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CHAPTER 4: CAUSES OF WRONGFUL CONVICTION

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4.1 Clarifying the terminology: wrongful convictions and miscarriages of justice

One difficulty with the claim that the abolition of the corroboration requirement could increase the risk of miscarriages of justice is that the term “miscarriage of justice” is itself used in a variety of different ways. In Scots law, it forms the sole ground of appeal against conviction.¹ Used in that sense, it is an omnibus term encompassing a wide range of possible defects in the original trial process (including a lack of awareness of evidence which only comes to light at a later date) which are regarded in law as justifying the quashing of a criminal conviction.²

In more general usage, “miscarriage of justice” can be understood as having one of three overlapping meanings, as follows:³

- (1) *Convictions which are quashed by the appeal court*: as explained above, this is the sense in which “miscarriage of justice” is used as a term of art in Scots law.
- (2) *The conviction of the factually innocent*: the sense in which most studies of “miscarriages of justice” use the term. Early studies were concerned primarily with cases where innocence had been positively established following conviction; some more recent analyses have not required positive proof of innocence but have treated miscarriages of justice as also encompassing cases where guilt cannot be taken to be reliably established.⁴
- (3) *The acquittal of the factually guilty*: a use of the term popularised by Tony Blair in 2002 (“It is perhaps the biggest miscarriage of justice in today’s system when the guilty walk away unpunished”),⁵ and reflected in the Carloway Report, where it was argued that “miscarriages of justice in the broad, rather than appellate sense” included such cases.⁶

It is important to recognise the different uses of this term. It has been argued that the abolition of the corroboration requirement would not increase the risk of miscarriages of justice of type (1).⁷ This may be true, assuming that abolition does not have any consequences which would indirectly increase this risk: for example, a reduction in the quality of investigative practices which increases the likelihood of appeals based on fresh evidence at a later date. However, it is an essentially circular

¹ Criminal Procedure (Scotland) Act 1995 ss 106(3) (solemn procedure) and 175(5) (summary procedure).

² See further F Leverick and others, *Scottish Criminal Cases Review Commission 10th Anniversary Research* (2009) 19, which identifies 32 different classifications of such defects. This builds on earlier work by P Duff and F McCallum, *Grounds of Appeal in Criminal Cases* (1996).

³ This classification is drawn, with some modification, from M Naughton, *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* (2013) 16-17. Naughton’s analysis would break category (1) down further, between convictions which are quashed as unsafe and convictions quashed as an abuse of process, reflecting the practice of the English Court of Appeal.

⁴ See T Thorp, *Miscarriages of Justice* (2005) 17, who locates this change in approach in 1993 with the publication of the report of the Runciman Commission: *Royal Commission on Criminal Justice* (Cm 2263: 1993).

⁵ See M Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (2007) 21.

⁶ *The Carloway Review: Report and Recommendations* (2011) para 7.2.42.

⁷ Scottish Parliament Official Report, Justice Committee 24 September 2014, cols 3243-3244 (Lord Carloway).

claim; a statement that changing the rules of a criminal trial will not result in the rules of a criminal trial being breached.⁸

The claim is also irrelevant, because objections to the abolition of the corroboration requirement are not based on any claim about type (1) miscarriages. Instead, they are based on a claim that abolition will risk a greater number of type (2) miscarriages: the wrongful conviction of the factually innocent.

Some progress can be made towards evaluating these objections, and understanding what alternatives to corroboration might meet these fears, by examining what is known about the causes of miscarriages of justice in the type (2) sense. To avoid confusion, we use the term “wrongful conviction” rather than “miscarriage of justice” in the rest of this chapter.

Attempts have been made in some jurisdictions to undertake wide-ranging reviews of the causes of wrongful conviction as part of a general examination of the criminal justice system.⁹ Our concerns here are slightly narrower than this. In this chapter, we aim to establish what is known about the causes of wrongful conviction, and which of those causes raise particular concern in the context of the abolition of the requirement for corroboration.

4.2 What do we know about the incidence of wrongful convictions in Scotland?

The short answer to this question is: surprisingly little. It might be assumed that the work of the Scottish Criminal Cases Review Commission would shed light on this, but that would be incorrect. The Commission’s role is not, at least directly, to consider whether or not someone is factually guilty or innocent. That remains the role of the trial court. The Commission’s role, instead, is to identify cases where a defect in the trial process may mean that the verdict of the court cannot be relied upon: a miscarriage of justice in the type (1), or formally legal, sense. While the majority of cases referred to the appeal court by the Commission involve evidence which was not heard at the original proceedings, or a failure by the prosecution to disclose evidence,¹⁰ such cases do not involve either the Commission or the appeal court establishing that the convicted person is factually innocent. That is not the focus of inquiry for the appeal court. Like other common law systems, the Scottish system operates on the basis that it is the trial court’s role to establish guilt or innocence, and that post-conviction review – at least in the normal case – does not involve asking that question a second time. Instead, the question is whether the trial court’s function was properly discharged.

It should be remembered, however, that modern examinations of wrongful convictions have generally been prompted by a small number of high-profile cases which have received significant public attention.¹¹ In a small jurisdiction such as Scotland, such individual cases or (especially) clusters of cases are statistically less likely to emerge. There is a danger that lawyers in such

⁸ J Chalmers, “Abolishing corroboration: three bad arguments” 2014 SLT (News) 7 at 9-10.

