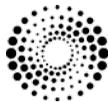


Dublin University Law Journal

2 0 1 2 ♦ VOLUME 35

ROUND HALL



THOMSON REUTERS

*in association with
the Law School, Trinity College, Dublin*

WHAT IS A MISCARRIAGE OF JUSTICE? THE IRISH ANSWER TO AN INTERNATIONAL PROBLEM

VICKY CONWAY* AND JENNIFER SCHWEPPE**

Even after the traditional appeals process has been exhausted, individuals continue to challenge criminal convictions. Ordinarily the courts do not permit further appeals as the finality of decisions is central to the legitimacy of the criminal justice system.¹ That said, facts can emerge following these ordinary appeals processes that disprove or cast doubt over a conviction, and so special procedures have been introduced in many jurisdictions for cases that may be considered ‘miscarriages of justice’² in which it would be inherently unjust not to permit further appeal or investigation. These special procedures are, as well shall see, a recent phenomenon, emerging predominantly in the last two decades.

For those who work within the criminal justice system, as well as for society more generally, the idea that a miscarriage of justice can occur is quite repugnant. The term brings to mind cases such as the Birmingham Six or Guildford Four involving individuals locked away for lengthy periods of time for a crime they did not commit. We may also think of extreme cases from countries such as the United States where persons have been sentenced to death only for it later to be confirmed that they did not commit the particular crime.³ We inherently link miscarriages of justice with innocence. Yet the language of the term is not so restrictive, and implies that a broader definition can be contemplated, one

* Vicky Conway, Lecturer in Law, University of Kent.

** Jennifer Schweppe, Lecturer in Law, University of Limerick.

1. See Kate Malleson, ‘Appeals Against Conviction and the Principle of Finality’ (1994) 21 JLS 151.
2. It should be noted at this point that a wide variety of terms has been used in the literature and some legal systems to describe these cases, ranging from ‘miscarriage of justice’ to ‘wrongful conviction’. This will be discussed in detail in section II but we use the term ‘miscarriage of justice’ throughout as this is the term that has been adopted by the legal systems in Ireland and the UK, as well as in international human rights instruments.
3. The Innocence Project states that 17 people have spent time on death row before DNA testing proved their innocence. This figure, available on their website <www.innocenceproject.org> (accessed 28 May 2012) excludes exonerations post-execution based on evidence other than DNA. Most recently Colombia Law School have published a report claiming that an innocent man was executed in Texas in 1989: see James Lieberman, ‘Los Tocayos Carlos’ (2012) 43(3) Colombia Human Rights L Rev (entire issue).

encompassing all cases in which justice has not been done or carried. There may be instances where, due to breaches of human and constitutional rights, it becomes difficult to claim that justice has been served or that the individual has been *rightfully* convicted. Whether or not to include such cases in a legal definition of the term is currently an important debate. Many countries, including France,⁴ Canada⁵ and, until recently, the United Kingdom,⁶ opt to limit the term to an innocence definition which, most practically speaking, prevents applicants who cannot prove innocence from securing compensation. This article examines how the Irish courts have dealt with this difficult issue and developed an approach embedded in human rights.

There have been a number of high-profile instances of miscarriages of justice in Ireland over the past decades:⁷ the cases of the Tallaght Two,⁸ Nora Wall (Sr Dominic),⁹ Frank Shortt,¹⁰ and, more recently, Michael Hannon and Martin Conmey.¹¹ A number of other controversial convictions were overturned or pardoned, though not legally declared miscarriages of justice (and so have no automatic right to compensation), including Nicky Kelly¹² and Peter Pringle.¹³ There have also been a number of cases that show further instances where the problems within the system can lead to injustice: the cases of Dean Lyons,¹⁴ the

-
4. Nathalie Dongois, 'Wrongful Convictions in France: The Limits of *Pourvoi en Révision*' in C Ronald Huff and Martin Killias (eds), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Temple University Press 2008).
 5. Kathryn M Campbell, 'The Fallibility of Justice in Canada: A Critical Examination of Conviction Review' in Huff and Killias (eds) *ibid*.
 6. Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer' (2007) 70 MLR 759, and for the most recent court ruling see *R v MacDermott and McCartney* [2011] UKSC 18.
 7. This list contains those cases that have attracted a degree of attention. It can be assumed that there are many other cases in which a miscarriage of justice was avoided but have not been brought to public attention.
 8. *The People (DPP) v Meleady and Grogan* [2001] 4 IR 16 (CCA). Meleady and Grogan were convicted of theft of a vehicle but following their release secured a certificate of miscarriage of justice when it was revealed that forensic testing, which proved they had not been in the front seat of the car as alleged, had not been disclosed to the defence.
 9. [2005] IECCA 140. Nora Wall, also known as Sister Dominic, was convicted of rape and imprisoned for life but later was granted a certificate of miscarriage of justice.
 10. [2002] 2 IR 696 (CCA). Frank Shortt was convicted of drugs offences and served three years in prison before being granted a certificate for a miscarriage of justice.
 11. [2009] IECCA 43. Michael Hannon was convicted of sexual assault. Twelve years later it was declared a miscarriage of justice when the alleged victim of the offence recanted and admitted she had falsified the allegations.
 12. [1983] IR 1 (SC). Nicky Kelly was convicted of the Sallins Mail Train Robbery on the basis of confession evidence, despite continued claims of severe physical abuse during detention. He was ultimately granted a presidential pardon and awarded compensation.
 13. 2 Frewen 57. Peter Pringle was convicted of murdering a garda despite garda misconduct throughout the investigation and trial. His conviction was ultimately quashed.
 14. Dean Lyons, a heroin addict with borderline mental handicap, confessed to murders

Hayes family¹⁵ and Frank McBrearty.¹⁶ From this range of cases it is clear that miscarriages of justice occur in Ireland. In light of that, clarity is needed on how the term is defined in Irish law. Legislation providing remedies for miscarriages of justice is relatively new, having been introduced in the Criminal Procedure Act in 1993. Yet since then the jurisprudence from these cases that analyses the 1993 Act provides that clarity. The Superior Courts in Ireland have definitively stated that the term ‘miscarriage of justice’ in Ireland is much broader than innocence, referring also to instances of ‘grave defects in the administration of justice’, cases where the prosecution should never have been brought due to a lack of evidence, and cases in which the procedure adopted was irreconcilable with judicial and constitutional procedure.

Nascent as the Irish procedure is, this is an impressively strong stance that sits counter to developments in many countries and displays an irrevocable dedication to due process, constitutional values and human rights. In this article, we examine the development of the definition, which has not at all times been steady. Until 1993 and the passing of the Criminal Procedure Act there was no definitive legal concept of a miscarriage of justice in Irish law. The legislation does not provide a definition of the key term, leaving this task to the courts. This article will begin by considering why the definition and application of the term is so problematic, followed by a conceptual and theoretical discussion of the term ‘miscarriage of justice’. It will then look at why the change in Irish law occurred in 1993, with a short overview of the new law. The focus will then turn to a substantive discussion of the case law on the issue, charting the evolution of the definition and difficulties that faced the judiciary. The article will conclude with a discussion supporting the approach of the Irish judiciary, arguing that it presents an important challenge to legal systems internationally.

in Grangegorman in 1997 to which someone else later confessed. Following his death the *Report of the Commission of Investigation into the Dean Lyons Case* (Stationery Office Dublin 2006), conducted by Mr Birmingham SC, found that while there was no deliberate breach of his rights, Dean Lyons had been asked inappropriate leading questions during his interrogation.

15. In 1984 Joanne Hayes and her family all falsely confessed to the murder of a baby. The *Report of the Tribunal of Inquiry into the ‘Kerry Babies Case’* by Mr Justice Kevin Lynch (Stationery Office Dublin 1985), failed to find fault with the conduct of gardaí involved, an outcome that has been heavily criticised: see Tom Inglis, *Truth, Power and Lies: Irish Society and the Case of the Kerry Babies* (University College Dublin Press 2003).
16. Frank McBrearty was wrongfully accused of the murder of Richard Barron in October 1996, subsequent to a false confession made in custody, considered by the Morris Tribunal. See *Report on the Detention of ‘Suspects’ Following the Death of the Late Richard Barron on the 14th of October 1996 and Related Detentions and Issues* (Stationery Office Dublin 2006).

I. THE DILEMMA POSED BY MISCARRIAGES OF JUSTICE

Miscarriages of justice, as a phenomenon, embody fundamental challenges for criminal justice systems embedded in human rights and due process. These cases by their very nature reveal a grave error in the system: in neither the trial nor the appeals system has it been identified that someone who should not have been convicted has been convicted. In order to maintain the integrity and legitimacy of the system, particularly given the commitment to due process and human rights, a mechanism for rectifying this error must be developed. While debates rage on how best to do that in terms of these normative aspects, one core challenge¹⁷ is identifying who can benefit from that mechanism and when we will admit that an error has occurred that needs rectifying. The system must balance a spectrum of factors:

- The recognition that errors do occur;
- The requirement to remedy these errors, if due process is a primary concern of the system;
- The admission that we do not wish to see guilty persons set free;
- The challenge posed by the endorsement of the conviction of a guilty person where their fundamental rights were breached to secure it;
- The concern that if we regularly admit errors and declare miscarriages of justice it will bring the legitimacy and integrity of the system into disrepute;
- And the equally valid, though circular, concern that if we do not rectify errors where required, the system is equally lacking in integrity.

