are clear that tunnel vision is reinforced by other cognitive distortions, including “hindsight bias,” or, more colloquially, the “I-knew-it-all-along” syndrome. In hindsight, people tend to believe that an outcome was inevitable, or at least was much more predictable than people originally thought. This often involves people projecting new

⁴⁴This issue was the subject of multiple independent and public reviews. In the context of a review conducted pursuant s. 696.1, Counsel for the Minister of Justice for Canada concluded that significant non-disclosure had taken place. Additionally, the Honourable Patrick J. LeSage, Q.C., arrived at the same conclusion in his report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell delivered to Government of Manitoba in January, 2007 (pp. 98–112).

⁴⁵ I have dealt with this in some detail in Bruce MacFarlane, “Convicting the Innocent,” above at 413–421 and 454–464. Briefly, in the United Kingdom forensic scientists were found to have lost objectivity because they saw their function as helping the police; in Australia a Royal Commission concluded that a key forensic witness had taken on the role of protagonist rather than a dispassionate provider of scientific information; in New Zealand a scientific expert witness displayed “a disturbing lack of neutrality” during and after testifying at trial; in the United States a court-ordered investigation into the work of the serology division of a police laboratory concluded that a “forensic science super star” had systematically misstated test results in about 134 cases, resulting in a significant number of post-conviction habeas corpus proceedings; and in Canada the

knowledge into their understanding of past events—without any recognition that their perception of events in the past has been coloured by the new information.⁴⁶

Hindsight bias may reinforce the premature focus on a suspect in a few ways. First, once someone becomes a viable suspect and the focus of police attention—in other words, once police or prosecutors arrive at a conclusion on culpability—hindsight bias may lead investigators, on reflection, to conclude that the person was the inevitable suspect from the beginning. This tends to lead investigators to overestimate the degree to which the suspect appeared guilty from the beginning, and to give greater attention to those facts and pieces of evidence that point to guilt.⁴⁷ For instance, in the case of the death of a child for whom a parent was immediately suspect due to exclusive opportunity, the acquisition of further circumstantial but equivocal evidence capable of pointing to that parent may cause investigators to say, in essence, “I knew it; its been clear from the beginning; she is the one that killed the baby.” Hindsight bias may also explain why ambiguous evidence may, through the eyes of an investigator or a prosecutor, be interpreted later as consciousness of guilt evidence. Whether and to what extent that same conclusion would be reached by a dispassionate third party unencumbered by these biases is quite a different matter.

An offshoot of hindsight bias has clear implications for investigators, police, and prosecutors: studies have repeatedly shown that confidence in the truth of an allegation increases as the allegation is repeated (the so-called “reiteration effect”). This confidence

Morin Inquiry emphasized the importance of developing a culture of independence and objectivity, and to pay particular attention to the communicative aspects of the expert’s work (Morin, at 310–311).

⁴⁶ Findley and Scott, above at 317.

⁴⁷ *Ibid.* at 318.

increases quite apart from whether the allegation is actually true. In practice, therefore, the longer that investigators, prosecutors, witnesses, and victims live with the belief that someone is guilty, the more difficult it is to shed that conclusion, even in the face of clear evidence to the contrary. As Findley noted: “the reiteration effect makes it increasingly difficult for police and prosecutors to consider alternate perpetrators or theories of a crime.”⁴⁸

Once again, the experience in Morin, Milgaard, Sophonow, and Driskell are instructive. In Morin, the lead prosecutor demonstrated “tunnel vision in the most staggering proportions,” even after DNA evidence had cleared the defendant.⁴⁹ In Milgaard, the Chief of Police in Saskatoon reaffirmed his belief in Milgaard’s guilt, even after DNA evidence conclusively showed that Milgaard was innocent and someone else was responsible.⁵⁰ In Sophonow, both the Chief of Police and the Attorney General publicly suggested that, despite an acquittal entered by the courts, Sophonow was probably guilty of murder.⁵¹ And in Driskell, Crown attorneys consciously entered a stay of proceedings on the charge, rather than allowing an acquittal, despite the fact that the federal Minister of Justice had quashed his conviction for murder and returned it for trial on the basis that a miscarriage of justice had likely occurred. A retired Chief Justice from Ontario subsequently concluded that Driskell had been wrongfully convicted,⁵² a position later supported by the Attorney General of Manitoba.⁵³

⁴⁸ *Ibid.* at 319.

⁴⁹ Public Inquiry concerning Guy Paul Morin, above at p. 489.

⁵⁰ CBC News On-line, June 8, 2005.

⁵¹ Sophonow Public Inquiry, above at 125.

⁵² Public Inquiry concerning James Driskell at 1.

⁵³ Media release of the Attorney General of Manitoba, issued on February 15, 2007.

Hindsight bias also has implications for the *quality* of the evidence used to convict. A good example involves eyewitness identification. When investigators, possibly suffering from tunnel vision themselves, offer confirming feedback to an eyewitness after the eyewitness has provided an identification, both the witness's confidence in the ultimate identification and his or her assessment of the conditions surrounding the identification can be inflated dramatically. Often, a witness pays little attention to the perpetrator at the time of the incident, resulting in a poor memory of the perpetrator. If, nonetheless, this same witness attempted to identify the suspect in a photo spread or lineup, it is probable the witness would actually develop a clear image from the identification procedure, replacing the original low-quality memory. While the witness could coincidentally turn out to be correct, he or she could just as easily be mistaken in the identification. Confirming feedback, in addition to this "cleaned up" memory of the perpetrator, results in an overstatement of both the quality of the original viewing conditions and the confidence—the inevitability—of the ultimate identification. The witness becomes "trapped in the tunnel."

In terms of the frailties of eyewitness identification and testimony, and their relationship to cognitive biases, there is no better example than the wrongful conviction case of Thomas Sophonow. Media photographs of Sophonow that were published between the tentative identification given by witnesses during the investigation, and their certain identification at the trial, acted as post-event information, reinforcing the brief acquisition of memory used for the purposes of the original, tentative identification.⁵⁴ In fact, one witness, who had seen the real killer in the doughnut shop, originally made a tentative identification of

Sophonow. Afterward, an investigator suffering from tunnel vision reinforced his identification with the result that his eyewitness identification became certain.⁵⁵ Cory concluded: “Mistaken eyewitness identification played a significant role in the wrongful conviction of Thomas Sophonow, as it has in many other cases.⁵⁶ While mistaken eyewitness identification and tunnel vision have frequently been noted as separate causes of wrongful conviction, as a suspect is making his or her way through the stages of the system, they inevitably fuel each other.

c) Some concluding thoughts on cognitive biases

All people are, to varying degrees and in different ways, susceptible to natural cognitive biases and distortions. Because the criminal justice system is very much a human process and involves a structured continuum of decision making, from investigative fact-finding at street level through to a jury’s verdict at trial, it is evident that tunnel vision in the criminal justice system is inevitable.

A finding of tunnel vision is not necessarily a statement about the values or honesty of the affected justice system participant; rather, it is a recognition that tendencies that are quite natural can distort normal decision-making processes, often to the detriment of the citizen. The innateness of these cognitive biases and distortions does not, however, absolve the affected players, for the person adversely affected invariably had an expectation of being dealt with fairly and objectively by “the system.” Personal accountability must therefore form a part of the process, and, equally importantly, the justice players themselves must

⁵⁴ Sophonow Public Inquiry, above at 29.

⁵⁵ *Ibid.* at 25.

recognize that they have a responsibility to acknowledge that they are susceptible and that they need to take steps to reduce or neutralize that vulnerability so that they will not be “trapped in the tunnel.”

In Part IV I will discuss some steps that can be taken to achieve this objective. But for now, it is important to note that institutional pressures tend to fuel the tendency toward tunnel vision, not reduce it.

4. Institutional pressures that reinforce tunnel vision

The Anglo-Canadian adversarial system of criminal justice has many positive features, and has served Canada well for centuries. By its very nature, however, the adversarial process polarizes independent yet interdependent justice system participants, and sets up a system of “winners” and “losers.”⁵⁷ This has the unfortunate effect of forcing the participants—particularly the investigators, prosecutors, and defence counsel—to define success from their own standpoint, and then pursue that objective tenaciously and in their own self-interest. For reasons that follow, this quest for success creates institutionalized biasing pressures that have the effect of reinforcing tunnel vision at many different levels.

a) Institutional pressure on the police

Tunnel vision often originates during the investigative stage. As later processes in the criminal justice system feed off the information generated at this stage, investigative tunnel vision will often set off a chain reaction that reverberates throughout the system.

⁵⁶ *Ibid.* at 30.

(1) *Sensational cases*

Pressure from victims, the community, media, and police supervisors often translates into the need to “clear” the case, with speed becoming the overriding factor.⁵⁸ Unrealistic public expectations about the capacity of police to solve crime and identify the perpetrator through forensic science—the so-called “CSI effect”⁵⁹—may cause investigators to prematurely focus on someone against whom there is some evidence, then set out to build a case against that person so that charges can be laid and the public be assured that the community is now safe. Imperceptibly, the investigative objective has shifted from an open-ended search for evidence and the truth to proving that the preferred investigative theory is correct.⁶⁰ This institutionalized pressure arose in virtually all of Canada’s wrongful conviction cases and, realistically, can be expected to arise regularly in the future unless steps are taken to reduce the risk.