⁹ See e.g. Thorp, *Miscarriages of Justice* (n 4) (New Zealand); California Commission on the Fair Administration of Justice, *Final Report* (2008); Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (2011) (Canada, following on from an earlier report in 2005); B L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) (US), examining the work of the Innocence Project (www.innocenceproject.org). See also the work of the National Registry of Exonerations in the US, available at www.law.umich.edu/special/exoneration/Pages/about.aspx

¹⁰ See J Chalmers and F Leverick, “The Scottish Criminal Cases Review Commission and its referrals to the appeal court: the first 10 years” [2010] Crim LR 608 at 613-614.

¹¹ Thorp, *Miscarriages of Justice* (n 4) 11-31.

jurisdictions may therefore assume that their system is somehow more resistant to wrongful conviction, when a more systematic review – such as that carried out by the retired judge Sir Thomas Thorp in New Zealand – would not provide any evidence to support this claim.¹²

In 1999, Clive Walker compiled a “catalogue of miscarriage cases” in Scotland,¹³ and concluded:¹⁴

These well-documented cases should suffice to suggest that persistent and unresolved miscarriages of justice do occur in Scotland and that the causes broadly correspond to England and Wales.

He was scathing about the Scottish response to concerns about wrongful conviction:¹⁵

Many Scottish lawyers display a great deal of what might best be described as complacency and at worst blind arrogance about the righteousness of the system.

There has been no systematic analysis of the causes of wrongful conviction in Scotland, and the available evidence on this issue must be drawn primarily from other jurisdictions. For present purposes, however, this is less of a handicap than it might initially appear. This report is concerned not with the risks of wrongful conviction as they currently exist in Scots law (which would be a much broader project) but with the risks of wrongful conviction which would be aggravated by the abolition of the corroboration requirement. In answering that question, it is therefore useful and indeed necessary to consider the evidence available from other jurisdictions where no such requirement exists.

4.3 Research into the causes of wrongful convictions

The early studies

Historically, there was a distinct reluctance to accept that wrongful conviction was a problem within Anglo-American criminal justice systems. The prevailing attitude of the early 20th century was encapsulated by these remarks made by the US Justice Learned Hand in *US v Garsson*:¹⁶

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve [jurors]. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

¹² Thorp, *Miscarriages of Justice* (n 4).

¹³ C Walker, “Miscarriages of justice in Scotland”, in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) 323 at 323-327.

¹⁴ At 327.

¹⁵ At 352. Gerry Maher and Lord McCluskey were identified as “honourable exceptions”.

¹⁶ 291 F 646, 649 (SDNY 1923).

In his comprehensive historical account,¹⁷ MacFarlane identified the earliest attempt to investigate the issue of wrongful conviction as that undertaken by the American Prison Congress Review in 1912.¹⁸ It is “charitable”,¹⁹ MacFarlane states, to describe this as a study, involving as it did simply writing to every prison warden in Canada and the United States and asking if they had personal knowledge of wrongful executions or wrongful “conviction of heinous crime”.²⁰ All but one of the responses to the first question were in the negative (with the one exception admitting only the possibility).²¹ There were a few positive responses to the second question, but these were dismissed by the respondents and the author of the study because in none of these cases was the wrongfully convicted individual considered “a worthy person”.²²

From the 1930s onwards, a handful of studies started to emerge which challenged the prevailing belief that wrongful conviction was not a problem to which attention should be devoted although, as Thorp notes, they had little or no effect on it.²³ The first of these was published by Edwin Borchard in 1932.²⁴ Borchard, who has been described as “the originator of wrongful conviction scholarship”,²⁵ identified 65 cases of wrongful conviction, primarily from the US but also including two English cases²⁶ and one Scottish case.²⁷ He suggested that the main causes of wrongful conviction were mistaken eyewitness identification, improperly obtained confessions, unreliable expert evidence, witness perjury and inadequate defence representation,²⁸ conclusions that have been reflected in almost every subsequent study. He also identified a number of other contributory factors, including public pressure to solve horrific crimes²⁹ and, in the context of the (Scottish) Oscar Slater case, the majority jury verdict.³⁰

Borchard’s seminal study was followed by a handful of similar projects. In 1957, for example, Jerome and Barbara Frank (a US judge and his daughter), in a study of 36 cases of wrongful conviction,³¹ supported Borchard’s analysis, stressing in particular the role of mistaken eyewitness testimony.³² They also identified the use of jailhouse informants as a cause of some of the wrongful convictions in

¹⁷ B MacFarlane, “Convicting the innocent: a triple failure of the justice system” (2006) 31 *Manitoba LJ* 403. For other studies that chart the development of research into wrongful conviction, see R Leo, “Rethinking the study of miscarriages of justice: developing a criminology of wrongful conviction” (2005) 21 *Journal of Contemporary Criminal Justice* 201; R A Rosen, “Reflections on innocence” (2006) *Wisconsin LR* 237; Thorp, *Miscarriages of Justice* (n 4) part 2.

¹⁸ RH Gault, “Find no unjust hangings” (1912-1913) 3 *J of the American Institute of Criminal Law and Criminology* 131.

¹⁹ MacFarlane (n 17) at 406.