We must therefore carefully identify when remedies should be provided, respectful of the need to protect due process as a value worth cherishing in itself, the rights of the individual, and the integrity of the system. We believe that there are two sets of concerns at play here: practical concerns and value concerns. From a practical concern perspective, if we apply the term to persons who can satisfy the system that they did not commit the crime (i.e. who can prove their innocence) then we can be confident that we are not detaching liability from guilty persons, nor are we undermining the system with regular quashing of convictions. On the other hand, if we consider value concerns, where due process and human rights are valued above such practical considerations, then that may dictate that, where those values have not been respected, a conviction should not stand. These tensions are real and difficult and how we define them

17. There are many other challenges that could be discussed: Who should determine whether or not there is a case to be considered? Who should determine whether or not there has been a miscarriage of justice? What evidence should be considered? Who should determine what compensation should be paid?

has fundamental consequences not just for the system but also for those who challenge their convictions.

The definition of the term also has very direct implications for the applicant, as it determines who may or may not benefit from the process. There are three core benefits relating to liberty, compensation and the declaratory effect of the term and these will only be enjoyed by a person to whom the definition applies.

First, and of most immediate concern, in many instances the claimant may still be imprisoned. They will often have exhausted the ordinary appeals mechanisms and this may be the only option to secure their release from prison. This result can, of course, be achieved through other means, whereby a conviction can be overturned and a person released through special procedures without this term being applied. It is, therefore, the other benefits that set the miscarriages of justice process apart from alternative reliefs available.

Second, international instruments such as the ICCPR and the ECHR impose requirements for compensation to be paid to persons who have suffered a miscarriage of justice. The ECHR states:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, *the person who has suffered punishment as a result of such conviction shall be compensated* according to the law or the practice of that State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.¹⁸

Given the impact that a conviction, particularly for a serious offence, can have on the individual on both a personal and professional level, compensation can play an important role in reintegration to society. Grounds has documented how the psychological consequences of imprisonment can be likened to those experienced by war veterans.¹⁹ For instance, in one of the cases in Ireland where a miscarriage of justice has been found, the court made the following statement about the applicant's experiences:

From the time he was first charged with the offences for which he was wrongly convicted up to the time when he was granted his certificate of a miscarriage of justice by the Court of Criminal Appeal the plaintiff lived

18. art 3, protocol 7, ECHR (emphasis added); art 14(6) ICCPR.

19. Adrian Grounds, 'Psychological Consequences of Wrongful Conviction and Imprisonment' (2004) 46(2) Canadian Journal of Criminology and Criminal Justice 165–82; Adrian Grounds, 'Understanding the Effects of Wrongful Imprisonment' (2005) 32 Crime and Justice 1–58.

through a nightmare of kafkaesque proportions which enveloped his entire existence. Everything he stood for, had strived for or aspired to seemed set at naught. It is a nightmare from which he has only relatively recently emerged but he will never escape the full consequences of this dreadful and traumatic period in his life.... The plaintiff suffered loss of liberty with all the ignominy of being condemned as a criminal by the State.²⁰

While nothing can undo the impact of a wrongful conviction, the payment of compensation may have some restorative value, going some way to right the wrong done.

Third, there is the declaratory effect of a statement of miscarriage of justice. From the moment that a person is arrested in relation to an offence, a stigma attaches that is difficult to avoid. Family relationships, community standing and professional reputation may all have been destroyed. The reputations of those close to the convicted person may also have been tarnished, possibly to the extent that they have been forced to relocate. To have the State admit clearly that this should not have happened, and that the individual should not have been convicted, can act as a key step in restoring the life of that individual. A simple quashing of conviction will not have the same impact for the individual as the declaration of a miscarriage of justice may have.

In addition to these benefits experienced by the successful applicant, the outcome can also have a strong accountability function as the declaration is the strongest statement that a court can make in such a case. If the case involved wrong-doing on the part of agents of the State – be it police, prosecution, lawyers or members of the judiciary – a pronouncement of that fact in open court, followed by an award of damages, will expose the misconduct of those agents and possibly prompt reform so that there is no recurrence of the behaviour. In England and Wales the MacPherson Report concerning the police investigation into the death of Stephen Lawrence²¹ led to the creation of the Independent Police Complaints Commission,²² and in Ireland the Morris Tribunal reports into police corruption in Donegal were a catalyst in the creation of the Garda Síochána Ombudsman Commission.²³ And, as we will see, throughout Canada and the US miscarriages of justice are reviewed by panels charged with examining the causes and making of recommendations in relation to the case.

These repercussions will only arise where the term ‘miscarriage of justice’ is

20. *Shortt v Commissioner of an Garda Síochána, Ireland and the AG* [2007] 4 IR 587, [92/93] (SC).

21. Justice MacPherson, *The Stephen Lawrence Inquiry* (HMSO 1999).

22. Created by the Police Reform Act 2002, becoming operational in 2004 and introducing, for the first time, independent investigations of serious police misconduct in England and Wales.

23. Created by the Garda Síochána Act 2005. See Vicky Conway, *The Blue Wall of Silence: The Morris Tribunal and Police Accountability in the Republic of Ireland* (Irish Academic Press 2010).

deemed to apply to a case; the narrower the definition, the fewer the cases that will fall within its ambit and the fewer the people who will enjoy these benefits. Yet precisely because of these implications the term should only be applied in meritorious cases. This points to the crux of the matter: When should it apply? What exactly constitutes a miscarriage of justice?

II. POSSIBLE RESPONSES TO THE DILEMMA

As we have identified, debate on the definition centres on whether the term should be limited to cases of actual innocence, or whether cases where the individual may be factually guilty but their rights were fundamentally breached to secure a conviction should be included. It cannot be denied that there is great normative appeal to restricting the definition to innocence. As Steiker and Steiker outline, there are certain characteristics of cases of innocence that set them apart and lend them more readily to extraordinary measures and the awarding of compensation.²⁴ Perhaps the most obvious point they address is that the punishment that has been imposed does not fit the crime, as none has been committed. This of course relates to the fact that the actual offender remains at large, creating risk for society, and to the fact that the actual offender has managed to evade justice, undermining the principle of deterrence, which is supposed to be one of the goals of punishment. Combining these points it is also the case that punishment of the innocent and failure to capture actual offenders reduces the legitimacy of the criminal justice system. There is additional cruelty in the imposition of punishment on an innocent person as, from arrest to trial and sentencing, that person is aware of their innocence and knows they do not deserve what is happening. Finally, in countries where the death penalty applies, the harm done is irrevocable.²⁵

Undoubtedly these are seductive qualities and activists and campaigners have often adopted this approach. Innocence Projects, which now exist in all common law jurisdictions²⁶ and beyond, have ascribed to this position, identifying as their

24. Carol Steiker and Jordan Steiker, 'The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy' (2005) 95(2) *Journal of Criminal Law and Criminology* 587.

25. *ibid* 596.

26. The Innocence Network is a consortium of such groups from across America, Australia, Canada, the United Kingdom and New Zealand: see <www.innocencenetwork.org> accessed 29 May 2012. An Innocence Project has recently been established in Griffith College Dublin in Ireland: see <www.gcd.ie/innocenceproject> accessed 29 May 2012. A student-led Miscarriages of Justice Project has been formed at the University of Limerick, which uses the broader definition of the term in its analyses: see http://www2.ul.ie/web/WWW/Faculties/Arts%2C_Humanities_%26_Social_Sciences/School_of_Law/Advanced_Lawyerig_Projects/Miscarriages_of_Justice/ accessed 29 May 2012.

central goal the overturning of the convictions of innocent people.²⁷ However, there are drawbacks to restricting the definition to innocence. For one, it sets the bar too high, creating an evidential requirement to prove innocence very few would satisfy.²⁸ As we will see, in Ireland there has only been one case where the applicant could have satisfied the courts of innocence: in the others there was no evidence that could positively prove innocence. As Nobles and Schiff have stated, ‘innocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt’.²⁹ Indeed, it would be to apply a standard that is not present at other stages of the system; juries, for example, make findings of ‘not guilty’, rather than a finding of innocence.

Such a restrictive definition may also ignore a large subset of cases. Walker defines a miscarriage of justice as a case in which the conviction represents ‘a failure to attain the desired end result of “justice”’.³⁰ He outlines six instances in which a miscarriage of justice can occur:

[F]irst, deficient processes or second, the laws which are applied to them, or third, because there is no factual justification for the applied treatment or punishment; fourth, whenever, suspects or defendants or convicts are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself.³¹

This is not restricted to cases of factual innocence and could include cases where the accused did commit the crime, with the requisite intent, but where the accused’s rights were breached to such an extent that the result cannot be considered just. The emphasis, in this definition, is placed on the operation of the criminal justice system. As Naughton states, the term ‘denotes an official and systemic acknowledgement of what might be termed a breach of the “carriage of justice”, the rules and procedures that together make up the criminal justice process, and it bears no relation to whether a successful appellant is factually guilty or factually innocent’.³² Naughton’s statement directs attention

27. The Innocence Project in New York: the founding project limits its work to cases where innocence can be proven by DNA testing: see <www.innocenceproject.org> accessed 29 May 2012.