(2) *Resource constraints*

⁵⁷ I say this despite the decision of Justice Rand in *R v. Boucher*, [1955] S.C.R. 16 at 23, and the many decisions that have followed that judgment. See footnote 67, below.

⁵⁸ On this issue, reference can be made to the Morin Public Inquiry Report at 1097.

⁵⁹ There is presently a healthy debate on what exactly the “CSI effect” is, and whether it even exists. Some say it raises jurors’ expectations about what kind of forensic evidence they can expect the police to use; others argue quite the contrary—that it allows defence counsel to point out all of the forensic evidence that is missing in a case. Allan Gold contends that the CSI effect is more myth than reality, and calls it “a bit of common prosecutorial folklore that they use to rationalize their losses”: “CSI Effect: Myth or Reality?” *Law Times*, December 10, 2007, p. 8. Section 649 of the Criminal Code precludes empirical research on the subject in Canada, although one study in the U.S. tends to suggest that jurors in that country are not influenced by television shows of this type: *Law Times*, above.

⁶⁰ Findley and Scott, above at 326.

Policing is costly. Fully 62% of the \$13 billion required to administer Canada's justice system is spent on the investigation of crime—significantly more than corrections, courts, prosecutions, legal aid, or any other component of the criminal justice system.⁶¹

As a consequence, investigative supervisors must constantly make decisions about how much time and investigative resources each case deserves. Newly emerging crime on the front page of newspapers constantly pressures police—both at the street and supervisory level—to dispose of older cases. In one celebrated case, a senior investigator with the RCMP took the unprecedented step of suing his commanding officer for taking him off a case and bringing the investigation to a conclusion. Rejecting the application, Dube J. noted that the commanding officer of a police service “has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation.”⁶²

Given that reality, it is not surprising that an investigator who has committed weeks if not months to an investigation would, if refused time-consuming and expensive forensic testing (as an example), seek to build the case around a jailhouse informant, a shaky eyewitness, or a confession obtained under dubious circumstances. This is, of course, a formula for tunnel vision and a wrongful conviction.

(3) *Emotional attachment*

⁶¹ Statistics Canada, “Police Resources in Canada” (2006), by Julie Reitano (Canadian Centre for Justice Statistics), University of Ottawa, Faculty of Social Sciences, Institute for the Prevention of Crime, “Cost of the Criminal Justice System” (2007).

⁶² *Wool v. the Queen* (1981), 28 C.L.Q. 162 at 166.

In particularly heinous crime, investigators can easily become emotionally affected by the event, and, despite their best efforts to remain objective, develop a strong sense of empathy for those most affected by the crime. The core investigators are particularly vulnerable, as they are the ones that most often witness the most disturbing aspects of a crime and see the victims at the height of their emotional need. Core investigators are often the ones to attend the autopsy following a baby's death—an event quite horrific in itself.

This sort of emotional connection can foster positive energy, as it tends to impel the investigator to solve the crime; but it can also put blinkers on investigators to focus on the main suspect and quickly build a case “to do justice” on behalf of those left struggling in the wake of the crime.

(4) *The victims' rights movement*

Victims' rights emerged with a passion in the 1980s and 1990s, as a new means, some have argued, of legitimizing political crime control initiatives.⁶³ Federal legislation authorized the reception of victim impact statements, and mandated judicial consideration of such statements during the sentencing process. Provincial legislation required police and prosecutors to provide information to victims respecting the status of criminal investigations, bail, plea bargaining, court processes, victim impact statements, and whether an accused has escaped or is being released from custody.

⁶³ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 318.

Manitoba went further, providing in a legislative preamble that “it is in the public interest to give guidance and direction to persons employed in the justice system about the manner in which victims should be treated.”⁶⁴ The Act continued to state that the head of the law enforcement agency responsible for investigating an offence *must* ensure victims are provided with information concerning their rights, services available to victims, and crime prevention and safety planning, and is required to *consult* the victim on issues such as pre-charge alternative measures and whether the alleged perpetrator should be held in custody pending trial to ensure the safety of persons affected.⁶⁵ In response, most police services have developed a victim services unit to discharge these new responsibilities.

The movement placed police and victims *together* in a new legislative and policy framework, requiring police by law to share investigative information, provide support, and enter into consultation with victims. Some have argued, with merit, that this new relationship may place institutional pressure on police that, if left unchecked, could contribute to tunnel vision. The argument continues that not only will investigators empathize with victims, they will unconsciously become far too willing to take at face value the victim’s version of what took place—accentuating even further the sorts of psychological biases I have discussed in this paper. Given this new relationship, investigators can reasonably be expected to ask: Can we realistically decline to charge because we disbelieve the victim? If we decline charges on that basis, how do we explain it publicly? Will we be attacked by the media and victims groups? Will a decision not to charge reflect adversely on our policing service, given its commitment to protecting the

⁶⁴ *Victims Bill of Rights*, Continuing Consolidation of the Statutes of Manitoba, Chapter V-55.

⁶⁵ *Ibid.*, ss. 3 and 4.

community? In light of this new and legislatively required police–victim relationship, the temptation to say “Lay the charge, and see what the courts decide” becomes irresistible. In the long term, that may serve to increase the risk of wrongful conviction to an unacceptable level.

The changing framework went beyond new legislative relationships. An important social and political environment developed during the 1980s. In 1984, the Badgley Report sent shock waves throughout Canada when it reported that, at some time during their lives, one in two females and one in three males will have been the victims of unwanted sexual acts. The report urged greater protection for victims than was being provided at the time. The focus became the criminal law. There was also a growing recognition that many children who had been placed in training and residential schools had been physically and sexually abused. Criminal charges were laid in some of those cases. Domestic violence “zero tolerance” policies started to emerge. A specialized domestic violence criminal court was established in Manitoba. In a series of articles published in 1984, *The Toronto Star* argued that “no decent society can fail to do all in its power to prevent it [child abuse], to punish the perpetrators and to protect the innocent victims.” In 1990, Anne McGillivray argued that this movement had shifted the immediate value of criminal prosecution for the victim toward the value of criminal sanctions to the community generally. Kristen Kramar put a finer point on the issue, arguing that law enforcement officers, including coroners, generated serious social concern about the cause of infant and child deaths, and that self-serving categories like SIDS masked intentional homicide. There is reason to believe that

by the middle to late 1980s, a victims' rights-based "child abuse homicide" environment was starting to take root in Canada.⁶⁶

b) Institutional pressure on prosecutors

(1) Pressure to convict

The legal framework concerning the role of a prosecutor is clear: they are "ministers of justice" whose duty is to fairly but firmly lay all of the material facts before a jury for its consideration. That role completely excludes any notion of "winning" or "losing."⁶⁷

That is the theory. In practice, prosecutors constantly face a multitude of external and internal pressures to prosecute their cases successfully—including pressure from individual victims and the family of victims, victim advocacy groups, the media, concerned and sometimes outraged members of the public, colleagues, and the prosecutor's own supervisors. Often, the most intense pressure arises from within the psyche of the individual prosecutor: to be seen as a successful litigator.

The issue of career advancement presents a special—and intense—institutional pressure on prosecutors. As two Australians recently have observed: "the most idealistic prosecutor would have few illusions about his future prospects if every person he prosecuted were to

⁶⁶ Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999) at 192–195; Kristen Kramar, "Coroners' Interested Advocacy: Understanding Wrongful Accusations and Convictions" (2006) 48 *Canadian Journal of Criminology and Criminal Justice* at 817–819.

⁶⁷ *R v. Boucher* (1954), 110 C.C.C. 263 at 270 (S.C.C.); *Randall v. The Queen*, [2002] 2 Cr. App. R. 17 (P.C.); *R. v. Regan* (2002), 161 C.C.C. (3d) 97 at 125 (S.C.C.); *DPP v. DO* (2006), IESC 12 (unanimous, per Murray C.J.); *R. v. Trochym*, 2007 SCC 6; a similar rule exists in the United States: *Berger v. U.S.*, 295 U.S. 78.

be acquitted. This is, perhaps, rarely taken into account at a conscious level but it adds to the overall ethos of rivalry and hence the need to win.”⁶⁸

These factors can combine and fuel each other into a “culture of winning,” or what some have described as a “conviction psychology”—an emphasis on obtaining convictions over “doing justice.”⁶⁹ Evidence that institutional and cultural pressures in prosecution offices contribute to conviction psychology can be seen in empirical data showing that it increases over time: the more experience a prosecutor has, the more likely he or she is predisposed to obtaining a conviction over “doing justice.”⁷⁰ This matches the Canadian experience: Crown counsel in Marshall, Morin, Milgaard, Sophonow, and Driskell all had lengthy experience in the courts.