²⁰ Gault (n 18) at 131.

²¹ *Ibid.*

²² Gault (n 18) at 132.

²³ Thorp, *Miscarriages of Justice* (n 4) at 5.

²⁴ E M Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932). For a detailed account of Borchard’s career and pioneering research, see M Zalman, “Edwin Borchard and the limits of innocence reform”, in C R Huff and M Killias (eds) *Wrongful Convictions and Miscarriages of Justice* (2013) 329.

²⁵ Zalman, “Edwin Borchard and the limits of innocence reform” (n 24) at 329.

²⁶ Borchard (n 24) at 8 (William Hebron) and 86 (Adolf Beck).

²⁷ At 228 (Oscar Slater).

²⁸ At xx.

²⁹ At xiii-xviii.

³⁰ At 234.

³¹ J Frank and B Frank, *Not Guilty* (1957).

³² At 132-148.

their sample, foreshadowing modern-day findings. Their conclusions were echoed by Radin in 1964,³³ who attributed a further 80 cases of wrongful conviction to factors including coerced confessions, single eyewitness identification, inadequate disclosure by the prosecution and inadequate defence representation.³⁴

All of these studies were relatively small scale and, while remarkably prescient of modern literature in terms of their conclusions, had no real impact. It was not until the 1980s that things began to change, with the publication of what has been described as the “watershed”³⁵ study of wrongful conviction undertaken by Bedau and Radelet.³⁶ Their dataset of 350 cases was the largest to date, spanning wrongful convictions that had occurred in capital cases (all rape or homicide) between 1900 and 1985. In 309 of these there was some sort of official recognition of innocence, such as an official pardon. In the others there was other compelling evidence of innocence such as another person subsequently confessing to the crime, or being implicated in it, the statement of a state official or subsequent scholarly consensus on the basis of the available evidence.³⁷ Like their predecessors, their catalogue of the causes of wrongful conviction included mistaken eyewitness identification, false confessions, witness perjury and prosecution suppression of exculpatory evidence.³⁸ Echoing Borchard, they also pointed to the contribution made by public pressure for a conviction in cases that had caused community outrage. Bedau and Radelet’s study was also significant because it was the first to point to misleading forensic evidence as a possible cause of wrongful conviction (identifying “erroneous diagnosis of the cause of death” as a factor in 16 of their cases).³⁹

The DNA exonerations and the innocence movement

The most significant development in the study of wrongful conviction came in the 1990s, with the emergence of DNA-based exonerations.⁴⁰ It was significant for two main reasons. First, it meant that even the most hardened sceptics could no longer deny that wrongful convictions had occurred in at least some cases, even if the scale of the problem could still be disputed. Various scholars have attempted to arrive at a figure for the rate of wrongful conviction, based on the known DNA exoneration cases,⁴¹ although these all contain so many caveats that it is difficult to conclude much from them other than the fact that wrongful conviction definitely happens, there are likely to be

³³ E D Radin, *The Innocents* (1964).

³⁴ In a similar vein, see E S Gardner, *Court of Last Resort* (1957).

³⁵ Leo (n 17) at 204.

³⁶ H Bedau and M Radelet, “Miscarriages of justice in potentially capital cases” (1987) 40 *Stanford LR* 21. See also A Rattner, “Convicted but innocent: wrongful conviction and the criminal justice system” (1988) 12 *Law and Human Behavior* 283, whose study of 205 wrongful convictions was published at around the same time and which reported similar findings.

³⁷ Bedau and Radelet (n 36) at 49.

³⁸ At 57 (table 6).

³⁹ At 62.

⁴⁰ Zalman describes this as the start of “the age of innocence”: see M Zalman, “An integrated justice model of wrongful convictions” (2010-2011) 74 *Albany LR* 1465 at 1499.

⁴¹ See e.g. D M Risinger, “Innocents convicted: an empirically justified factual wrongful conviction rate” (2007) 97 *J of Criminal Law and Criminology* 761 at 778 (who arrives at a figure of 3.3% for capital rape-murders in the US); S Gross, “How many false convictions are there? How many exonerations are there?”, in Huff and Killias, *Wrongful Convictions and Miscarriages of Justice* (n 24) at 45 (concluding that at least 1.5% of those sentenced to death in the US were factually innocent).

some cases in which it remains undiscovered⁴² and that the true rate of wrongful conviction cannot be known for sure.⁴³

Second, it led to increasing attention being devoted to tackling the problem, both in terms of identifying the causes of wrongful conviction and identifying reforms that might address these, a debate that continues to the present day.⁴⁴ A series of broad enquiries started to take place, many of which centred around the death penalty in the US. In Illinois, for example, following the release of 13 wrongfully convicted prisoners from death row, the Governor (who was a strong death penalty supporter) imposed a moratorium on capital punishment in January 2000 and appointed a commission to investigate the causes of wrongful conviction in March of that year.⁴⁵ The Commission's subsequent report identified particular concerns including the uncorroborated evidence of in-custody informers, false confessions, and unreliable eyewitness evidence.⁴⁶ Most significant, however, were the studies stemming from the birth of the modern day innocence movement,⁴⁷ a collection of mostly university based innocence projects devoted to identifying and rectifying wrongful convictions. The most notable is the Innocence Project,⁴⁸ founded in 1992 and based at Cardozo Law School.⁴⁹ Its focus is purely on DNA-based exoneration and, at the time of writing, it had identified 316 such cases in the US.⁵⁰ It maintains a database of DNA exonerations and this has spawned a number of research projects investigating the causes of wrongful conviction, the most substantial of which has been undertaken by Garrett.⁵¹ His study was based on the first 250 DNA exonerations and, for each of these, the vast majority of which were cases of murder and/or rape,⁵² Garrett examined case files, trial transcripts, police reports and other court documents in order to identify the evidence on which the conviction was based.⁵³