28. This is particularly the case in the context of DNA testing, which is prohibitively expensive, to the extent that laws have been passed in a number of states providing a right to DNA testing.

29. Richard Nobles and David Schiff, ‘Guilt and Innocence in the Criminal Justice System: A Comment on *R (Mullen) v Secretary of State for the Home Department*’ (2006) 69 MLR 80, 91.

30. Clive Walker and Kier Starmer, *Justice in Error* (Blackstone Press 1993) 2.

31. *ibid* 4–6.

32. Michael Naughton, ‘Redefining Miscarriages of Justice: A Revived Human-Rights

to the wording of the phrase ‘miscarriage of justice’. That the term relates to the carriage of justice links to processes: Has justice been carried on its road appropriately? Has the way it has been achieved been right? There is, in many of these debates and jurisdictions, use of alternative phraseology, such as ‘wrongful convictions’,³³ but even that term, which suggests that the conviction is wrong, is open to application to both questions of innocence and serious procedural injustice. International human rights instruments use the term miscarriage of justice, which is not of itself exclusively referring to cases of innocence.

There is also the broader impact that the definitional issue can have. Quirk has argued that an innocence approach would effectively sanction ‘noble cause corruption’³⁴ in the investigation and prosecution of crime, whereby the ends justify the means. While those who cannot establish innocence may be in a position to establish sufficient doubt to have their convictions overturned through these extraordinary appeals procedures, the highest condemnation would be reserved for innocent persons. It would lessen our commitment to due process, constitutional values and human rights, which would become secondary to the question of guilt or innocence.

It may be countered that the highest condemnation ought to be reserved for innocent persons, but the view that cases of wrongful conviction of innocent persons are the worst-case scenario might be misplaced. Steiker and Steiker, commenting on the American context, maintain that ‘such errors might be worse when they happen but collectively they are not necessarily the worst part of our capital punishment system’.³⁵ The regular use of illegal, unconstitutional interrogation or investigation methods that breach human rights is arguably deserving of much greater concern than the irregular conviction of an innocent person. Quirk has said that a focus on innocence minimises the scale of problems in the criminal justice system and thereby the impetus for reform.³⁶ Where a miscarriage of justice occurs, it is generally accompanied by a public examination as to what went wrong, and why. Without such examinations, abhorrent practices might go uninvestigated and remain accepted by police, prosecutors and the courts, thus embedding Quirk’s ‘noble cause corruption’ into the criminal justice system.

Finally, Steiker and Steiker fundamentally question the normative attachment to innocence:

the harm of punishing innocents resonates with the public precisely because most Americans can empathize with the harms that they fear

Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction’ (2004) 45 BJC 165, 169.

33. For instance, Huff and Killias (eds) (n 4).

34. Quirk (n 6).

35. Steiker and Steiker (n 24).

36. Quirk (n 6) 773.

could happen to themselves, rather than those that happen only to 'bad people'. Lurking behind innocence's appeal, then, might be indifference if not hostility to other types of injustice.³⁷

Unless a person can prove their innocence, an attitude of 'there's no smoke without fire' may prevail, suggesting that the convicted person deserves whatever they get, if not for this crime then for something else they have done. This may equally undermine the legitimacy of the system.

Analysing these opposing perspectives theoretically one could look to Packer's two models of the criminal justice system, crime control and due process, which represent extremes on a spectrum.³⁸ These represent competing value systems, in tension with each other in any criminal justice system. The crime control model promotes the 'repression of criminal conduct' as a 'guarantor of social freedom'. Value is attached to efficiency in the apprehension, trying, convicting and disposing of offenders. The criminal justice system represents an assembly line in which 'ceremonious rituals which do not advance the progress of a case' are excluded. At each point on the conveyor belt the case is further developed toward the goal of a conviction. Non-offenders should be screened out early and a presumption of guilt operates from then on. Finality is a central value. On the opposite end of the spectrum sits the obstacle course that is the due process model. In this model each stage presents hurdles that must be overcome if the case is to move to the next stage. The possibility of error is core to this perspective, even if efficiency must be sacrificed. Quality control is valued above output and finality is not valued.

Applying this to the debates at hand, neither perspective is purely crime control. All proponents advocate reviewing cases, which violates the finality tenet of crime control. However, those that advocate a broad definition are clearly at a further point on the due process spectrum. An innocence-based approach exhibits many of the crime-control concerns: a dedication to conviction of the guilty, not prioritising the 'quality' of the system above convictions and a limitation of when appeals should be possible. Further reviews should be possible where the wrong person has been convicted but not where a person was wrongly convicted. The broad definition, on the other hand, advocates an encompassing concept of when extraordinary appeals should be permitted due to the need to ensure and uphold the integrity and quality of the system.

Our perspective in this piece aligns with a strong concept of due process: our analysis of the discourses outlined above leads us to the conclusion that for the integrity of the system, particularly in a country such as Ireland with its constitutional dedication to fundamental rights, this is essential. The criminal justice system should concern itself with its failures, not just in terms of convictions of innocent people, but in how it treats all individuals who come

37. Steiker and Steiker (n 24).

38. Herbert Packer, 'Two Models of the Criminal Process' (1964) 113 U Penn L Rev 1.

before the system. Any system imbued with powers of this ilk should be so concerned. If it does not concern itself in this way, public confidence in the system will be reduced. In a democratic state that claims to respect due process, the powers of the State are exercised on a mandate that the rights of all individuals will be respected, in line with the presumption of innocence. A state that fails in this regard cannot claim to have adhered to this mandate and so miscarriages of justice strike at the core of the State's capacity to govern over all citizens, not just those who have suffered directly as a result of the miscarriage.³⁹ Further, we subscribe to the view, outlined above, that cases of innocence may not be the most serious in a system. It is, we contend, normatively worse from a systematic perspective that a police officer frames an individual who cannot later prove innocence than a witness wrongly identifying an individual without malice. Limiting the definition to cases of innocence is, we contend, detrimental to the criminal justice system. The definition should include cases where justice has not been carried out, i.e. where fundamental rights have been breached to secure a conviction.

In terms of how such breaches may manifest themselves, it is accepted internationally that there are six key causes of wrongful conviction: police and prosecutorial misconduct; false eyewitness identification; false confession; junk science; ineffective assistance of counsel; and informant testimony.⁴⁰ Where any of these occur, we find that the 'carriage of justice' has been disrupted, and thus, that the legitimacy of the conviction and any failed appeals requires re-examination. For example, confession evidence is regularly relied upon at trial. If it were established after the normal appeals process was exhausted that this evidence was obtained as a result of police brutality and intimidation, this would merit revisiting. Similarly, if it appears after the appeals process that testimony of a probative witness is unreliable, for example where a witness perjured herself, we must accept that the carriage of justice was disrupted, and the system must allow for this wrong to be put right. The article will now move to consider how various jurisdictions have attempted to address this dilemma.

III. INTERNATIONAL APPROACHES

A difficulty for comparative purposes is that while many countries have dealt with mechanisms that permit the revisiting of possible miscarriages of justice, few have considered what actually constitutes a miscarriage of justice in legal terms. In reality this solely becomes an issue when a person seeks compensation, as convictions can be quashed, overturned or revisited without reference to

39. See David Beetham, *The Legitimation of Power* (MacMillan 1991) for a discussion of the legitimate use of power.

40. Robert Schehr, 'The Criminal Cases Review Commission as a State Strategic Selection Mechanism' (2005) 42 *American Criminal L Rev* 1289.

this term. The delay in addressing these issues is reinforced by human rights instruments where the issue of miscarriages of justice arise only in relation to an entitlement to compensation, where it can be shown that one has occurred, though again no definition has been provided.⁴¹ Here, we will review the definition in a range of countries. To remedy the shortfall of information we will also consider the grounds on which a case can be revisited after the standard appeals procedure, as in many cases this is highly indicative of how a country would legally define the term.

In New South Wales the DNA Review Panel considers claims of innocence and where satisfied can refer the case to the Court of Appeal for reconsideration.⁴² These claims relate solely to DNA evidence and the definition is not just limited to innocence, but innocence established by a particular form of evidence. South Australia has recently introduced a bill to establish a Criminal Case Review Commission (CCRC). At present the only remedy is for an individual to petition the Attorney General, who has the power to refer the case to the Full Court.⁴³ Similar provisions exist throughout Australia but South Australia is the first to move toward a version of the CCRC. The proposals, however, do not make any reference to the term at all so it is most unclear how that body will integrate with this debate. Despite Australia being signatory to the ICCPR there is no common law or statutory right to compensation. States or territories may choose to make an *ex gratia* payment. There are no guidelines in relation to this payment. The Australian Capital Territory has enshrined a right to compensation through section 23 of the Human Rights Act 2004, but it is unclear as yet how the term will be defined. New South Wales, then, is in effect the only territory to give any clarity and it has a strong innocence-based conception of the term.

In New Zealand the payment of compensation is limited to cases where an individual can establish that they are innocent on the balance of probabilities.⁴⁴ However, there is scope for an individual to argue that extraordinary circumstances exist, which show that it is in the interests of justice to pay compensation. Mathias has argued that ‘the guidelines are not, therefore, unduly concerned with failure to compensate people who are really innocent, and they are arguably over-concerned with avoiding compensating people who are really guilty’.⁴⁵ Payments are made on an *ex gratia* basis and so are discretionary in nature. Hong Kong also operates an *ex gratia* payments system whereby there is no general entitlement. Compensation ‘is payable’ (i.e. there is no right) where

41. art 3 protocol 7 ECHR; art 14(6) ICCPR.