The point is this: given the multi-layered and multidimensional institutional pressures on prosecutors, it takes a special strength of character to resist becoming fixated with the culpability of the perpetrator identified by the police following a lengthy investigation, and not to succumb to the notion that conviction is important.

(2) Prosecutors must believe in the case

Canadian law is clear that a prosecutor must have an honest belief in the guilt of the accused based on facts that would lead a reasonable person to conclude that the accused is

⁶⁸ Jill Hunter and Kathryn Cronnin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: Butterworths, 1995) at 187.

⁶⁹ Findley and Scott, above at 328. Reference can also be made to Bruce MacFarlane, above at p. 440.

⁷⁰ Findley and Scott, at 329, particularly footnote 266.

probably guilty of the crime alleged.⁷¹ This legal requirement, or institutional pressure, once again fosters tunnel vision on the part of prosecutors. As Findley and Scott have noted:⁷²

Ironically, even for the most ethical prosecutors, those most committed to the ideal of doing justice, the prosecutorial role inevitably fosters tunnel vision. Unlike a defence attorney, an ethical and honourable prosecutor must be convinced of the righteousness of his position; “the honourable prosecutor simply cannot believe that he is prosecuting the blameless.” Indeed, prosecutors motivated to do justice “must satisfy themselves of an individual’s guilt as a precondition to determining that the conviction of an individual is an end to be sought on behalf of the state.... (footnote deleted)

As I noted in Part III, a deeply rooted belief in guilt can later result in “belief perseverance,” causing even a seasoned prosecutor to be dismissive of new evidence when it conflicts with their existing belief in guilt.

(3) Prosecutors receive a unidimensional view of the case

Tunnel vision that may have led police investigators to focus on a particular suspect, and to build a unidimensional case against that person while disregarding inconsistent evidence, may also tend to shape the information upon which prosecutors base their decisions once the matter is referred to them for prosecution.⁷³

Given the separation of the police and prosecution process,⁷⁴ prosecutors generally see only the evidence generated by the police investigation, and do not see information tending to implicate alternative suspects who were quickly eliminated early in the investigation. This occurred in the case of David Milgaard, when police dismissed the potential role of Larry

⁷¹ *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Proulx v. Quebec* (2001), 159 C.C.C. (3d) 225 (S.C.C.).

⁷² Findley and Scott, above at 329.

⁷³ *Ibid.* at 330–1.

Fisher—the real killer—and, in the case of Thomas Sophonow, where police inexplicably cleared a man named Terry Arnold despite the fact that he lived close to the scene of the crime, resembled the killer, had had a “crush” on the victim, and somewhat bizarrely went to the hospital five days after the victim was strangled “to see how she was doing.” Arnold was later convicted of serial rapes, was believed to be a murderer, and ultimately committed suicide in 2005.⁷⁵

(4) Close working relationship between the police and prosecutors

The traditional working relationship between the Crown and police used to be clear: police investigated the crime, laid charges, prepared a report, turned it over to the Crown, who, if they agreed there was a case, prosecuted the charges in court. That model started to change in the 1970s, when police, much to their chagrin, were forced to go through the Crown to obtain judicial wiretap authorizations.⁷⁶ All of a sudden, Crown lawyers had to be drawn into the details and secrecy of a long-term criminal investigation, mid-stream.

Over the years, the relationship has changed even further. *Charter* principles of due process and the limitation on police powers required ongoing Crown advice in many different types of cases: complex conspiracy investigations required intense advice, sometimes on a daily basis; and, more recently, the emergence of “task forces” or “integrated units,” which place police and prosecutors together under the same roof, have created an even closer working relationship—and, some would argue, eroded the independence of both functions.

⁷⁴ *R. v. Regan* (2002) 161 C.C.C. (3d) 97 (S.C.C.).

⁷⁵ Sophonow Public Inquiry Report at 35; *R. v. Arnold*, 1999 CanLii 6576; *R. v. Arnold* (2001), 151 C.C.C. (3d) 263 (BCCA); *R. v. Arnold*, 2005, BCCA 611; “Suspect Found Dead, Denies Killing Stoppell,” *CBC News*, March 29, 2005.

A recent decision of the Supreme Court of Canada underscores the importance of maintaining a separation between the role of the police to investigate, and the responsibility of the Crown to independently assess the evidence and, providing there is sufficient evidence, prosecute the case in court. A blurring of those roles erodes the ability of the Crown to make objective assessments of the case, and, the Court noted, can contribute to the conviction of someone who is innocent.⁷⁷

Briefly put: the criminal justice system has important checks and balances built into it. Distinctions between roles are a part of those checks and balances. A blurring of the Crown role can lead to a loss of objectivity in the assessment of the case, and set the stage for Crown tunnel vision to set in. A Crown attorney co-opted by the police is, at best, unhelpful to the investigators, and, at worst, can through admittedly skilful advice eventually take all of the justice system participants through the tunnel and into a wrongful conviction.

In summary: The roots of tunnel vision can be traced to cognitive biases. Those biases are, in turn, very much a part of the human process. As former Chief Justice Lamer observed, “any system that depends on human beings is, by virtue of that very feature, fallible.” He continued by observing that “tunnel vision is seldom the result of personal malice ... [but rather is] rooted in systemic problems.”⁷⁸ I will now consider what lessons Canada has

⁷⁶ Part IV.1, First enacted S.C. 1973–74, c. 50, now Part VI, “Invasion of Privacy.”

⁷⁷ *R. v. Regan* above, at paras. 67–70 and 151–163.

⁷⁸ The Lamer Public Inquiry, above at 172.

learned in the criminal justice system, and how they may be applied, if at all, to forensic pathology.

Part IV: Some Lessons Learned, and Their Potential Application to Forensic Pathology

Overcoming tunnel vision and the predisposing circumstances that are built into our social and legal frameworks poses one of the most intractable problems underlying the conviction of the innocent. Because there are so many causes that are built into our psyches, our culture, and our institutions, and because both tunnel vision and predisposing circumstances can emerge in so many ways, simple solutions are quite elusive.

There are several similarities between criminal justice system work and work in the field of forensic pathology. Both involve fact-finding in respect of a past event. Both rely primarily on the skill and judgment of trained professionals, although science and medicine play a role in both. The primary players in both fields are registered members of a governing body, and are subject to its discipline for incompetence or unprofessional conduct. And both regularly have the results of their work considered in public by the courts.

There are, however, several important differences. There is a labyrinth of substantive, procedural, evidentiary, and constitutional safeguards in the criminal justice system that have been developed over the centuries to ensure fairness in proceedings and to reduce the risk of making a mistake in the final determination of guilt or innocence. Forensic pathology lacks those safeguards. Layers of appeals to independent tribunals exist in the criminal justice system. None are available in forensic pathology. Proceedings in the criminal justice system lead to a final and precise conclusion of guilt, innocence, or a termination of proceedings. Forensic pathology is widely seen as an “inexact” science. Peer

consultation is common within prosecutions services, the judiciary, and, perhaps to a lesser degree, the defence community. The small number of qualified forensic pathologists does not easily lend itself to extensive peer consultation and support. Indeed, some would argue that the field of forensic pathology is dotted with examples of the iconic “lone ranger” whose work eventually became controversial and may have led to miscarriages of justice.⁷⁹

A. Developing a culture of fact verification and the reliability of interpretations

As I discussed in Part II, confirmation bias, which involves the tendency to seek or interpret information in ways that support existing beliefs, lies at the heart of tunnel vision. It is, therefore, important to suspend judgment on a case or defer arriving at a conclusion too quickly. Once developed, conclusions on a case can distort subsequent perceptions, and be very difficult to displace—even where, through professional education, there is an awareness that cognitive biases may, in fact, be at play.

There is, therefore, a need to emphasize and value the critical importance of “keeping an open mind” until all facts are in. This encourages a trier of fact or an investigator to permit an understanding of what took place to be shaped and reshaped as the facts emerge, and aids in combatting the normal tendency to filter information and process only that which fits the prematurely held view. The process of challenging and re-challenging facts in

⁷⁹ Sir Bernard Henry Spilsbury and Professor Sir Roy Meadow, both from the United Kingdom, immediately come to mind. Concerning Spilsbury, the Attorney General of England said this in a speech entitled “Expert Evidence—the Problem or the Solution?” in January 2007: “Juries were in awe of [Spilsbury] and he was considered invincible in court. Yet, even in the later years of his life [he died in 1947] judges began to express concern about this. His dogmatic manner and unbending belief in his own infallibility gave rise to criticism and some research has indicated that his inflexibility led to miscarriages of justice.” Concerning Meadow and the situation in the United Kingdom generally, see Kathryn Campbell and Clive Walker, “Medical Mistakes and Miscarriages of Justice: Perspectives on the Experiences in England and Wales,” a paper prepared for this Commission.

court—which forms the heart of the adversarial process in the criminal justice system—can apply with equal vigour during the investigative stage, both in the criminal justice system and in forensic pathology.