⁴² The DNA exonerations are often referred to as "the tip of an iceberg". See e.g. K Roach, "Wrongful convictions in Canada" (2011-2012) 80 *University of Cincinnati LR* 1465 at 1470; Garrett, *Convicting the Innocent* (n 9) at 262; K A Findley and M S Scott, "The multiple dimensions of tunnel vision in criminal cases" (2006) 2 *Wisconsin LR* 291 at 291.

⁴³ See Gross (n 41) at 46; Risinger (n 41) at 788; Garrett, *Convicting the Innocent* (n 9) 264.

⁴⁴ Thorp (n 4) at 5; D Givelber, "Kalven and Zeisel in the twenty-first century: is the jury still the defendant's friend?", in C J Ogletree and A Sarat (eds), *When Law Fails: Making Sense of Miscarriages of Justice* (2009) 140 at 141.

⁴⁵ MacFarlane (n 17) at 432; C J Ogletree and A Sarat, "Introduction", in Ogletree and A Sarat (eds), *When Law Fails* (n 44) 1 at 2-3.

⁴⁶ Report of the Governor's Commission on Capital Punishment (State of Illinois, 2002) 8.

⁴⁷ For a comprehensive account of its history and development, see Zalman (n 40).

⁴⁸ <http://www.innocenceproject.org/>.

⁴⁹ There is a detailed account of the history of the Innocence Project in B Scheck, P Neufeld and J Dwyer, *Actual Innocence* (2001).

⁵⁰ Correct as of 15 April 2014: the cases are listed at <http://www.innocenceproject.org/know/Browse-Profiles.php>.

⁵¹ B L Garrett, *Convicting the Innocent* (n 9). A shorter summary of his findings can be found in B L Garrett, "Trial and error", in Huff and Killias (eds), *Wrongful Convictions and Miscarriages of Justice* (n 24) at 77. An earlier study, based on the first 200 exonerations, is reported in B L Garrett, "Judging innocence" (2008) 108 *Columbia LR* 55. Others have analysed the Innocence Project data (see e.g. R K Little, "Addressing the evidentiary sources of wrongful convictions: categorical exclusion of evidence in capital statutes" (2008) 37 *Southwestern University LR* 965) but Garrett's study is by far the most extensive.

⁵² There were 171 rape cases (68%), 22 murder cases (9%) and 52 rape/murders (21%). The remaining five exonerees were convicted of other offences, mostly robbery: Garrett, *Convicting the Innocent* (n 9) at 5.

⁵³ *Ibid.*

Of equal significance in research terms is the National Registry of Exonerations (NRE),⁵⁴ a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. Unlike the Innocence Project, the NRE does not itself investigate cases of wrongful conviction but instead aims to provide a comprehensive record of all exonerations in the US since 1989. At the time of writing, it noted 1,350 known exonerations.⁵⁵ A major research project based on this dataset reported in 2012,⁵⁶ examining the causes of the first 873 exonerations (those registered from January 1989 to February 2012).⁵⁷ The dataset on which the NRE report is based is wider than that of Garrett/the Innocence Project because the NRE does not limit itself to DNA-based exonerations.⁵⁸ In addition to these, it encompasses cases where pardons were granted or where criminal charges were dismissed at the prosecutor’s motion after new evidence of innocence emerged, acquittals at retrials, a small number of “certificates of innocence” issued by courts and some posthumous exonerations.⁵⁹ As such it covers a broader range of offences than the Innocence Project,⁶⁰ although the majority are still cases of homicide or sexual assault.⁶¹

The insights offered by these studies are remarkably similar to those offered by Borchard in his 1932 work. To take the Innocence Project dataset first, Garrett examined the evidence that supported conviction in each of the first 250 exonerations.⁶² His findings are displayed in table 1 below.

Table 1: Evidence supporting wrongful conviction (Innocence Project/Garrett study)

Type of evidence	Number of cases
Eyewitness evidence	190 (76%)
Forensic evidence	185 (74%)
Informant evidence	52 (21%)
Confession evidence	40 (16%)

⁵⁴ www.law.umich.edu/special/exoneration/Pages/about.aspx

⁵⁵ Correct as of 15 April 2014: the cases are listed at <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx>

⁵⁶ S R Gross and M Shaffer, *Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations* (2012).

⁵⁷ At 1.

⁵⁸ In Gross and Shaffer’s report, these accounted for only 37 per cent of exonerations: Gross and Shaffer, *Exonerations in the United States* (n 56) 8.

⁵⁹ Ibid.

⁶⁰ In the Gross and Shaffer study, there were 406 cases of homicide, 203 cases of sexual assault (including rape), 102 cases of child sex abuse, 47 cases of robbery; 58 cases of other violent crimes (such as attempted murder, assault and arson); and 58 cases of non-violent crimes (such as drug crime, fraud type offences and theft): at 20 (table 2).