42. Crimes (Appeal and Review) Act 2001, s 90.

43. Criminal Law Consolidation Act 1935, s 369.

44. Law Commission of New Zealand, ‘Compensating the Wrongly Convicted’ (1998) paper 49.

45. Donald Mathias (2011), commentary on compensation for wrongful convictions: <<http://www.nzcriminallaw.blogspot.co.uk/2011/05/compensation-for-wrongful-convictions.html>> accessed 24 May 2012.

a new fact shows ‘conclusively that there has been a miscarriage of justice’. Again, the term is not defined.⁴⁶

In America we can note a number of developments. First, the focus has often centred on bodies that consider the causes of miscarriages of justice rather than bodies like the CCRC, to which individuals can apply. Innocence Commissions, as they are called, have now been established in 11 states. The name indicates quite clearly an association between miscarriages of justice and innocence. More recently, prosecutors in a number of states have set up what are called either Conviction Integrity Units or Justice Review Panels, but again these centre on DNA evidence of innocence. At a federal level the Justice for All Act 2004 contains the Innocence Protection Act,⁴⁷ which provides a right of DNA testing in support of a claim of innocence.⁴⁸ Perhaps most tellingly, compensation laws, which now exist at a federal level and in 27 states, require that the individual has been deemed innocent, and in fact occasionally go so far as to state that the individual is not entitled to compensation if they contributed to their wrongful conviction, which could include having made a false confession.⁴⁹ In terms of the ICCPR, America entered a reservation to Article 14(6), effectively stating that it does not recognise a right to compensation, the only country to make such a statement.⁵⁰

Within the Canadian Department of Justice there is a dedicated Criminal Conviction Review Group that considers applications and can make recommendations to the Minister for Justice, who determines what action should be taken.⁵¹ At that point the process outlines that the individual does not have to prove innocence but must show reason to believe that a miscarriage of justice, undefined, may have occurred. Again, however, when it comes to compensation, innocence is required. While legislation has not been enacted, each province has introduced guidelines for the payment of compensation for miscarriages of justice and these are based on the premise that an individual has been convicted of a crime they did not commit.⁵²

France has a special procedure called *pourvoi en revision*, which permits applications for a new trial following a final verdict. Under Article 622 of the

46. For further discussion, see Jason Costa, ‘Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction’ (2005) 19 *Emory Int’l L Rev* 1615.

47. Title IV of the Justice for All Act 2004.

48. s 411.

49. For a thorough discussion of compensation laws in the United States see Adele Bernhard, ‘Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated’ (2003–2004) 52 *Drake L Rev* 703.

50. For a further discussion, see Costa (n 46).

51. For an overview of the process in Canada, see Campbell (n 5).

52. For instance, see the guidelines for the State of Ontario: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/section5.asp>> accessed 31 May 2012.

Code of Criminal Procedure such a petition can be made for serious cases where new facts raise a doubt as to the guilt of the individual. So while innocence need not be proven, the aim is directed towards the accuracy of the conviction, rather than the propriety of the trial.⁵³ In Israel section 31 of the Court Law was amended in 1995 to permit a further review where real suspicion exists that there has been a miscarriage of justice. The terms are undefined, and while Rattner has argued that it could be a 'wide basket' the reality is that the courts have exonerated just two persons from 85 requests, leading to the conclusion that there is 'a great deal of unwillingness to admit its own errors to an extent that makes some wonder about the sanctity of the criminal law'.⁵⁴

In the UK, applications are made to a Criminal Case Review Commission that determines whether or not new evidence raises questions as to the safety of the conviction. The CCRC, following a review of the case, makes recommendations to the Court of Appeal on whether or not the Court should reconsider the case.⁵⁵ The Court of Appeal can quash the conviction and the individual then has to apply to the Secretary of State for an order of compensation where he feels there has been a miscarriage of justice. Despite difficulties with resourcing, the CCRC has been lauded internationally as an independent body that assesses claims of miscarriages of justice.⁵⁶ As of 31 March 2012, 321 convictions have been quashed by the Court of Appeal following referrals from the CCRC.⁵⁷ The jurisprudence has emerged from judicial reviews of the Secretary of State's decision. The leading case until last year was *Mullen*,⁵⁸ where the House of Lords presented opposing views on this issue, with Lord Bingham taking a wide view (the individual should not have been convicted at trial) and Lord Steyn restricting it to cases of demonstrable innocence.

In *McCartney and McDermott*⁵⁹ the Supreme Court considered in detail the meaning of miscarriage of justice to be applied by the Secretary of State in making a decision as to compensation. The new definition goes further than the *Mullen* conception of innocence and centres on the fresh evidence presented:

A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that *no conviction*

53. See generally Dongois (n 4).

54. Ayre Rattner, 'The Sanctity of the Criminal Law: Thoughts and Reflections on Wrongful Conviction in Israel' in Huff and Killias (eds) (n 4).

55. Regulated by ss 9–14 of the Criminal Appeal Act 1995.

56. For an examination of the work of the Commission over its first ten years, see Laurie Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Case Review Commission* (Justice 2008).

57. This is out of 460 applications to the court and a total of almost 14,000 cases completed by the Commission. Data available on Department of Justice website <<http://www.justice.gov.uk/about/criminal-cases-review-commission>> accessed 16 May 2012.

58. *R v Secretary of State ex parte Mullen* [2004] UKHL 18.

59. *R (Adams) v Secretary of State ex parte McCartney, MacDermott* [2011] UKSC 18.

could possibly be based upon it. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt.⁶⁰

This approach is motivated by a concern that not all of those who are innocent can prove that fact, while accepting that, inevitably, the approach will benefit others. It does not appear to go so far as saying that when a fundamental right has been breached a miscarriage of justice has occurred. However, when this definition was applied to the cases concerned this was the effect it had. Both McCartney and MacDermott were convicted solely on the basis of confession evidence they had continually contested, maintaining that the confessions were forced by ill-treatment or were concocted. Their convictions were overturned when the evidence relating to the ill-treatment was re-evaluated and the confessions were deemed to be unsafe. The Supreme Court here ruled that these cases satisfied the definition of miscarriage of justice proposed. This had nothing to do with whether or not the applicants were innocent, but as Lord Phillips stated:

in the light of the newly discovered facts ... these were proceedings that ought not to have been brought because the evidence against them has been so completely undermined that no conviction could possibly be based upon it.⁶¹

Equally Lord Kerr held that it was not simply the case that they should not have been convicted, but they should never have been prosecuted in the first place. So it is clear that if the evidence is such that the prosecution should not have occurred in the first place, this will be considered a miscarriage of justice in the UK.

This review identifies four possible approaches that have been adopted elsewhere to defining miscarriages of justice. First, Israel has not addressed or defined the term. Second, a range of countries, such as New Zealand, America, France, Canada and possibly Australia require innocence (established to varying levels) in order for the case to be considered a miscarriage of justice. Third, New Zealand also contains a further category where extraordinary circumstances suggest that compensation should be payable in the interests of justice. While not phrased in terms of miscarriages of justice, given that this arises in such cases, this at least implies a recognition that limiting the term to innocence may not always be just. Finally, the UK, through the Supreme Court, has adopted a

60. *ibid*, Lord Phillips, [55] (emphasis added).

61. *ibid*, Lord Phillips, [113].

broader approach that considers whether a conviction could possibly be based on the evidence. The second and third options clearly recognise the due process concerns. The review has also identified a number of countries that have yet to address this thorny issue and for whom this work may be instructive. This article will now turn to consider how the Irish legislature and superior courts have addressed the issue, beginning with a consideration of the legal position before 1993 when the first statutory scheme was introduced.

IV. THE DILEMMA IN IRELAND

In Ireland, prior to 1993, the only avenue for redress was to seek a presidential pardon. The President is granted a power of pardon under Art 13.6 of the Constitution. Unlike the United States President, who has broad discretion to grant pardons,⁶² the Irish President grants such pardons ‘on the advice of the government’, a constitutionally polite way of providing that the President can only grant a pardon where instructed to by the government.

The presidential power of pardon has only been exercised on three occasions in the State: in 1940 for Thomas Quinn, in 1943 for Walter Brady,⁶³ and for Nicky Kelly, who was convicted in the 1978 for the Sallins Mail Train robbery, alongside three other men.⁶⁴ While his co-defendants were acquitted, Kelly was only released in 1984 following a hunger strike and a substantial public campaign. In 1992 he was granted a presidential pardon and awarded over £750,000 in compensation.⁶⁵

The effect of a pardon is unclear; whether it is to simply relieve the individual of the punishments attaching to the conviction,⁶⁶ or whether it replaces a verdict of guilty with not guilty.⁶⁷ In 1990, a Committee of Enquiry in Ireland concluded that the effect is to negative guilt and blame, concluding: ‘It seems to us that the

62. President Clinton, for example, granted 200 pardons in his last days in office, as did George W Bush in the same period. Perhaps most controversially, in 1974 President Ford pardoned former President Nixon for his actions that led to the Watergate scandal.