This may involve a significant culture shift in the field of forensic pathology. It can, over time, be achieved by

- a) reinforcing the importance of fact verification, and independent reliability checks of key interpretative issues, starting in medical school;
- b) emphasizing the importance of fact verification in case conferences and in the “contrarian” process, discussed below;
- c) conducting post-examination audits that are intended, at least in part, to detect tunnel vision; and,
- d) recommending that the Royal College of Physicians and Surgeons give the development of this culture a high priority in its training and accreditation process.

B. Defining proper information upon which reliance should be placed in making key decisions

Experience in the criminal justice system has shown that wrong decisions can be made when reliance is placed on information, or sources of information, that is of dubious value. Crown reliance on the testimony of criminals is fraught with danger, and we now know that jailhouse informants are notorious liars whose evidence has contributed to several wrongful convictions. Reliance on pseudo-science has prompted false positives (or negatives), and likewise has contributed to the conviction of innocent people.

Similar dangers exist in the field of forensic pathology. Historically, examiners have sought all information on the case.⁸⁰ One authority argues that the practice of incorporating extra-medical factors in decision making is *intensified* when the victims are babies.⁸¹

The information provided can, however, be quite irrelevant to the task at hand, and end up distorting normal decision making because of its highly prejudicial nature. For example, should the result of a police polygraph be considered, especially when it was administered shortly after the death of a child—at a time when the parent was distraught over his or her loss? Should an historical police report of a domestic dispute years earlier be taken into account when the report evidences no hostility toward a now deceased child, or indeed any children? To what extent, and in what circumstances, should findings of past abuse or healed fractures influence a determination of the present cause of death? Should the forensic pathologist be briefed on the police or Crown’s theory of what took place? Should the results of other tests be provided to the examiner? To what end, and for what purpose?

Should the issue of the cause of death be examined through a “social” or “moral” lens that takes into account, for instance, that the mother has had several live-in partners, is thought to be sexually promiscuous, and has never married despite having several children? One scholar argues that when pathologists look beyond the biological evidence, they run the risk of “reading in” an ideological interpretation of the manner and cause of death through

⁸⁰ Risinger et al., above at 32.

⁸¹ Dr. Kirsten Kramar, “Coroners’ Interested Advocacy: Understanding Wrongful Accusations and Convictions” (2006) *Canadian Journal of Criminology and Criminal Justice* 811 at 816.

a personal and professional moral lens. In a recently published article, Kirsten Kramar contends that⁸²

[t]he forensic expert distills moral judgment about the likely cause of death into medical fact, which is taken up in law as expert opinion evidence to become legal fact. Once this evidence becomes legal fact, it seems unassailable, having both passed medical-scientific scrutiny and being accepted as independent, disinterested medical knowledge in an adversarial legal process. This process can be associated with wrongful convictions.

To guard against “self-deception,” Risinger et al. suggest that forensic examiners should be insulated from all information and theories on the case “except necessary, domain-specific information.”⁸³ But is that filter too narrow? Or patterned on forensic sciences that are fundamentally different from forensic pathology? As noted in Part II, Findley and Scott argue that to preserve actual and perceived objectivity, laboratory analysts should be shielded from: the police theory on the case; the nature of other test results; and the results the police hope to obtain from the examination sought. That, at a minimum, seems quite supportable.

Other issues seem less clear: Where an autopsy is performed shortly after death, what information should be provided to police? And should post-autopsy, police-gathered evidence influence the writing of the autopsy report? Should a police-generated synopsis of their investigation work its way into an autopsy report—either expressly or by weaving it into a report that others will see as a medical assessment? More fundamentally, is there a risk of cross-contamination of facts—either by police to pathologist, or the reverse?

⁸² *Ibid.* at 825.

⁸³ Risinger et al., above at 31.

In the result, it seems clear that some wall of separation should be established between the examiner and any information that is irrelevant or not needed to conduct a proper examination and arrive at a sound conclusion. An approach of this sort is needed to protect the examiner from unwarranted attacks just as much as it is needed to justify the resulting conclusion. This can, I believe, be achieved by the forensic pathology community through the establishment of a new consensus-based policy framework, preferably on a national basis, or through a network of protocols, after consultation with affected stakeholders in the medical, legal, and, perhaps, scientific communities.

C. Developing the role of a “contrarian”

In the criminal justice system, there is a growing sense that, at least in policing circles if not prosecution services, Canada needs to develop the role of a “contrarian” to guard against tunnel vision.⁸⁴ A contrarian can take many forms: someone specifically and exclusively assigned to challenge the investigative team in difficult cases; a senior investigator *within* the team whose primary task is to ask “tough questions” about the investigative theory and the direction of the investigation; a policy framework that requires investigative managers to oversee the work of line investigators and, without micro-managing the investigation, ensure that all reasonable lines of inquiry are pursued and investigative theories are fully challenged; or a “fresh eyes” review—whether by a single, experienced colleague, or a team of experienced professionals. Some have even suggested that the lead investigator or trial prosecutor should be required to argue against his or her own position: in effect, play

⁸⁴ Public Inquiry concerning Guy Paul Morin, above at p. 1125.

the devil's advocate in their own case, with a view to countering their own cognitive biases.⁸⁵

The United Kingdom has gone a different route. By law, investigators are required to pursue all reasonable lines of inquiry, whether pointing toward or away from the suspect.⁸⁶ This may, however, have the effect of diverting later trial proceedings from a consideration of whether the accused committed an offence to whether the police pursued all available leads.⁸⁷

In my view, an institutionalized contrarian role provides a better model, is more flexible, and has application to police investigations, prosecution services, and (recognizing resource issues) forensic pathology.

The genesis for a contrarian may be found in the 1996 report of Mr. Justice Archie Campbell on the investigation of Paul Bernardo. Among other things, Justice Campbell noted “the need to co-ordinate the work of the investigators with the work of other agencies and resources such as the Coroner’s office and the Centre of Forensic Sciences.... The officer in charge of a major serial predator investigation,” he continued, “must have immediate access to the best advice available, whether it comes from the forensic or pathological or legal or other disciplines.” On that independent advisory role, Justice Campbell said:⁸⁸

⁸⁵ Findley and Scott, above at 388–9.

⁸⁶ C.P.I.A., Criminal Procedure and Investigation Act (1996) (UK), 1996 c. 25, s. 23(a).

⁸⁷ For instance, see: *R. v. M.*, [2001] EWCA Crim. 2024.

⁸⁸ *Bernardo Investigation Review*, Report of Mr. Justice Archie Campbell, June 1996 (unpublished) at 307.

A small inter-disciplinary advisory committee must be available throughout the course of the investigation. Its members need not work full-time on the investigation, although they must be available as needed and sometimes for extended periods. The members of the inter-disciplinary advisory committee should be selected to ensure a consistently high level of continuing technical, legal and forensic advice, and to provide ideas about other sources of the technical and professional advice that could be of assistance.

That theme was picked up and advanced by Commissioner Kaufman in the Commission on Proceedings Involving Guy Paul Morin. Commissioner Kaufman said this under the heading “Peer Review” in relation to major police investigations in Ontario:⁸⁹

Inspector Mercier testified that peer review by independent consultants is becoming more common in complex cases. As a result of the Campbell report, the Province of Ontario is developing a major case management unit which would identify case managers throughout the Province. These individuals could offer input on new strategies and ideas. They may comment on investigative theories which have been developed in an unsolved investigation.

Inspector Mercier also described many occasions when a meeting was held earlier in the investigation with the Crown Attorney’s office, the Coroner’s office, and the pathologists or scientists involved in the case to discuss the best process or test to ensure proper results are obtained.

Commissioner Kaufman further noted that Inspector Mercier had testified that “tunnel vision will be dealt with through the use of independent investigative consultants ... who will not agree with ideas which are totally wrong.”⁹⁰

Commissioner Lamer also alluded to this strategy in his 2006 Report to the Government of Newfoundland and Labrador. In the context of a discussion on police tunnel vision, the Commissioner quoted, with apparent approval, from the plan of the provincial police, which drew on the experience of the scientific community: “Scientists know that the best

⁸⁹ Public inquiry concerning Guy Paul Morin, above at p. 1125.

⁹⁰ *Ibid.* at 1125

way to have their research findings accepted is to do everything possible to disprove their own hypothesis.” He continued: “[T]he absence of such a ‘contrarian’ or ‘truth-scrutinizing’ role was the fatal flaw in this investigation. Everyone simply ‘jumped on the bandwagon’ or ‘looked the other way.’⁹¹

Again, within the context of the criminal justice system, Findley and Scott expressed a similar view in 2006:⁹²

The investigative supervisor should routinely posit alternate theories of each case during the briefing sessions in which cases are discussed. Much as scientists seek to “prove” theories by testing the null hypothesis (providing a reason to reject the hypothesis that something occurred merely by chance), police investigative supervisors should seek to “prove” a case by offering evidence and a rationale to reject all reasonable alternative theories as to how the crime was committed and by whom.