⁶¹ Ibid at 20.

⁶² Garrett, *Convicting the Innocent* (n 9) at 279. His analysis has been criticised in the respect that merely identifying that a particular type of evidence was used in a wrongful conviction case does not tell us anything about the degree of influence that such evidence had on the outcome: see S A Cole and W C Thompson, “Forensic science and wrongful convictions”, in Huff and Killias, *Wrongful Convictions and Miscarriages of Justice* (n 24) at 118.

As table 1 shows, there were four main types of problematic evidence that had supported the wrongful convictions: eyewitness evidence, forensic evidence, evidence of informants (a category encompassing jailhouse informants,⁶³ co-defendant testimony and other witnesses who had something material to gain from offering information) and confession evidence. Garrett also identified a number of wider contributory factors, most notably “ineffective assistance of [defence] counsel”,⁶⁴ public pressure to solve notorious cases,⁶⁵ prosecutorial and police misconduct⁶⁶ and tunnel vision/cognitive bias.⁶⁷ He did not attempt to quantify the number of wrongful convictions in which these played a role, but referred to them as “systemic” factors,⁶⁸ affecting many of the cases in his sample.

The findings of the Gross and Shaffer study are shown in table 2.⁶⁹

Table 2: Contributing factors to exonerations (NRE/Gross and Shaffer study)

Contributory factor	Number of cases
Perjury/false accusation	445 (51%)
Mistaken eyewitness identification	375 (43%)
Official misconduct	368 (42%)
False or misleading forensic evidence	210 (24%)
False confession	135 (15%)

Although their classification scheme is slightly different to Garrett’s, there are some major similarities between the two studies. Like Garrett, they identify mistaken eyewitness identification, false confessions and misleading forensic evidence as significant causes of wrongful conviction. Their figures for the proportion of cases involving eyewitness evidence are lower than those of Garrett (43 per cent compared to 76 per cent), but this is due to two factors. First, unlike Garrett, they attempted to distinguish between genuine mistakes and deliberate misidentifications and classified the latter as “perjury”.⁷⁰ Second, as noted above, a wider range of cases are included in the NRE compared to the Innocence Project (the former focuses on exonerations generally, the latter only on DNA-based exoneration). Identification was more likely to be at issue in Garrett’s sample, which comprised mainly murders and “stranger” rapes (and it is worth noting that where these types of case appeared in the Gross and Shaffer sample, the proportion of cases involving mistaken

⁶³ Cases where a cellmate of the defendant claimed the defendant had confessed to him or her.

⁶⁴ Garrett, *Convicting the Innocent* (n 9) 165-167.

⁶⁵ At 150.

⁶⁶ At 167-170.

⁶⁷ At 265-268. He also discussed (150-153) the role of guilty pleas (and the incentives offered to induce them), but this lies outwith the scope of our study.

⁶⁸ At 265.

⁶⁹ Derived from Gross and Shaffer, *Exonerations in the United States* (n 56) 40 (table 13).

⁷⁰ At 43.

identification was far higher).⁷¹ Indeed, as Gross and Shaffer themselves state, for the DNA exonerations in their sample, their figures for mistaken eyewitness identification are much closer to those of Garrett.⁷²

There are some other minor differences between the two studies. Gross and Shaffer's category of perjury/false accusation is broader than Garrett's category of informant evidence. It encompasses informant evidence and the evidence of accomplices, but it also includes other false accusations, such as claims by a complainant that a criminal act had taken place when it had not, and, as noted above, all deliberate misidentifications.⁷³ The greater representation of perjury/false accusations compared to Garrett's research may also be due in part to the wider sample of cases included in the NRE. Gross and Shaffer's dataset included 102 cases of "child sex abuse",⁷⁴ a category that was absent from Garrett's sample and there was a false allegation in 74 per cent of the child sex abuse cases that ended in a wrongful conviction.⁷⁵ As Gross and Shaffer state, these were "usually produced by pressure on the children from relatives, police officers or therapists; they generally unravel[led] when the witnesses recant[ed]".⁷⁶

Finally, unlike Garrett, who merely identified it as a relevant factor at play, Gross and Shaffer attempted to quantify the number of cases in which official misconduct played a contributory role, concluding that this was a cause of 42 per cent of the wrongful convictions in their sample.⁷⁷ Official misconduct encompassed "a broad category of behaviors that affect the evidence that's available in court, and the context in which that evidence is seen".⁷⁸ It included "flagrantly abusive investigative practices", "committing or procuring perjury", "torture", "threats or other highly coercive interrogations", "threatening or lying to eyewitnesses" and "forensic fraud".⁷⁹ At the extreme end, it included "framing innocent suspects for crimes that never occurred" and "concealing exculpatory evidence from the defendant and the court".⁸⁰ Like Garrett, they also noted the role played by defence representation, pointing to "clear evidence of severely inadequate legal defence"⁸¹ in 104 exonerations, but they could not produce even a reasonable estimate of the overall figure and so did not include it in their data.⁸²

The issues identified by Garrett and by Gross and Shaffer will be discussed in more detail shortly, to the extent that they are relevant to the terms of reference of this research.