63. Both cases cited by Deputy O’Donnell, Dáil Debates vol 436, col 901.

64. *People (DPP) v Kelly* [1982] IR 90 (CCA). See generally Patsy McGarry, *When Justice Slept: Nicky Kelly and the True Story Behind the Sallins Mail Train Robbery* (Liffey Press 2006).

65. That compensation was paid was confirmed by the Minister for Justice in 1993; see Dáil Debates 7 October 1993, vol 434, col 461. The amount was not confirmed by the government but in his book, McGarry (ibid 242) indicated that it was almost £1 million including costs.

66. In *R v Foster* [1985] QB 115 (CA) the Court held that the power of pardon does not include a power to set aside a conviction.

67. In the United States case of *ex parte Garland* 71 US 333 (1866) the Supreme Court held that the power of pardon ‘releases the punishment and blots out of existence the guilt’.

effect of a pardon in such terms is to clear the person from all infamy.⁶⁸ In an earlier report, however, it was argued that the term ‘pardon’ was not appropriate in the context of a miscarriage of justice, as

it suggests that he had done something for which a pardon was needed and that a pardon, unlike a retrial and acquittal, does not conclusively establish the legal innocence of the person concerned nor make the conviction void *ab initio*.⁶⁹

It would appear that in an Irish context at least, the effect of a pardon is dependent on the terminology of the pardon itself: it may simply discharge the individual of penalties incurred on foot of a conviction,⁷⁰ or may go so far as to pronounce, as those early pardons did, that the individual ‘did not commit and had no part or lot in the commission of the crime with which he was charged’.⁷¹ It does not thereby provide clear relief for a person who believes they have been subject to a miscarriage of justice. Further, reliance on this approach would, according to McDowell, raise serious questions for the constitutional doctrine of the separation of powers:

Criminal convictions are not *private* rights: they are adjudications of a public kind. If the Constitution permits the public, through the Executive, to solemnly surrender, or abandon, a court order of a public kind convicting someone of crime, and permits, in so doing, that the convict should thereafter be regarded in public as though he had never been convicted, what affront is there to the courts, the judiciary, or the administration of justice?⁷²

Other problems limit the remedying impact of the pardon. It is a highly inaccessible mechanism, relying on the government to take action on the case, which presumably would require substantial public disquiet. In Nicky Kelly’s

68. *Report of Committee to Enquire into Certain Aspects of Criminal Procedure* (Stationery Office Dublin 1990) 18.

69. *Report of the Attorney General’s Committee on the Constitution* (1968) as quoted from in Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (4th edn, Tottel Publishing 2003) 213.

70. The language used in the 1943 pardon was ‘that he shall henceforth stand released and discharged from all penalties, forfeitures, and disqualifications incident to or consequent on his said conviction ... as if he had not been so charged or convicted’.

71. These were the terms used in the presidential pardon in 1940 of Thomas Quinn, *Report of Committee to Enquire into Certain Aspects of Criminal Procedure* (n 68) 17.

72. Michael McDowell, ‘Pardon: An Adequate Response to Injustice?’ (1991) 1(1) ICLJ 1, 6. In the case of *Brennan* [1995] 1 IR 612 (CCA) the Court held that the commutation of punishment did not amount to a breach of the doctrine of separation of powers; the Court did not rule on whether or not the power encompasses a right to restore innocence to the individual.

case it took nearly ten years and a song by Christy Moore⁷³ to generate sufficient maelstrom for the government to act. Further, there was no statutory right to compensation attaching to the presidential pardon. Compensation was granted to Nicky Kelly but the awarding of compensation, including the amount, is at the discretion of the government. Ireland was a signatory at this time to the ICCPR, Article 14(6) of which required the payment of compensation to victims of miscarriages of justice; however the government had entered a reservation on this particular subsection, stating that payment of compensation was at the discretion of the government. This reservation was removed in 1998.

The sole legislative reference to the term at this point was in the Criminal Justice Act 1928 which, in considering the powers of the Court of Appeal, stated that an appeal could be dismissed by the court ‘if they consider that no miscarriage of justice has actually occurred’.⁷⁴ This is a negative reference with no definition provided. A review of case law prior to the 1990s shows that a number of judgments refer to miscarriages of justice but all were in the context of the ordinary appeals system and resulted in the conviction being overturned.⁷⁵ The case of *People (AG) v Murtagh* is perhaps a sole example of an attempt to consider the meaning of the phrase.⁷⁶ There Kenny J looked to the English case of *R v Bywaters*, where it was stated that the term miscarriage of justice ‘means that a person has been improperly found guilty’.⁷⁷ The use of the word improperly ties to the broader conception of miscarriages of justice referred to above, rather than one tied to innocence.

In England and Wales the issue of miscarriages of justice came to a head in the late 1980s through the so-called ‘Irish cases’. In 1989 the Guildford Four were released after 15 years in prison, and the following year both the Birmingham Six and the Maguire Seven were also released. The Royal Commission on

73. The song ‘The Wicklow Boy’ concerns Nicky Kelly’s plight for innocence: ‘Give the Wicklow Boy his freedom, give him back his liberty, or are we going to leave him in the chains, while those who framed him up hold the key? Deprive of human rights by his own people sickened by the injustice he jumped bail, in the Appalachian Mountains found a welcome, til his co-accused were both release from jail, He came back expecting to get justice, Special Branch took him from the plane, for five years we’ve deprive him of his freedom, the guilty jeer the innocent again. The people versus Kelly was the title of the farce we staged at his appeal, puppets in well rehearsed collusion, I often wonder how these men must feel, as I walked past Portlaoise Prison, Through concrete and steel a whisper came “My frame-up is almost complete, I’m innocent, Nicky Kelly is my name.”’ From the album *The Time Has Come* (WEA 1983).

74. s 5(1).

75. For example, *People (AG) v Grey* [1944] 1 IR 326 (CCA); *People (AG) v Carney and Mulcahy* [1955] IR 324 (SC); *People (AG) v Marshall* [1956] IR 79 (CCA); *People (AG) v Flynn* [1963] IR 255 (CCA); *People (AG) v O’Loughlin* [1979] IR 85 (CCA).

76. [1966] IR 361 (SC).

77. 17 Cr App R 66.

Criminal Justice set up in their wake reported in 1993⁷⁸ and led to the creation of the CCRC in 1997.⁷⁹

In 1989 a Committee was established by the Irish Government to determine the need for an additional appeals procedure, due to concerns emerging domestically following those English cases mentioned, as well as the Nicky Kelly and the Kerry Babies cases.⁸⁰ The Minister for Justice established a Committee of Inquiry under Mr Justice Frank Martin to examine both the need for a system of reviewing alleged miscarriages of justice and the use of inculpatory statements in court. The Martin Report, published in 1990, determined that the Irish system did not at that time offer any relief and so:

In consequence, it seems to us that to cater for those rare cases in which substantial doubt as to the correctness of a conviction may arise, the concept of justice calls for a procedure wherein the entire matter, including such new evidence as may have come to light, may be fully and publicly investigated.⁸¹

The Committee, which at no point actively defined the term miscarriage of justice, concluded that the establishment of ‘an independent body with statutory powers of inquiry is by far the most effective manner of dealing with the situation’.⁸² This body would sit in public, have powers under the Tribunals of Inquiry Act, consist of one or more persons and be in a position to appoint its own counsel if so needed. The Attorney General would act as gatekeeper, receiving applications and making referrals to the body where appropriate. Having considered the evidence, the Board of Inquiry would express an opinion on whether doubt existed ‘as to the propriety of the conviction’ on which the government could decide what action to take.⁸³ The Committee also called for statutory compensation for those victims of miscarriages of justice.

Three years later the Criminal Procedure Bill 1993 was published, which departed wildly from the Martin Report, proposing a court-based remedy.⁸⁴ On enactment, the Court of Criminal Appeal was for the first time granted the power to reopen a case which it had already decided where new or newly discovered facts indicated that a miscarriage of justice had occurred. To balance concerns expressed by the Martin Committee that the evidence in an appeal may not

78. Royal Commission, *Report on Criminal Justice* (Cmd 2263, 1993), also known as the *Runciman Report*.

79. Established in March 1997 under Part II of the Criminal Appeal Act 1995.

80. *Report of the Inquiry into the ‘Kerry Babies Case’* (n 15).

81. *Report of Committee to Enquire into Certain Aspects of Criminal Procedure* (n 68) 10.

82. *ibid* 12.

83. *ibid*.

84. See the second stage of the debate on the Bill in the Dáil Debates 6 October 1993, vol 434, col 396.

satisfy a court, alternative mechanisms, including a petition to the Minister for Justice, who would not be bound by the same evidential requirements as a court, were also created.