The investigation can be built around what investigators do not know, but should try to discover. By aggressively seeking to fill in all of the significant knowledge gaps in a case, investigators should be constantly challenged to explain those knowledge gaps. Do the gaps exist merely because the evidence has not yet been found, or do they exist because the theory of the case is wrong?

The forensic pathology community ought to be challenged to consider a strategy along these lines. Adjustments to the criminal justice model will need to be made; doubtless, the availability of a smaller number of professionals will pose challenges. Nonetheless, it seems to me that in consultation with disciplines that have experienced this approach, or are considering it, a model—perhaps a cross-agency one—can be developed that will significantly reduce the risk of tunnel vision and cognitive bias in forensic pathology.

⁹¹ Lamer Public Inquiry Report, above at 132.

One final point should be made: the exchange of views in the contrarian approach may themselves be subject to *Stinchcombe* disclosure if the matter ultimately proceeds to court. Minutes of meetings or exchanges of memoranda may well be subject to disclosure to the defence on the basis that they are relevant to the opinion eventually proffered in evidence. This is not to say that the contrarian approach is fundamentally flawed; rather, it is simply to point out that professionals may be provided with an opportunity to outline the manner in which a mature and well-developed conclusion was ultimately reached, and that the contrarian approach was adopted to ensure a sound product for court.

D. Education and training that will achieve this objective

The Morin and Sophonow inquiries served as a wake-up call to the legal profession on a number of different issues, especially the existence, identification, and impact of tunnel vision. Commissioners Kaufman and Cory recommended that education and training on the subject be provided to the profession, as did Commissioner Lamer several years later.⁹³

In the wake of these reports, a significant number of seminars and conferences on the causes of wrongful conviction, and their avoidance, have taken place in Canada. Some have been international in scope, drawing on expertise from around the world. Attendees have included prosecutors, defence counsel, police, and members of the judiciary. All seminars have considered tunnel vision and related issues.⁹⁴ Significantly, the subject is

⁹² Findley and Scott, above at 382–3.

⁹³ Morin Public Inquiry Report, above, recommendation 74, p. 1136; Sophonow Public Report, above, p. 37; Lamer Public Inquiry Report, above, recommendation 18 (a) and (b), p. 329.

⁹⁴ For instance, on the 23rd and 24th of September, 1999, Manitoba Justice hosted the “Jailhouse Confessions and Tunnel Vision Conference”; from October 20–22, 2005, members of the judiciary, Crown, defence, and the University of Manitoba hosted an international conference on avoiding wrongful convictions, including a panel on tunnel vision, co-chaired by the Honourable Peter Cory and Bruce MacFarlane; and in 2007 the

now taught to aspiring members of the profession in several large law schools across Canada.⁹⁵

In my view, the forensic pathology community across Canada should examine these experiences, and, with appropriate modifications, consider a similar approach. Indeed, education should be extended beyond tunnel vision and include issues such as

- a) distortion in the decision-making process due to irrelevant and prejudicial extraneous information;
- b) the proper role of the forensic pathologist in Canada (see below); and
- c) presentation of evidence in court, with particular emphasis on the limitations of that evidence and the need to clearly convey those limitations to the court when testifying (recognizing that work in this area was announced by the Chief Coroner in his public announcement on April 19, 2007).⁹⁶

Additionally, the forensic pathology community should consider the following:

- a) Education on these issues should start in medical school.
- b) Education of this nature should be ongoing, and not be seen simply as a “one-shot” event.

Crown/Defence Liaison Committee in Manitoba hosted yet another conference that included discussion on tunnel vision and “Crown culture.” Various other local and regional seminars and conferences have been held throughout Canada during the past several years.

⁹⁵ Intensive courses on the subject of wrongful convictions and their causes are currently taught at the University of Toronto, the University of British Columbia, the University of Manitoba, and the University of Ottawa. Instructors at these universities have recently prepared a joint “resource book,” 992 pages in length, which includes a 95-page chapter on tunnel vision.

⁹⁶ It should be noted that recommendation 7 in the Commission on Proceedings Involving Guy Paul Morin provided that the Centre of Forensic Sciences, in the preparation of its reports, “must contain the conclusions drawn from the forensic testing and *the limitations to be placed on those conclusions.*” (emphasis in original)

- c) Education should be multidisciplinary in nature, drawing on psychological and legal expertise.

Finally, I should note that education beyond the medical community is clearly required. Both Crown and defence counsel need to have a much better appreciation of the evidence of forensic pathologists. Crown counsel need to understand how the evidence fits into the Crown's case, as well as any limitations that arise. Defence counsel have an even greater need of this appreciation. It is often noted that counsel for the accused provides the greatest safeguard against wrongful conviction. If counsel is unfamiliar with the work of a forensic pathologist, it will be very difficult to do a critical examination in advance and conduct an effective cross-examination of the Crown's forensic pathologist. For all of these reasons, criminal litigators need to receive education and be trained on the subject of forensic pathology, especially on what forensic evidence can establish in court, as well as its limitations. Finally, it would be helpful to the defence community to receive from appropriate authorities, on a regular basis, a list of qualified forensic pathologists that defence counsel could consult, both within Canada and elsewhere.

E. *Understanding the limits of expert opinion evidence*

The criminal justice system has well-developed limits or “safeguards” respecting the reception of expert opinion evidence in court. For the purpose of this discussion, three “safeguard principles” seem relevant.

First, opinion evidence is presumptively inadmissible. The evidence of *expert* opinion is, however, an exception to that exclusionary rule. There are four criteria involved in determining the admissibility of expert opinion evidence: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert.

Concerning the last criterion: a qualified expert is not entitled to proffer opinions *generally*. Instead, it is essential that the opinion given be within the area of the demonstrated expertise of the witness. Otherwise, it is inadmissible.⁹⁷ Careful thought should be given to ensuring that all experts in baby death cases stay within the limits of their expertise. The judge especially bears a burden in this regard as it may actually be in the interests of one of the parties to have an expert’s opinion on matters outside their expertise. Although the opposing party can object to such questions, this requires that they be familiar with the limits of the expertise in a variety of disciplines. In this regard, it is noteworthy that the Marshall Commission called on judges, including appellate court judges, to examine possible legal errors even if they were not raised by the parties. The point is simply that all of the players—judiciary, counsel, and the witness—should endeavour to keep the evidence within the area of demonstrated expertise.

Second, when assessing whether expert opinion evidence is admissible, *novel science* is subject to special scrutiny. A party wishing to tender this type of evidence must first establish that the underlying science is sufficiently reliable to justify its reception in a court of law.⁹⁸

This threshold test of reliability is especially important where the tendered scientific evidence is based on a theory that has not yet been widely accepted and its accuracy has not been determined.⁹⁹ Where reliability is not established, novel scientific theories routinely will be excluded, particularly where the opinion amounts to little more than an educated guess.¹⁰⁰ Indeed, recent judicial pronouncements have raised questions about whether this more demanding test of admissibility should be applied to even established disciplines.¹⁰¹

Finally, the Supreme Court of Canada has pointed to two central concerns respecting the admission of expert opinion evidence. First, the opinion needs to be scrutinized carefully because, “[d]ressed up in scientific language which the jury does not easily understand, and submitted through a witness of impressive antecedents, this evidence is apt to be accepted

⁹⁷ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.); *R. v. Inch* (1989), 91 Cr. App. R. 51 (C.A.).

⁹⁸ *R. v. J-LJ*, [2000] 2 S.C.R. 600; *R. v. Terceira* (1998), 123 C.C.C. (3d) 1, affirmed 142 C.C.C. (3d) 95 (S.C.C.).

⁹⁹ *R. v. Taillefor* (1995), 100 C.C.C. (3d) 1 (Que. C.A.), quoted with approval in *R. v. Trochym* (2007), 216 C.C.C. (3d) 225 (S.C.C.).

¹⁰⁰ *R. v. Ranger* (2003), 178 C.C.C. (3d) 375 (On. C.A.); *R. v. Clark* (2004), 182 C.C.C. (3d) 1 (On. C.A.) at para. 78–9; *R. v. Klymchuk* (2005), 203 C.C.C. (3d) 341 (On. C.A.) at para. 18 [concerning an opinion on the type or category of person who committed an offence].