⁷¹ In sexual assault cases, for example, the figure was 80%. In robbery cases, it was 81% (at 40 (table 13)).

⁷² At 51 n 75.

⁷³ At 50.

⁷⁴ At 40.

⁷⁵ At 40 (table 13).

⁷⁶ At 51.

⁷⁷ Which they suggest (at 41) is probably an underestimate.

⁷⁸ Gross and Shaffer (n 56) at 66.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ At 42.

⁸² At 43.

The limitations of the US exoneration research

The Garrett and Gross and Shaffer studies do suffer from a number of limitations which might affect the extent to which their conclusions can be generalised.⁸³ For a start (and most obviously), they are both based on the US. As we will see shortly this is not especially problematic, given that the findings of studies from other jurisdictions have tended to reach the same conclusions about the causes, even if not the rate, of wrongful conviction. They are also limited in terms of the type of offences they examined and the date at which the wrongful conviction occurred. For Garrett, his sample comprises almost exclusively rapes and/or murders where the perpetrator was unknown to the victim and where the defendant was convicted after a trial in the 1970s or 1980s.⁸⁴ Gross and Shaffer's sample has a similar profile in terms of the date of conviction.⁸⁵ As it was not based purely on DNA exonerations, it is slightly wider in terms of the categories of offence it contains, but it is still limited to mainly homicides and sexual assaults (and a handful of other serious offences). As Gross and Shaffer note, we know very little about the incidence and causes of wrongful conviction for less serious crimes and those in which DNA evidence is unavailable.⁸⁶

These are not limitations, though, that are of any great concern for our purposes. It may be that some causes are over-represented or under-represented in the US exoneration research,⁸⁷ but there is no reason to believe that the causes that these studies have identified never occur in other contexts. The main point here is not the numbers, but the identification of potential contributory factors that may have some significance in Scotland post-corroboration.

Research outside the US context

There have, in the various common law jurisdictions, been major reviews of the causes of wrongful conviction but few of these have undertaken any extensive empirical research. Instead they have tended for the most part to focus on the lessons that can be learned from a single case (or small number of cases) or to draw on the findings of the Innocence Project or the NRE. In Canada, for example, there have been no less than nine major enquiries into wrongful conviction.⁸⁸ Six were sparked by individual cases and focused primarily on the lessons that could be learned from the case concerned.⁸⁹ One was an investigation of forensic paediatric pathology services in Ontario following

⁸³ These are discussed by the authors of the studies: see Garrett, *Convicting the Innocent* (n 9) 81; Gross and Shaffer, *Exonerations in the United States* (n 56) 10-17. See also K A Findley, "Defining innocence" (2010-2011) 74 Albany LR 1157 at 1167; Cole and Thompson (n 62) at 116-118.

⁸⁴ Garrett, *Convicting the Innocent* (n 9) at 265.

⁸⁵ Gross and Shaffer do not provide the date of the convictions in their report, but information can be found on the NRE website: <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx>

⁸⁶ Gross and Shaffer, *Exonerations in the United States* (n 56) at 5.

⁸⁷ The relative contribution of forensic evidence and identification evidence is likely to be over-represented: see Garrett, *Convicting the Innocent* (n 9) at 81.

⁸⁸ MacFarlane (n 17) discusses three of these in detail (at 421-431). The other six had yet to report when he wrote his article.

⁸⁹ Royal Commission on the Donald Marshall Jr Prosecution, *Digest of Findings and Recommendations* (1989); The Commission on Proceedings Involving Guy Paul Morin, *Report* (1998); Manitoba Justice, *The Inquiry Regarding Thomas Sophonow* (2001); The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken, *Report and Annexes* (2006); The Honourable Mr Justice Patrick J LeSage, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2007); The Honourable Mr Justice Edward P MacCallum, *Report of the Inquiry into the Wrongful Conviction of David Milgaard* (2008).

a number of wrongful convictions caused by evidence given by a particular expert witness.⁹⁰ The other two were broader reviews undertaken by the Federal/Provincial/Territorial (FPT) Heads of Prosecutions Committee Working Group, which culminated in reports in 2005⁹¹ and 2011,⁹² but neither undertook any empirical investigation of the causes of wrongful conviction, preferring instead to take these as given and focus on ways to best address the problems concerned. As such, the 2011 Report lists mistaken eyewitness identification and testimony, false confessions, in-custody informers, DNA evidence, forensic evidence and expert testimony, tunnel vision and education as “issues that have been identified time and time again ...as the key factors that contribute to wrongful convictions”.⁹³

In Australia there have also been a number of public enquiries, each following a specific case of wrongful conviction,⁹⁴ but none identified any issues that have not already been thoroughly canvassed above.⁹⁵ In New Zealand, a Royal Commission established to investigate a single case of wrongful conviction⁹⁶ identified police misconduct and a lack of neutrality from a scientific witness as causal factors.⁹⁷ A more wide ranging enquiry was undertaken in New Zealand in 2005 by Sir Thomas Thorp, a former High Court judge who, following retirement, was asked by the New Zealand Ministry of Justice to investigate the causes of wrongful conviction.⁹⁸ He examined the files relating to 70 claims of “miscarriages of justice”⁹⁹ received and assessed by the Ministry of Justice between 1995-2002,¹⁰⁰ most of which were convictions for murder, rape or serious assault.¹⁰¹ It is worth making a brief comment here about terminology. Thorp draws on a database of alleged “miscarriages of justice” in the type (1) sense, as making a claim to the Ministry does not in itself indicate that the claimant is factually innocent. His study is worth noting, nonetheless, because his findings were broadly in line with the US studies, in that the three most common application grounds were newly discovered evidence, police or prosecutorial misconduct (including the non-

⁹⁰ The Honorable Stephen T Goudge, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (2008).