V. CRIMINAL PROCEDURE ACT 1993

The Criminal Procedure Act 1993 for the first time provides a statutory mechanism in Ireland for those who wish to claim a miscarriage of justice, post-appeal. Three mechanisms are created: an application can be made directly to the Court of Appeal,⁸⁵ the Minister for Justice can be petitioned for a pardon⁸⁶ and the Minister is empowered to establish a committee of inquiry into a case to determine if the power to pardon should be exercised.⁸⁷ The Act also regulates the provision of compensation where a certificate of miscarriage of justice has been granted.⁸⁸

Section 2 of the Criminal Procedure Act 1993 states that a person who has been convicted on indictment or following a guilty plea⁸⁹ can, following appeals,⁹⁰ apply to the Court of Criminal Appeal to have his sentence quashed where 'he alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction'. This provides an individual with direct access to the Court of Criminal Appeal where he has evidence of a 'new or newly discovered fact'. The legislation, which applies retrospectively, allows the court to quash the conviction and order a retrial if it deems necessary, or quash, confirm or vary the sentence imposed.⁹¹ A finding of miscarriage of justice is not necessary to take those actions. Once the suggestion of the miscarriage of justice is established sufficiently for the court to hold the hearing at all, it then effectively becomes an ordinary appeal with the additional option for the court to issue a certificate that a miscarriage of justice has occurred. Even where a court does find that there may have been faults in the trial process and believes that a point raised in the appeal might be decided in favour of the appellant, it can confirm the conviction on the basis that it is of the belief that, all things considered, no miscarriage of justice actually occurred.⁹² Equally it can quash the conviction and order a retrial, where the jury will hear the case

85. s 2.

86. s 7.

87. s 8.

88. s 9.

89. In effect excluding convictions from the District Court. Persons convicted by the District Court can have their cases considered under ss 7 and 8.

90. The fact that a retrial or civil proceedings have been held is no bar to this procedure. The sole requirement in terms of other cases is that there must be no criminal proceedings pending in relation to the case.

91. s 3.

92. Criminal Procedure Act 1993, s 3(1)(a).

without the tainted evidence,⁹³ or quash the conviction and substitute a verdict of guilty for some other offence.⁹⁴ Thus, merely establishing that there were errors in the initial trial process does not automatically give rise to the conviction being quashed under section 3(1)(b) of the Act.

Under the legislation, a ‘new fact’ means a fact that was known to the convicted person at the time of the trial or appeal in relation to which he can reasonably explain the lack of evidence.⁹⁵ A ‘newly discovered fact’ is one that was discovered, or came to the notice of the convicted person, after the appeal proceedings.⁹⁶ It could also be a fact that he knew at the time but did not appreciate the significance of. The first step taken by the Court of Criminal Appeal when an application is made under section 2 is to determine whether either such fact exists. Once satisfied of that, the case then proceeds as any other appeal. The definition of these terms – new and newly discovered facts – as well as the relationship between them and a miscarriage of justice, has been heavily litigated in the Irish courts.⁹⁷ However, these issues are not the focus of this article. Our concern is to track the evolution of the term miscarriage of justice in Irish law.

Before moving to this, a brief word on how compensation is secured. While the quashing of a conviction may be a satisfactory outcome for some applicants, others seek compensation. Section 9 of the 1993 Act provides that where the Court of Criminal Appeal certifies that a miscarriage of justice occurred, the Minister for Justice is required to authorise payment. The Act is not entirely clear on the circumstances in which a certificate will be issued, the procedure for issuance, nor whether the Court is obliged to do so once a conviction is quashed. This issue arose in *Pringle*.⁹⁸

Here, the Court of Criminal Appeal quashed the conviction of the appellant, but refused his application for a certificate that the newly discovered fact gave rise to a miscarriage of justice. Blayney J in the Supreme Court bluntly stated that simply because a conviction is quashed as being unsafe does not entitle the applicant to a certificate. Lynch J noted that a primary condition of section 9(1)(a)(i) is that ‘all criminal proceedings in relation to the offence of which the

93. s 3(1)(c).

94. s 3(1)(d).

95. s 2(3).

96. s 2(4). While the Act differentiates between a new and/or newly discovered fact in s 2, it rather confusingly goes on to conflate them in ss 7 and 9. In *People (DPP) v Shortt (No 2)* [2002] 2 IR 696 the Court of Criminal Appeal conclusively stated that no distinction should be drawn.

97. See, among other cases, *People (DPP) v McDonagh* [1996] 1 IR 305 (CCA); *DPP v Michael Joseph Kelly* (20009) IECCA 56; and *DPP v Gannon* [1997] IR 40 (CCA). For a detailed discussion of this area see Vicky Conway, Yvonne Daly and Jennifer Schweppe, *Irish Criminal Justice: Theory, Practice and Procedure* (Clarus Press 2010) ch 14.

98. [1997] 2 IR 225 (CCA).

applicant was convicted have finally concluded with an acquittal'.⁹⁹ Following this declaration, the applicant then applies to the Court of Criminal Appeal for it to certify that a miscarriage of justice occurred in the case.¹⁰⁰ The burden of proof at this point, the Court found, is on the applicant to show that a miscarriage of justice occurred in the case under the procedure in section 9(1)(a)(ii). Lynch J stated:

The stage has been reached where the matter is no longer a criminal matter at all: it is now a civil claim arising out of completed criminal matters and the applicant is an applicant or a plaintiff for civil relief of a monetary nature.¹⁰¹

The burden of proof that rests on the plaintiff is thereby the civil one, and thus the applicant must show that a newly discovered fact shows that there has been a miscarriage of justice in the case.¹⁰² Unfortunate confusion could clearly arise were the courts to use the term 'miscarriage of justice' as a term of art, but clear analysis of its meaning has been provided, and it is to this that we now turn.

VI. AN IRISH ANSWER TO AN INTERNATIONAL PROBLEM

The Criminal Procedure Act 1993 does not provide a definition for the term 'miscarriage of justice' and so it has been for the courts to determine its interpretation. The Dáil debates on the Bill do not provide illumination on the matter. While the meaning of terms such as pardon and newly discovered fact were considered by the House in detail, no question is raised as to what cases exactly fall under the umbrella of miscarriage of justice. Presenting the Bill to the House, Minister for Justice Máire Geoghegan-Quinn spoke of cases where 'the verdict may have been unjust'¹⁰³ and where there is evidence 'casting substantial doubt on the correctness of a conviction'.¹⁰⁴ These statements could support a broad interpretation of the term miscarriage of justice. That said, the

99. *ibid* 242.

100. s 9(1)(a)(i). Blayney J argued that it is important to differentiate the two applications, arguing, 'if the term "miscarriage of justice" were held to apply to the applicant's case, the applicant would be entitled to compensation. If the term were to be construed in this way, the result would in my opinion be to prefer unfairly an applicant who succeeded in having his conviction quashed because of a newly-discovered fact over an applicant whose conviction was quashed on some other ground.' *ibid* 235.

101. *ibid* 244–45.

102. *ibid* 245. This was reiterated in *DPP v Nevin* [2010] IECCA 106, where Hardiman J observed that the applicant should simply prove on the balance of probabilities that a miscarriage of justice occurred in order to secure a certificate.

103. Dáil Debates vol 434, col 398.

104. *ibid* col 428.

Minister also stated, ‘One of the faults of our present system is that the Court of Criminal Appeal has no power to reopen an appeal already decided, even where clear evidence pointing to innocence comes to light.’¹⁰⁵ She also stated, ‘Society had every reason to be outraged when a miscarriage of justice results in an innocent person serving a prison sentence.’¹⁰⁶

The issue was not raised in substance by the opposition but references can be found in general discussions to cases where innocent persons had been wrongfully convicted.¹⁰⁷ Deputy Gilmore spoke of ‘the dreadful damage that can be done to the lives of innocent people by miscarriages of justice, innocent people taken away from their families, locked up under the harshest of conditions for almost 20 years for crimes they did not commit’.¹⁰⁸ Equally, Deputy Boylan told the House, ‘Nobody wishes to see a miscarriage of justice whereby a person is jailed for a crime he or she did not commit.’¹⁰⁹ From reading the debate one could surmise that the government and opposition politicians understood the term to mean innocent persons who had been wrongfully convicted. But without direct discussion of the meaning of the term there is no useful statement that the judiciary could draw on in interpreting the term.

The issue came to a head quite quickly in the courts, given the retrospective application of the legislation. In 1995 appeals were lodged in two cases, those of Meleady and Grogan, and Peter Pringle. The case of *DPP v Meleady*,¹¹⁰ colloquially known as the case of ‘the Tallaght Two’, involved the theft of a car by a number of youths from the owner’s driveway. Having witnessed the incident, the owner jumped on the bonnet of the car while it was moving, where he remained until the front seat passenger knocked him off. The owner and his son later identified the two defendants in the District Court. Both defendants were convicted and received five-year sentences. A retrial was later ordered subsequent to claims by a third party, who admitted being in the vehicle, that Meleady was not in the front seat of the car during the incident. On retrial, however, the defence lawyer failed to raise this issue or to call the accused to testify despite his continued denial of being in the car. Both were reconvicted and sentenced to imprisonment. In 1990 a television documentary revealed fingerprint evidence that had not been disclosed at trial, confirming that another passenger in the car had been in the front seat. The fact that a forensic examination of the car had been conducted was never disclosed to the defence. At this point the Minister for Justice remitted the remainder of the sentences to be served: seven months for Meleady and nothing for Grogan, who had by then been released. Following the passing of the 1993 Act, both applied to the Court of Criminal Appeal on the

105. *ibid* col 428.

106. *ibid* col 434.

107. See, for instance, *ibid* col 454.

108. *ibid* col 461.

109. *ibid* col 474.

110. [1995] 2 IR 517 (CCA).

grounds that their convictions amounted to miscarriages of justice.