¹⁰¹ *R. v. Trochym*, 2007 SCC 6 per Bastarache J. (Abella and Rothstein J.J. concurring); and see Kent Roach’s commentary on the Truscott case, where he analyzes the Court of Appeal’s commentary on the importance of evidence-based forensic science that allows for the testing of results, as distinct from experts who have an experience-based approach: (2007), 53 C.L.Q. 149 at 150. On the same issue, reference can also be made to Dr. Gary Edmond, “Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence,” a paper posted on this Commission’s website.

by the jury as being virtually infallible and as having more weight than it deserves.”¹⁰²

Second, it is important to ensure that the reception of this type of evidence does not impair the basic fairness of a criminal trial, and expose an accused to the risks of being wrongfully convicted. As I noted earlier, the Supreme Court of Canada has in the past few years repeatedly expressed the view that our substantive, evidentiary, and procedural laws should be developed in a way that avoids wrongful conviction.¹⁰³

Given the legal framework that I have just described, what issues concerning the giving of opinion evidence can be expected to arise in the field of forensic pathology—particularly in light of its “inexact” nature? In any given case, the following may be “live” issues requiring consideration by the police, Crown, defence and trial judge:

- Limitations on the opinion must be made clear both before testifying and during presentation of the opinion in court. Overconfidence or overstating the conclusion may result in a distortion of the fact-finding process by prompting the trier of fact to give more weight to the opinion than it deserves, treating it as virtually infallible. This may significantly increase the risk of convicting an innocent person.
- Is there sufficient probative value to justify admission of the evidence to begin with, or is the opinion really an “educated guess” dressed up in professional language not easily understood by persons outside of the medical community?
- Were the conclusions supported by other qualified experts, or was the examiner, though eminent, essentially acting alone? Was there, in essence, one “driving force” or “lone ranger” in the case in support for the laying of charges? Where no internal

¹⁰² *R. v. Mohan*, above; *R. v. Trochym*, above.

checks were present prior to the laying of charges, counsel and the trier of fact may need to be more cautious in their assessment of the evidence.

- Was there a split in the views of the professionals in the case, and, if there was, does that mean that there was a reasonable doubt on the cause of death?
- Was a “contrarian” approach used in the development and finalization of the examiner’s views?

It should be noted that the British Medical Association is considering the preparation of guidelines concerning the giving of evidence in the wake of the Court of Appeal’s decision on October 26, 2006, concerning Professor Sir Roy Meadow. Guidelines, if prepared, may build on a report issued by the Department of Health on October 30, 2006, entitled “Bearing Good Witness: Proposals for Delivery of Medical Expert Evidence in Family Law Cases.”

F. Safeguards when deciding whether to prosecute: The transition from forensic pathology to the criminal courts

1. The issues and the risks

Deciding whether to prosecute is among the most important—and difficult—decisions in the criminal justice process. Considerable care must be taken to ensure that the right

¹⁰³ *U.S.A. v. Burns*, [2001] 1 SCR 283; *R. v. Trochym*, above; *Hill v. Hamilton-Wentworth Regional Services Board*, 2007 SCC 41 at para. 36.

decision is made. A wrong decision to prosecute and, conversely, a wrong decision *not* to prosecute tend to undermine public confidence in the criminal justice system.¹⁰⁴

The decision to prosecute has serious implications for the person charged. Quite apart from any sentence that may be imposed if found guilty, the simple commencement of a public criminal charge can affect family, career, health, business, travel, and can, in a very serious way, leave one's reputation in ruins. In the case of a homicide, experience in North America and in the United Kingdom has shown that even a later exoneration does not necessarily erase the stigma of having been seen as a murderer, especially where the victim was young.¹⁰⁵

Deciding whether to prosecute is also the point at which forensic pathology and the legal system intersect. Investigative cognitive biases of the sort I described in Part III may therefore be carried into the decision as to whether to recommend prosecution; and the bias may not only be carried forward, but may be magnified in the hands of the Crown if prosecutorial "belief perseverance" sets in to resist changing the theory of guilt, even in the face of new, dispositive evidence to the contrary.

What you end up with is an investigative cognitive bias in favour of a theory of guilt that becomes magnified even further by a second, but different, layer of prosecutorial cognitive bias. At this point, a prosecutor may be so hopelessly enmeshed in a theory of guilt that no

¹⁰⁴ These principles underlie prosecution policy throughout the Commonwealth, including Canada at both the federal and provincial levels.

retreat is possible. That may go a long way to explain the tunnel vision of “the most staggering proportions” that emerged in the prosecution of Guy Paul Morin.

The risk of “cognitive bias layering” underscores the need for care in the decision as to whether to prosecute, and points to the need for an element of independence in the decision-making process. Independence of this sort has been achieved with considerable success in the criminal justice system through the use of a few basic and relatively low-cost mechanisms. Prosecution services in Canada regularly ask another prosecution service to assume conduct of a case where charges have been laid against a local justice system participant.¹⁰⁶ In recent years, Manitoba prosecuted a New Brunswick case involving the former Premier of that province; likewise, Manitoba assumed conduct of an Alberta prosecution against a member of the RCMP for first-degree murder. The practice of bringing in outside professional assistance even extends to situations where a key witness or victim in a case is a justice system participant. For instance, Ontario recently assigned a senior staff prosecutor to conduct a prosecution involving the niece (as victim) of a Deputy Attorney General in another province, and in another case a private practitioner in Toronto was appointed special prosecutor in a case involving the Chief Justice of another province—again, as victim.

Police services have adopted similar practices to inject an element of independence into their investigations, and to enhance public confidence in the result. Protocols between a

¹⁰⁵ In Canada, that was particularly the case with Thomas Sophonow; in the United Kingdom, Sally Clark, and in the United States, Sam Sheppard, never did overcome the stigma, and both died at a relatively young age as severe alcoholics due to alcohol poisoning.

number of police services across Canada have been developed to allow one police service to obtain the services of an investigator(s) from other police services where, for instance, there has been a fatal police shooting and there is a need to investigate what happened. Can these principles apply to forensic pathology, and, if so, how?

In rough terms, there are three categories of cases where forensic pathology may play a role in the decision to prosecute:

1. where pathology evidence forms a relatively small part of a much broader network of inculpatory evidence;
2. where pathology evidence is at the heart of the case, but is supported to one degree or another by other, independent evidence; and
3. where the pathology evidence is the very heart of the case.

The comments that follow are directed primarily at categories 2 and 3, although they may, in some circumstances, have application to cases in category 1.

Wrongful convictions exposed in the criminal justice system have roughly fallen into two groups. The first group is where a crime was committed, but the exoneree simply did not do it. These are best exemplified by the miscarriages of justice experienced in the case of Steven Truscott, David Milgaard, Guy Paul Morin, and Thomas Sophonow. The real killer in the case of David Milgaard was eventually found, prosecuted, and convicted, but the perpetrators in the other cases have not yet been held accountable.

¹⁰⁶ This practice was approved by the Alberta Court of Appeal in *Kostuch v. Alberta* (1995), 101 C.C.C. (3d) 321 at 333 (Alta. CA).

The second group involves cases where no crime was committed in the first place. The case was *interpreted* as one of culpable homicide, but the death turned out to be natural, unexplainable, or accidental. These are best exemplified by the cases of Ronald Dalton, Sally Clark (U.K.), and, most recently, William Mullins-Johnson.¹⁰⁷

The case of Mr. Mullins-Johnson is an important one to consider in the context of safeguards that may be necessary when deciding whether charges should be laid. Mr. Mullins-Johnson was convicted of first-degree murder, sentenced to life imprisonment, and spent 12 years in jail for the unexplained but apparently natural death of his niece, Valin Johnson. On June 27, 1993, Valin's parents found their daughter lying dead in her bed. Her body was taken to hospital, and an autopsy began six hours later. Before the autopsy was finished, Dr. Charles Smith was consulted. He felt that it was a case of "chronic abuse." A gynecologist/obstetrician with expertise in child abuse was called in. She declared it was one of the worst cases of child sexual abuse she had seen.

Events then moved quickly. By the end of the day, police were called and advised that the death was a homicide. Less than 12 hours after Valin's body was found, her uncle was arrested and charged with first-degree murder. His resulting conviction was appealed and rejected by both the Ontario Court of Appeal and the Supreme Court of Canada.¹⁰⁸

¹⁰⁷ The Lamer Commission of Inquiry pertaining to the cases of Ronald Dalton, Gregory Parsons and Randy Druken (Newfoundland and Labrador, 2006); *R. v. Clark*, [2003] EWCA Crim. 1020; *R. v. William Mullins-Johnson*, 2007 ONCA 720.

¹⁰⁸ (1996), 112 C.C.C. (3d) 117 (Ont. C.A.) [2-1], affirmed (1998), 124 C.C.C. (3d) 381 (S.C.C.) [5-0].

During the appellate proceedings, however, Borins J. dissented from convicting in the Court of Appeal. Prophetically, he focused on the fact that there was no direct evidence of guilt, and that the expert witnesses were in disagreement about several key issues: time of death, cause of death, and whether Valin had been sexually assaulted before she died. He concluded that the Crown's evidence was weak, and that the forensic evidence did not connect the accused to the deceased. He would have quashed the conviction and ordered a new trial.

With growing concern over the appropriateness of his conviction, Mr. Mullins-Johnson was released on bail in 2005 pending a review of the case by the Minister of Justice. Six eminent Canadian and international experts were consulted during the review. They unanimously concluded that the medical evidence did not support the earlier, hastily developed opinion, and that not only was there no evidence that Mr. Mullins-Johnson had committed a crime—there was no evidence that a crime had been committed at all. The panel concluded that the findings earlier said to establish assault and sexual abuse were the result of natural changes to the body after death or of the post-mortem examination process itself.