⁹¹ FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2005).

⁹² FTP Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (2011).

⁹³ At 3.

⁹⁴ C R Shannon, *Royal Commission Report Concerning the Conviction of Edward Charles Splatt* (1984); The Hon Mr Justice T R Morling, *Report of the Royal Commission of Inquiry into Chamberlain Convictions* (1987); D Hunt, *Report of the Inquiry Pursuant to S 475 of the Crimes Act 1900 Into the Guilt of Douglas Harry Rendell of the Murder of Yvonne Kendal* (1989); Corruption and Crime Commission, *Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeal of Mr Andrew Mark Mallard, and Other Related Matters* (2008); Justice F Vincent, *Report on the Conviction of Farah Abdulkadir Jama* (2010).

⁹⁵ For discussion, see MacFarlane (n 17) at 415.

⁹⁶ The Hon RL Taylor, *Report of Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Leonore Crewe* (1980).

⁹⁷ At 96-98.

⁹⁸ Thorp, *Miscarriages of Justice* (n 4).

⁹⁹ At 51.

¹⁰⁰ In New Zealand any convicted person can, after the appeals process has been exhausted, apply to the Ministry of Justice (acting on behalf of the Governor-General) and request he exercise the prerogative of mercy and either quash the conviction or refer it back to the courts: see the discussion in Thorp, *Miscarriages of Justice* (n 4) 49-51). The system is similar to that which existed in England and Wales and in Scotland prior to the establishment of the Criminal Cases Review Commissions in these jurisdictions.

¹⁰¹ Thorp, *Miscarriages of Justice* (n 4) 53.

disclosure of evidence) and incompetence of counsel. Less common but still significant were claims alleging witness perjury and faulty eyewitness identification of the accused.¹⁰²

In England and Wales, empirical research into the causes of wrongful conviction is also rare. The most extensive study to date was undertaken in 1973 by Brandon and Davies.¹⁰³ The authors reviewed 70 cases where it had been “proved”¹⁰⁴ that someone had been wrongfully convicted and imprisoned, proof being on the basis that a free pardon had been granted (52 cases) or that the Home Secretary had referred the case to the Court of Appeal and the conviction had been quashed (18 cases), excluding “those cases where the basis of the pardon or referral was simply a legal technicality”.¹⁰⁵ They identified the main causes of wrongful conviction as “unsatisfactory identification, particularly by confrontation between the accused and the witness”, false confessions, the failure to disclose exculpatory evidence, witness perjury, “especially in cases involving sexual or quasi-sexual offences”, badly-conducted defences and “criminals as witnesses”.¹⁰⁶ Various studies have investigated the bases of successful appeals against conviction in England and Wales¹⁰⁷ or the grounds on which cases have been referred by the Criminal Cases Review Commission,¹⁰⁸ but like Thorp’s research in the New Zealand context, they suffer from the obvious limitation that a successful appeal or Commission referral is not necessarily an indication of factual innocence. Aside from this, studies have been limited to summarizing existing research and/or presenting anecdotal evidence,¹⁰⁹ or, as in Canada, Australia and New Zealand, drawing conclusions from individual cases (most commonly those where defendants were wrongfully convicted of terrorism related offences).¹¹⁰ Most importantly for present purposes, no additional insights stem from any of these sources that are not covered by the Innocence Project and the NRE studies.

There is also a small body of literature in the English language that examines the causes of wrongful conviction in continental jurisdictions. Chrisje Brants, for example, has examined a small number of

¹⁰² Ibid.

¹⁰³ R Brandon and C Davies, *Wrongful Imprisonment: Mistaken Convictions and their Consequences* (1973). For a similar but much smaller scale study covering nine cases, see C G L Du Cann, *Miscarriages of Justice* (1960).

¹⁰⁴ Brandon and Davies, *Wrongful Imprisonment* (n 103) 19.

¹⁰⁵ At 19.

¹⁰⁶ At 21.

¹⁰⁷ See e.g. M Naughton, *The Innocent and the Criminal Justice System* (n 3).

¹⁰⁸ C Walker, “Miscarriages of justice and the correction of error”, in M McConville and G Wilson (eds), *The Handbook of the Criminal Justice Process* (2002) 505; C Walker, “Miscarriages of justice in principle and practice”, in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) 31 at 53-55; L Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008).

¹⁰⁹ See e.g. JUSTICE, *Miscarriages of Justice* (1989), noting “five common threads through most of the allegations made over the years” as being “(a) wrongful identification; (b) false confession; (c) perjury by a co-accused and/or other witnesses; (d) police misconduct, usually in the allegation of a verbal confess[i]on which, it is claimed, was never made, or the planting of incriminating evidence; (e) bad trial tactics” (para 1.7).