Pringle had been convicted in 1980 of the murder of a garda, at the time a capital offence. His conviction was based solely on confession evidence that he denied ever making. Having established that his confession had been written by the police officer prior to his interrogation, Pringle's conviction was quashed.¹¹¹ He then applied for a certificate of a miscarriage of justice. Both applications were heard in the Court of Criminal Appeal in 1995, went to the Supreme Court in 1997 and were finally resolved in the Court of Criminal Appeal in 2001.

In the original application to the Court of Criminal Appeal in *Meleady*, the Court declined to define a miscarriage of justice and instead spoke of the term in this way:

[T]he mischief which this legislation was designed to remedy was not simply the non-disclosure to the court of trial of facts which, if available, would have conclusively demonstrated the innocence of the accused. It was also to provide redress, hitherto not available, in cases where facts came to light for the first time after the appeal to this Court which showed that there might have been a miscarriage of justice.¹¹²

Much like the initial Dáil debates, the issue is mentioned but not discussed substantively. A more developed approach was presented in the first application of Peter Pringle, months later. O'Flaherty J stated:

Where it is established that the applicant was innocent of any involvement in the crime alleged that would provide ample justification for the granting of a certificate. Further, for example, if in a given case the court were to reach the conclusion that a conviction had resulted in a case where a prosecution should never have been brought in the sense that there was no credible evidence implicating the applicant, that would be a case where a certificate most likely should issue.¹¹³

More obliquely, in stating that the Court was obliged to make a positive finding of a miscarriage of justice, O'Flaherty J stated that this means 'that the accused was improperly found guilty in the sense that that finding should not, in the circumstances as ultimately found, have been open to the court'.¹¹⁴ Speaking in general terms then the Court suggests that innocence, a scenario where the prosecution should never have been brought in the first place, or that the finding should not have been open to the court to make, may be grounds for a miscarriage of justice being declared. While this should not be interpreted

111. *People (DPP) v Pringle*, 16 May 1995 (CCA).

112. [1997] 2 IR 517, 542 (CCA).

113. *People (DPP) v Pringle (No 2)* [1997] 2 IR 225 (CCA).

114. *ibid* 232.

as indicating specific grounds on which such a claim should be made, it does indicate that the court certainly believed that the term was not limited to cases where innocence could be established. In the case at hand Pringle was not entitled to a certificate as, in the Court's view, the findings of the trial court were justified on the basis of the evidence that was presented to them. No mention is made of how this evidence came to exist. So where there is a confession, which may be very difficult to contest in the absence of audio-visual recording, thus making it arguably credible, there appears to be little room for arguing that this was falsified or secured by abuse of constitutional rights.

In both cases the Court felt that the circumstances did not fall within the concept of miscarriage of justice and appeals were lodged with the Supreme Court. In March 1997 the Supreme Court gave its judgments in both on the same day. In the decision in *Pringle*,¹¹⁵ Blayney J, giving judgment for the Court, referred back to the Court of Criminal Appeal decision, and stated that 'the court did not attempt an exhaustive definition of the term miscarriage of justice and in my view this court should not attempt such a definition either. It is sufficient to show that the term cannot be applied to the facts of this case.' Lynch J, in a minority judgment that would be relied upon in many later cases, including the UK case of *Mullen*, directly questioned what was meant by the phrase:

The Act of 1993 does not define the term ... The primary meaning of miscarriage of justice in section 9 of the Act of 1993 is that the applicant for the certificate is on the balance of probabilities innocent of the offence of which he was convicted.¹¹⁶

This has often been quoted as defining the term on the grounds of innocence but, in a less cited part of the judgment, Lynch J continued to outline that 'there may be other cases such as ... a case involving such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial or constitutional procedure at all'.¹¹⁷

This was a much broader definition given in the Court of Criminal Appeal decision in *Pringle*. For the first time, albeit in a minority judgment, cases that had relied upon improper and unconstitutional procedures were brought within the ambit of the term. Pringle returned to the Court of Criminal Appeal but was unsuccessful.¹¹⁸ The definitional point did not arise in the *Meleady and Grogan* judgment, though the reasoning of the Court of Criminal Appeal on other points was deemed invalid, opening the possibility of a certificate being issued.¹¹⁹

Four years later in 2001 (now some 17 years since the incident in question

115. *ibid.*

116. *ibid* 245 (SC).

117. *ibid.*

118. *Pringle v Ireland and the Attorney General* [1999] 4 IR 10 (CCA).

119. *The People (DPP) v Meleady and Grogan (No 2)* [1997] 2 IR 249 (SC).

occurred, and 8 years after the introduction of the Criminal Procedure Act 1993), Meleady and Grogan's case returned to the Court of Criminal Appeal for consideration.¹²⁰ Applying the definition from *Pringle* the Court found that the new facts were such that had they been available to the trial judge the identification evidence would have been excluded and, with no other evidence of guilt, the conviction was declared a miscarriage of justice.¹²¹ The statements from the Supreme Court were considered in detail by the Court. Geoghegan J acknowledged that Lynch J's use of the word innocent could have different interpretations: 'it might mean "innocent" in the popular sense or simply "not guilty" in the legal sense'. He believed however that Lynch J had intended it to mean the popular sense. Considering this definition, Geoghegan J made the position in Irish law clear:

There would be insuperable problems in this case in the applicants proving, as a matter of [sic] probability, that they were innocent in the non-legal or popular sense of that word. This is a case that depended entirely on identification and this court does not believe that the Supreme Court would ever have intended that this court should embark on a full civil trial to determine whether, on foot of the newly discovered facts, the applicants were, as a matter of probability, innocent of any involvement in the events ... indeed it would seem highly undesirable.¹²²

The difficulties discussed at the beginning of this article with setting the standard at innocence were clearly apparent to the Court. He continued:

In case there could be any ambiguity, some matters should be made crystal clear. The court is not making any finding one way or the other as to whether the applicants were in fact innocent of actual involvement in the events. That kind of innocence would not even have been proved a result of an acquittal by a jury. There could easily be cases ... where it would be clear that the applicant for the certificate under section 9 had no involvement in the events at all. But it is equally clear that the Supreme Court was not intending to confine cases of miscarriage of justice to that type of situation.¹²³

The Court clearly, then, did not wish to confine or limit the term to the concept of innocence, primarily due to the impossible evidential burden such a standard would impose. Indeed, the Court inferred that this evidential issue was the reason that Blayney J had declined to define the term in *Pringle (No 2)*. Somewhat

120. *The People (DPP) v Meleady and Grogan* [2001] 4 IR 16 (CCA).

121. [2001] 4 IR 16 (CCA).

122. *ibid* 27.

123. *ibid* 32.

bizarrely, having said the term extended beyond innocence, over the next five pages of the judgment the Court did not spend time considering what would constitute a miscarriage of justice save for the concluding comment of the judgment where it made the key – though brief – statement that the term ‘is not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself’.¹²⁴ Applying this jurisprudence to the case at hand, it was held that the trial judge, had he known the facts, might have excluded the identification evidence, in which case there would have been no evidence of guilt to put to the jury. On this basis the court ordered that there had been a miscarriage of justice in *Meleady* and *Grogan*’s case.

This case then directly brings interference with the administration of justice within the meaning of the term. While the problems with limiting the definition to innocence were explored there is no explanation provided as to why the Court developed the definition in this way. The Court has moved in the one case from saying that the term cannot be limited to innocence for evidential grounds, to including the much broader definition that includes cases in which there have been grave defects in the administration of justice. This move was not necessarily the logical progression from basing the term in one of innocence. Indeed the jurisprudence in the UK courts shows that somewhat of a middle ground can be found.

The practical implication of this jurisprudential development is that it makes it easier to make a claim, once a new or newly discovered fact that points to an interference in the administration of justice can be established. That said, it is not necessarily without problems. In *People (DPP) v Shortt (No 2)*,¹²⁵ the next case in which a certificate of miscarriage of justice was granted, the Court explicitly stated that this finding should not be interpreted as a finding of innocence. *Shortt* was convicted of allowing drugs to be sold in his nightclub. After the trial, it was established that the investigating gardaí had in fact set up the man, planted evidence and perjured themselves in court in order to secure the conviction. In that case, the Court endorsed the *Meleady* definition: the term miscarriage of justice encompasses both innocence and an interference with the administration of justice. Indeed, Hardiman J went so far as to describe what occurred in that case as a ‘grave defect in the administration of justice, brought about by agents of the State’.¹²⁶ *Meleady* was interpreted by Hardiman J as having expanded the definition and central to *Shortt*’s case was that evidence had been ‘deliberately suppressed’ by agents of the State. The deliberate concealment of documents by gardaí, the perjury of a garda who was the main prosecution witness, and the importance of these documents and this testimony to the conviction fell within this definition. However, the Court specifically outlined that they were not making a finding as to the innocence of the accused: ‘The issue is not as

124. *ibid* 33.

125. [2002] 2 IR 696 (CCA).