The Minister of Justice referred the case to the Ontario Court of Appeal, which concluded, unanimously, that flawed pathology evidence was at the heart of a terrible miscarriage of justice in the case:¹⁰⁹

It is now clear that there is not and never was any reliable pathological evidence that Valin was sexually assaulted or otherwise abused during her short life and certainly not on the evening of her death. It is also now clear that there is no

¹⁰⁹ *R. v. Mullin-Johnson*, above at 2.

evidence to support a finding of homicidal asphyxia, the cause of death proffered at trial. While the cause of Valin ██████'s death remains undetermined, there is now no evidence to suggest it was the result of any crime. That Mr. Mullins-Johnson was arrested, convicted of first degree murder and spent twelve years in prison because of flawed pathology evidence is a terrible miscarriage of justice.

2. Safeguarding the process

The greatest risk in the decision as to whether to prosecute arises in the second and third scenarios I outlined earlier (i.e., where the case is based largely or entirely on medical opinion). In those situations, the sometimes shifting ground of medical theory can serve as the entire basis for putting someone in jail. There is, therefore, a need to ensure that the medical view is clear, unambiguous, and reduced to writing. If the medical evidence is based on a theory, there is a need to ensure that the theory is broadly shared across the profession; is consensus-based, and certainly not driven by a single person, however eminent; is not a minority view subject to vigorous and convincing dissent; has an element of independence from the local pathology community; and was sought and obtained within a policy framework that ensures quality and consistency in approach. In saying this, I am not suggesting that unanimity in medical views should be a prerequisite to the laying of criminal charges. Unanimity is sometimes difficult to obtain, and is therefore somewhat unrealistic.¹¹⁰ Rather, where the medical opinion itself is essentially the heart of the case for the Crown, extreme care must be taken before charges are laid, and before a finding of guilt is entered.

For these reasons, I think it advisable to develop a protocol between the Ministry of the Attorney General, the Chief Coroner for Ontario, the College of Physicians and Surgeons

¹¹⁰ *R. v. Trochym*, 2007 SCC 6 at para. 140, per Bastarache J. (Abella and Rothstein J.J. concurring).

of Ontario, the Chief Forensic Pathologist of Ontario, and the key police services in the province. The object of such a protocol would be to agree upon the process for assessing whether criminal charges should be laid in respect of the death of a child in what I will loosely refer to as a “domestic” situation, i.e., a child in family care, where a family member or spouse is suspected. The process agreed upon could be extended to other situations in due course, either formally or informally, but it seems preferable to start in a modest, manageable way.

The protocol may contain the following elements:

- It is triggered when a family member or spouse may be charged with murder, infanticide, or manslaughter as a result of the death of a young child in family care.
- An expert panel of at least three forensic pathologists should be established on the case, one of whom should be from outside Ontario.
- Panel member assessments should be conducted separately and independently, and not as a deliberative, jury-like body. Not all members need to participate directly in the autopsy: the results, including photos, slides, and data, should be documented clearly and provided to those not participating directly.
- Absent extraordinary circumstances, the Crown should be slow to prosecute unless there is a strong consensus in favour of the laying of charges. A reasoned contrary view by an experienced forensic pathologist may signal the existence of a reasonable doubt on the cause of death, or the suspects’ involvement. Once again, I am not suggesting that the existence of a contrary view should amount to a veto on

the issue of charging. Rather, it should serve as a “red flag” for Crown counsel to consider in the context of the case as a whole.

- On receiving a recommendation to prosecute, the Crown attorney should consider whether s/he ought to retain an independent pathologist to assist in working through the issues in the case, and to ensure that, from a legal standpoint, there is a reasonable prospect of conviction.¹¹¹ In some cases, particularly in smaller communities, I recognize that this step may prove quite challenging if not impossible.
- There may need to be some flexibility worked into the protocol where the life or safety of someone is in peril, or where the evidence clearly signals the need to proceed with dispatch.

Some may argue that this process is too cumbersome, costly, will take too long, and does not recognize the limited number of experts in the province. Such criticism is not without merit. But, in my view, the following factors need to be worked into the equation:

Limited professional resources. A network of protocols can and should be developed with other jurisdictions to tap professional resources elsewhere. Also, given the tight criteria proposed in the protocol, a relatively small number of cases will trigger its application in the first place.

Costs. Some financial resources will be required, but the cost should be measured against the significant compensation awards that have been made in previous wrongful conviction

cases in Canada. Viewed through that lens, the additional costs can be justified by government as a relatively modest risk management strategy.¹¹²

Process is too long and cumbersome. As noted by Commissioner Lamer in the 2006 Newfoundland Inquiry report, tunnel vision prompted everyone to “jump on the bandwagon” in favour of prosecution. And that is precisely what happened in the case of William Mullins-Johnson. Care, experience, an element of independence, and time for reflection are all good values in this process, and are probably the best guard against the setting in of tunnel vision.

Finally, some may argue that, in contrast to the situation in Ontario during the 1990s, the approach proposed here has caused the pendulum to swing too far in the other direction. True homicides will be filtered out because it is feared that a wrongful conviction will occur. To that, I simply say this: picking up on Blackstone’s most famous observation, and giving it a 21st-century flavour, if we as a society care about “doing justice,” as I believe we do, it is better to forego prosecution where there is a doubt about how the death occurred, rather than place even one more mother, father, or uncle in jail for something they did not do, in respect of a crime that never even existed.¹¹³

¹¹¹ Under the Crown Attorney’s Act, a Crown Attorney shall review the papers that Coroners are required to transmit, and may cause charges to be further investigated and additional evidence to be collected: Crown Attorney’s Act, R.S.O. 1990, C. 49, s. 11(a)

¹¹² Some of the more notable compensation awards in Canada, in chronological sequence, are: Donald Marshall (\$1.5 million); Guy Paul Morin (\$1.2 million); David Milgaard (\$10 million); Thomas Sophonow (\$2.3 million); Randy Druken (\$2 million); Greg Parsons (\$1.3 million); James Driskell (\$250,000 as a good faith advance, with negotiations ongoing).

¹¹³ In 1765, Sir William Blackstone, one of England’s most revered jurists said “... it is better that ten guilty persons escape, than that one innocent suffer”: *Commentaries on the Laws of England*, Vol. 4 (Oxford, 1769, First Edition) at p. 352. The full history behind this legal principle, which actually precedes Blackstone by

G. Reconsidering the role of forensic pathologists in Canada

In Part III, I described some of the role blurring that can distort decision making in the Crown office, and lead to a loss of professional objectivity in the assessment of cases proposed for prosecution. That can, as judges of the Supreme Court of Canada have noted, permit tunnel vision to set in, and set the stage for the conviction of an innocent person.¹¹⁴ The same risk may arise in the field of forensic pathology, albeit in a different way.

There is some sense that forensic pathologists have traditionally seen themselves as advocates for the deceased victim, and as protectors of the public safety. “We speak for the dead to protect the living” is a philosophy that some argue has permeated forensic pathology for years.¹¹⁵ Authorities writing in the McMaster University Medical Journal in 2003 illustrated the point by referring to the comments of Dr. Chitra Rao, an associate professor of Pathology and Molecular Medicine, and head of the forensic pathology unit at the Hamilton General Hospital: “[I]t is an honour and a privilege to be present ‘at’ the death of an individual.” Her work was motivated by a desire to help those who are unable to speak for themselves. She quotes the same motto: “We speak for the dead to protect the living.”¹¹⁶

centuries, is described succinctly by Glanville Williams in *The Proof of Guilt* (London: Stevens & Sons, 1958) at 154–5.

¹¹⁴ *R. v. Regan* (2002), 161 C.C.C.3d 97 (S.C.C.) at para. 89–90 (majority) and para. 186 (minority).

¹¹⁵ Kirsten Kramar, above, at 822; Praseedha Janakiram and Asha Gupta, “Forensic Pathology: Unravelling the Mysteries of Death” (2003) 1 McMaster University Medical Journal 55, also relied on by Kramar.

¹¹⁶ Kirsten Kramar, above at 822.

There are some risks with this approach. Forensic pathologists may believe that they are on a mission on behalf of the deceased, which is anchored in the public interest. In the process, however, one may lose sight of the importance of truth-seeking as the ultimate objective in death investigations. The linkage to and parallels with noble cause corruption, examined in Part II, are clear and quite disconcerting.