¹¹⁰ See Sir John May, *Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report* (1993-94 HC 449) (investigating the conviction of the ‘Maguire Seven’); Report of the Royal Commission on Criminal Justice (Cm 2263: 1993) (which was prompted by the successful appeal against convicted in the case of the “Birmingham Six”). See also M Naughton, *Rethinking Miscarriages of Justice* (n 5); C Walker and C McCartney, “Criminal justice and miscarriages of justice in England and Wales”, in C R Huff and M Killias (eds) *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2008) 183; Walker, “Miscarriages of justice and the correction of error” (n 108); MacFarlane (n 17) at 417-421 (where he discusses the relevant cases).

high profile cases of wrongful conviction that have occurred in the Netherlands.¹¹¹ The factors she identified as having contributed to these are familiar ones: false confessions, misleading scientific evidence and mistaken identification.¹¹² Like Garrett, she also highlights the role played by cognitive bias and tunnel vision.¹¹³ Once again the most important point for present purposes is that research undertaken in continental jurisdictions, insofar as details are available in the English language,¹¹⁴ does not appear to yield any insights additional to those already discussed.

4.4 Conclusion

The first point to note from the discussion above is that wrongful convictions definitely happen, contrary to historic doubts about this. The rate at which they occur is still open to debate (and it may be – indeed it is likely – that the US figures cannot be extrapolated to the Scottish context) but wrongful conviction is a very real danger to which the criminal justice system should be alert. The second point to note is the remarkable consistency in the findings of studies into the causes of wrongful conviction.¹¹⁵ Our interest is primarily in the evidential causes of wrongful conviction and, based on the survey undertaken in the previous section, we can now identify these as eyewitness misidentification; lying witnesses who, for want of a better description, “have something to gain” from their lies (including but not limited to so-called “jailhouse informers” and accomplices); false confessions; and unreliable forensic evidence.

Aside from these evidential causes, there are a number of wider environmental and cognitive factors at play.¹¹⁶ Relevant environmental factors (or as MacFarlane puts it “predisposing circumstances”¹¹⁷) include inadequate defence representation; public pressure to convict in serious high profile cases; and, “a local legal environment that has converted the legal process into a ‘game’, with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost”.¹¹⁸ To these can be added a number of well-documented (at least in the psychological literature) human cognitive biases,¹¹⁹ such as confirmation bias,¹²⁰ hindsight bias¹²¹

¹¹¹ C Brants, “Tunnel vision, belief perseverance and bias confirmation: only human?”, in Huff and Killias (eds), *Wrongful Convictions and Miscarriages of Justice* (n 24) at 161; C Brants, “The vulnerability of Dutch criminal procedure to wrongful conviction”, in Huff and M Killias, *Wrongful Conviction* (n 110) at 157.

¹¹² Brants, “Tunnel vision” (n 111) at 171-174.

¹¹³ At 177-178.

¹¹⁴ Aside from the Netherlands, see G Gillieron, “Wrongful convictions in Switzerland: a problem of summary proceedings” (2011-2012) 80 *University of Cincinnati LR* 1145; M Killias, “Errors occur everywhere – but not at the same frequency: the role of procedural systems in wrongful convictions”, in Huff and Killias (eds), *Wrongful Convictions and Miscarriages of Justice* (n 24) at 61 (continental Europe generally); and Huff and M Killias (eds), *Wrongful Conviction* (n 110) (chapter on Switzerland at 139-136, Germany at 213-248, France at 249-262 and Poland at 273-286).

¹¹⁵ A point noted by many of the leading contributors: see e.g. Leo (n 17) at 212 (noting the “unified voice” of the literature); Roach (n 112) at 393 (noting the “remarkable consensus”); Thorp, *Miscarriages of Justice* (n 4) 73 (noting that the “degree of commonality” between the studies is “significant”); MacFarlane (n 17) at 406 (noting that “the patterns and trends that emerge from [studies of wrongful conviction] are both chilling and disconcerting”).

¹¹⁶ The wrongful conviction scholarship has sometimes been criticised for focusing on the evidential causes to the detriment of these wider systemic issues: see e.g. Leo (n 17) at 213; Zalman (n 40) at 1503.

¹¹⁷ MacFarlane (n 17) at 436.

¹¹⁸ *Ibid.*

¹¹⁹ The leading paper on this subject is Findley and Scott (n 42). See also Brants, “Tunnel vision” (n 111).

¹²⁰ Discussed by Findley and Scott (n 42) (citing the relevant psychological studies) at 309-316.

and outcome bias,¹²² which all lead to tunnel vision: the danger that criminal justice professionals do not view evidence objectively once they have formed a view about the guilt of a particular suspect. It is also worth noting that wrongful convictions rarely have a single cause. As MacFarlane states, often “multiple causes interact in a single case, and fuel each other into a wrongful conviction”.¹²³ Our concern here is with those risks of wrongful conviction which might be aggravated by the abolition of the corroboration requirement. As such, we are interested primarily in the evidential, rather than the environmental, factors noted above (while still recognising that environmental factors might interact with these). Of particular concern are the issues of mistaken eyewitness identification, false confessions and the evidence of informers and accomplices. As such, each will be discussed in subsequent chapters of the report.

¹²¹ At 317-319.

¹²² At 319-321.

¹²³ MacFarlane (n 17) at 444.