As an advocate, it is easy to become swept away with public concerns over child abuse. That is not an issue where the public can easily see two sides to the coin: there are no “pros” and “cons.” Unfortunately, this reality can lead to natural deaths being read as unnatural or violent homicides. In 1999, Dr. David King, a forensic pathologist and formerly head of the pathology unit in Hamilton, Ontario, said this under the heading of “Sudden Natural Death Masquerading as Unnatural Death: “[A] more worrying area of death investigation is the death which appears, at the scene, to be unnatural or violent. There are a number of events or changes which may occur in the deceased just before death, during the process of dying or in the seconds, minutes, or hours after death.”¹¹⁷

For instance, pseudo-ligature marks are occasionally seen on the neck, particularly in the case of obese adults or children “when the tissues of the neck are thrown into folds resulting in white post-mortem marks resembling ligature marks.”¹¹⁸ A pathologist on a mission may see that quite differently from someone else. That almost certainly explains

¹¹⁷ Dr. David E.L. King, forensic pathologist at (and formerly head of) the Chief Gordon V. Torrance Regional Forensic Pathology Unit in Hamilton, Ontario, “The Investigation of Death,” chap. 8 in *Forensic Evidence in Canada*, 2nd ed., edited by G.M. Chayko and E.D. Gulliver (Canada Law Book: Aurora, Ontario, 1999) at 129.

¹¹⁸ *Ibid.* at 131

what occurred in the tragic case of Williams Mullins-Johnson,¹¹⁹ and may help us to understand what happened in the equally tragic cases in the United Kingdom.¹²⁰

In Mullins-Johnson, discussed earlier, various bruises and injuries said to be the result of abuse and murder were no more than the result of normal processes following death or caused by procedures connected to the post-mortem investigation.¹²¹

In the assessment of the medical cause of death, there is a respectable view that forensic pathologists should focus sharply on the scene of death, with the question: “What was this person doing when he or she died or became fatally injured?”¹²² Some would extend the review to the post-mortem, although, as occurred in Mullins-Johnson, even that can generate false conclusions. More aggressively, some seek to consider extra-medical data such as family, social, and economic information, a proposition most emphatically rejected by Kirsten Kramar of the University of Winnipeg:¹²³

Reliance upon extra-medical data is closely linked to this advocacy role. Forensic-science research on unexplained infant deaths instructs pathologists to look beyond the autopsy results to the social and familial circumstances of the victims and their parents by incorporating a thorough crime scene investigation and reconstruction into their final decision as to the cause of death ... forensic pathologists want, therefore, to look “beyond” the autopsy. Criminal-justice authorities and judges are apt to interpret the evidence of forensic pathologist as factual, disinterested scientific evidence of cause of death, rather than as a narrative of events described by a forensic advocate....

¹¹⁹ *R. v. Mullins-Johnson*, above.

¹²⁰ *R. v. Clark*, above; Bruce MacFarlane, “Convicting the Innocent,” above; and reference can be made to the excellent essay on this issue by Kathryn Campbell and Clive Walker, “Medical Mistakes and Miscarriages of Justice: Perspectives on the Experiences in England and Wales,” prepared for this Commission.

¹²¹ *R. v. Mullins-Johnson*, above, para. 15–16.

¹²² Dr. David E.L. King, above at 126.

¹²³ Kirsten Kramar, above at 816.

When the forensic-science practice of incorporating extra-medical assumptions into scientific cause-of-death determinations is injected into a criminal court of law engaged in evidentiary fact finding, the result may be the unlawful conviction of innocent parents and caregivers, who are primarily women.

Death investigations and advocacy do not mix well. There are several dangers. The advocacy role often leads to distorted conclusions because the case is viewed through a lens different from mere truth-seeking, and is subject to myriad public and media pressures that vary from case to case, and year to year. And, as noted earlier, a judge and jury may be left with the impression that medical opinion evidence of this nature is virtually infallible, rather than recognizing its limitations. The prospect for a wrongful conviction is painfully clear.

In the result, it seems to me that the Royal College of Physicians and Surgeons, or an appropriate medical body, ought to undertake a fundamental review of the role of forensic pathologists in Canada.¹²⁴ On the continuum of “neutral investigator” to “advocate for the dead,” forensic pathologists ought to lean more toward pursuing the truth in determining the cause of death. Advocacy and partisanship have no role here; that should be left to provincial Children’s Advocates, whose mandate is to provide advocacy on behalf of

¹²⁴ In a recent article in the Canadian Medical Association Journal, Dan Lett argues that it has recently been revealed that medical professionals with no formal training in forensic pathology routinely perform many of the legal autopsies introduced as evidence in courtrooms across Canada. He adds: “[U]nlike the United States and United Kingdom, Canada’s medical community has been entirely unable to reach a consensus on National standards for post-graduate training in forensic pathology.” Mr. Lett further adds that, despite Ontario adding forensic pathology as a subspecialty in 2003, “it remains unclear how many medical schools will be ready to offer specific courses in forensic pathology.”

children in a wide vary of circumstances, and to report and provide advice to governments, Ministers, and the Legislative Assembly.¹²⁵

Redefining the role of forensic pathologists may and almost certainly will involve a fundamental culture shift within the profession. That will take some time to achieve. To be successful, the reassessment and redefinition ought to be reinforced by an accompanying policy framework approved by the Royal College of Physicians and Surgeons and the College of Physicians and Surgeons of Ontario, together with nationally agreed-upon standards, accreditation, and training for both existing and aspiring forensic pathologists. That will go a long way toward ensuring that inappropriate role-blurring capable of distorting important medical conclusions will not contribute to any further wrongful convictions.

Part V: Some Final Thoughts

Justice system participants and forensic pathologists are both vulnerable to predisposing circumstances, tunnel vision, and cognitive biases that have the effect of distorting normal decision-making processes. Susceptibility in this context does not mean that the players are dishonest, corrupt, or conspiratorial. However, in a sense the situation is even more serious because the distortions at play have often become institutionalized and are systemic in nature. Seemingly normal, professional decisions may actually be distorted—not in the interest of the public, but in the interest of a *mission* that is not at all visible to the public.

¹²⁵ Provincial Advocate for Children and Youth Act, 2007, S.O. c. 9, esp. ss. 15, 16, and 21; Ombudsman and Children's Advocate Act, R.S.S. 1978, c. 0-4; Child and Family Services Act, C.C.S.M. c. C-80, as amended

The practical effect of predisposing circumstances in the case of a suspicious infant death is not at all surprising. An otherwise healthy baby has died, in the care of its parents.

Suspicion mounts, and investigative media start to look into the background of family members. Someone must be held accountable.

Against this backdrop, it is easy for tunnel vision to set in among investigators, including forensic pathologists. Some evidence points to a particular family member, and investigators narrow their focus and then set out to “build” a case around the most logical suspect—ignoring, or perhaps unconsciously filtering out, evidence that tends to point away from guilt. By this time, investigators and perhaps even prosecutors are hopelessly enmeshed in a theory of guilt that even dispositive exculpatory evidence cannot dislodge—as appears to have occurred, with terribly tragic results, in the case of Guy Paul Morin. Interlocking, remedial measures are available. They can reduce the distorting effects of these phenomena, even if they do not eliminate them completely. Most of these measures are not resource-intensive. They require cultural changes, and a different way of doing business. Some are based on lessons learned in the criminal justice system, while others are relatively new. All will need to be adapted to the realities of work in the field of forensic pathology.

The remedies I have identified can be grouped into six areas:

1. *professional education*, training, and the development of standards for forensic pathology;

2. *a clear understanding of the information and data* upon which key decisions are to be made and, correspondingly, agreement on the information that ought *not* to be taken into account in the making of those decisions;
3. *development of a culture of fact verification and ongoing assessments about the reliability and level of certainty respecting medical interpretations*: emphasizing the need to keep an “open mind” until all proper information is gathered; ensuring a careful decision-making process that values peer consultation and the seeking of outside opinion, and the testing of operational theories with other experts in the field;
4. *development of the role of a “contrarian”* to reduce the risk of tunnel vision, the impact of pre-disposing circumstances, and the emergence of unconscious cognitive biases—an expert in the field, with an element of independence from the investigation, who can ask the “tough questions” concerning the case, and can: challenge the direction of the investigation; posit alternate theories or interpretations, and generally ensure through fresh eyes that forensic pathologists do not prematurely become entrenched into a view of the case before all the facts are in and have been dispassionately evaluated;
5. *understanding the proper role of forensic pathology*, which de-emphasizes advocacy on behalf of the dead, and underscores objective truth-seeking and the need to understand limits to opinions concerning the cause of death;
6. *a more structured approach to the decision as to whether to prosecute in child death cases where forensic pathology is at the heart of the case and may be problematic*: one that guards against the shifting ground of medical opinion, and

recognizes the cold reality that a simple medical opinion can place someone in jail, and accepts, for that reason, that it is preferable to have the views of several experts—rather than just one, however eminent—including someone who is independent and preferably from out of province.

The key values here are care, thoroughness, independence of thought, transparency, and objectivity. These values may have the effect of slowing the decision-making process down a bit, but that is an acceptable outcome considering that in Canada and the United Kingdom people have been jailed simply on the basis of controversial and eventually discredited medical opinions and theories. Reliance on these values will, I expect, avoid a “rush to judgment,” and ensure that already grieving mothers, fathers, uncles, and aunts will no longer be jailed and stigmatized for a crime that, on reflection, never even existed.