126. *ibid* 710.

simple since there was other evidence, in the additional statement, admittedly somewhat general and tenuous, as to the course of business conducted in the applicant's premises which might have led to a conviction.¹²⁷

Two points should be made in relation to this case. First, a hierarchy of miscarriages of justice may emerge where a broad definition is adopted with some applicants actively having the court declare that they were innocent of the offence charged and others 'just' having their case declared a miscarriage of justice. Quirk¹²⁸ has argued that using the term 'innocent' in some cases can impose a negative stigma on those it is not applied to. Thus, those who succeed 'only' because of an argument that there were defects in the administration of justice may still be viewed as guilty by the courts and society at large—the collective response being 'he got off on a technicality'. She contends that in this way we create two tiers of miscarriages of justice. An analysis of Shortt suggests that this may not be problematic. The requirement of a grave administration of justice is an exceptionally high standard that moves the case beyond a simple retrial or overturning. By doing that, these cases are being set apart as involving a serious injustice. If there are tiers emerging, this case suggests that it is irrelevant in practice. There appears to be a collective normative appreciation of the grave circumstances that must exist before a court will declare that a miscarriage of justice occurred in a case. The *Irish Independent* described Frank Shortt's case as 'An Appalling Vista Where No-one Dared to Say Stop'.¹²⁹ When he challenged the award of damages offered by the Minister of Justice, the Supreme Court discussed in detail the devastating impacts of his experiences and awarded him €4.7 million in damages. Mr Shortt was not treated as any less of a victim on the basis that the Court could not actively declare that he was innocent of the offence.

The second point to note is that the Court specifically made reference to the fact that the grave defect was brought about by agents of the State. This reinforces the views expressed above of the important accountability function of the application of the term. It is not just about the experience of the victim. It paints a very clear picture of what is expected by the criminal justice system in the performance of its functions, which perhaps sits well with other jurisprudence of the Irish courts.¹³⁰

Three years later in the case of *DPP v Nora Wall*¹³¹ the most substantive definition of the term 'miscarriage of justice' to date was provided. In 2005 Nora Wall received a certificate of a miscarriage of justice from the Court of Criminal Appeal. She had been imprisoned in 1999 for life on a conviction

127. *ibid* 709.

128. Quirk (n 6).

129. 25 March 2007.

130. Such as *People (DPP) v Kenny* [1990] 2 IR 110 (CCA) and *People (DPP) v Laide and Ryan* [2005] 1 IR 209 (CCA).

131. [2005] IECCA 140.

of rape. Six weeks after her conviction the DPP agreed to a retrial after some questions arose regarding non-disclosure of evidence relating to one of the witnesses. Four months after that the DPP said he would not be pursuing the retrial, stating that the accused should be considered innocent of all the charges and the Court thereby quashed the conviction. Wall, a nun, sought a certificate of a miscarriage of justice on the basis of newly discovered facts. The DPP agreed at the hearing that a certificate should be granted. Kearns J, delivering judgment and granting the certificate, referring to the decision in *Pringle (No 2)*¹³² stated, ‘an exhaustive definition of the term “miscarriage of justice” had not been attempted by the Court of Criminal Appeal or by the Supreme Court which has indicated that courts should not attempt such a definition’.¹³³ That said, he continued:

Examples of circumstances which may constitute a miscarriage of justice include, but are not limited to the following –

- a. Where it is established that the applicant was innocent of the crime alleged.
- b. Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the accused.
- c. Where there has been such a departure from the rules which permeate all judicial procedures as to make what happened altogether irreconcilable with judicial or constitutional procedure.
- d. Where there has been a grave defect in the administration of justice, brought about by agents of the State (*The People (DPP) v Shortt (No 2)* 2 IR 696).

The exercise in which the court is engaged under the Act of 1993 is to determine whether the newly discovered facts show that a miscarriage of justice occurred and this is not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself (*The People (DPP) v Meleady and Grogan (No 3)* [2001] 4 IR 16).

This list effectively combines all statements from the courts to date on what constitutes a miscarriage of justice. Nor is this an exhaustive list; the Court has retained the discretion to expand this list in the future should cases that could not previously have been contemplated arise. But the position of the courts is clear: in Ireland miscarriages of justice are not just about innocence but are strongly connected to the operation of the criminal justice system and the protection of judicial and constitutional norms.

In *Wall*, the Court found sufficient newly discovered facts to merit a finding

132. *DPP v Pringle (No 2)* [1997] 2 IR 225 (SC).

133. [2005] IECCA 140.

of a miscarriage of justice. One of the complainants had a history of making false complaints of assault, both physical and sexual, and had a history of psychiatric problems. It was later revealed that an order had been issued that the key witness should not be called at trial, having been deemed unreliable. That witness later admitted to a friend that she had lied in evidence, in saying that she had been an eyewitness to the events complained of. The Court was satisfied as a result that there had been a serious defect in the administration of justice, utilising again the language of *Shortt*. There were a variety of factors that led to a conclusion of a miscarriage of justice, though the Court did not specify which of the above criteria it felt this case fell within. The Court did not, however, express a view on the innocence of the applicant.

The statements from Wall have not since been altered. A somewhat surreal argument arose for consideration in the Court of Criminal Appeal in 2009 in *DPP v Hannon*.¹³⁴ Mr Hannon had been convicted of sexual assault in 1997. The conviction was based solely on the testimony of the 10-year-old complainant. Mr Hannon received a four-year suspended sentence as the Court did not believe he had a propensity for criminal behaviour and the assault had taken place in the context of a family feud. Nine years later, the complainant, who had since moved to America, returned to Ireland to recant her statement and admit that she had falsified the allegation. Mr Hannon sought a declaration of miscarriage of justice. The DPP challenged the application, arguing that a miscarriage of justice could only occur where there is some ‘fault on the part of either the prosecutor or of the Garda investigators or other State agents’.¹³⁵ No such fault had been established. It was accepted that the case was well investigated and tried, but with just the complainant’s testimony as evidence it was simply a case of the jury believing a false story. Considering the Irish case law, the prosecution submitted that there had been no case in Ireland involving a declaration of a miscarriage of justice without culpability being a feature. The DPP submitted that ‘culpability was a necessary component of a “miscarriage of justice”’.¹³⁶ The possibility of two persons coming together to deceive the court and share the damages in such a case was raised.¹³⁷ The DPP pointed to the English case of *Mullen v Home Secretary*,¹³⁸ in which Lord Bingham in the House of Lords, speaking for the majority, stated that compensation would only be payable for a miscarriage of justice where there had been a failure of the trial process.

134. [2009] IECCA 43.

135. *ibid*.

136. *ibid*.

137. Presumably, the reasoning of the DPP was that a victim and offender could resolve their differences and agree to jointly commit a fraud on the State, where the victim would recant their testimony, upon which basis the offender would apply for compensation on foot of an application for a miscarriage of justice. It is argued here that while theoretically possible, the likelihood of this ever occurring is negligible, and a classic example of the maxim ‘hard cases make bad law’.

138. [2004] 3 AER 65 (HL).

The suggestion was effectively that such was the integration of the issue of procedural justice into the Irish definition of the term that unless this was present, there was no miscarriage of justice. Some debate on this issue had arisen previously. In *Shortt* the DPP had tried to argue that the term solely related to innocence.¹³⁹ That Court disagreed but proceeded to develop its logic in a somewhat curious manner:

if the granting of a certificate does not always or necessarily imply a positive finding of innocence, it must follow that a positive finding of innocence is not necessary to the granting of a certificate. In fact, it occurs to us that an innocent person could be wrongfully convicted without giving rise to a miscarriage of justice (as where a court jury bona fide accepts identification evidence which turns out to be wrong). Equally a guilty person could be wrongfully convicted as in Mr Comyn's [counsel for the DPP] example in submissions of a person undoubtedly guilty of the offence but convicted on the basis of conscious and deliberate perjury.¹⁴⁰

This was a particularly unhelpful *obiter* statement, which raised the potential that an innocent person may not be able to avail of the remedies reserved for miscarriage of justice cases. Hardiman J in *Hannon* admittedly restricted his comments to whether this particular applicant was entitled to a certificate, clearly stating that this analysis was not to be confused 'with the cognate but quite separate question as to whether *only* a person whose innocence is recognised or incontrovertible is entitled to such a certificate ...'

In the further Court of Criminal Appeal judgments in *Shortt* this anomalous comment was not addressed, but in *Wall* Kearns J explicitly stated that innocence was a clear example of a miscarriage. These conflicting statements were, however, from the same court. Thus in *Hannon*, it was in fact a viable, if disappointing, argument for the DPP to make. The Court, unsurprisingly, found no requirement of State fault for a miscarriage of justice to have occurred. Hardiman J commented, 'It is difficult to know what is more obviously within the ordinary or dictionary meaning of the phrase "miscarriage of justice" than the conviction of an innocent person.'¹⁴¹ The Court declined to follow the findings of the Court in *Mullen*, and noted the authoritative statements in both *Meleady* and *Shortt* as to the appropriate construction of the phrase 'miscarriage of justice'. Thus, as Langwallner correctly points out, the meaning of the term miscarriage of justice is 'an evolving standard and is not confined to factual

139. *DPP v Shortt* [2002] 2 IR 686 (CCA).

140. [2002] 2 IR 686 (CCA) 692.

141. [2009] IECCA 43.

innocence'¹⁴² but despite the DPP's attempts it seems clear that it does include innocent persons.

VII. CONCLUSION

A number of observations can be made of this series of cases. The Wall case sets out four instances that should be considered miscarriages of justice: actual innocence, where the prosecution should not have been brought in the first place, where judicial and constitutional procedure has been departed from and where there has been a grave defect in the administration of justice. It is important to point out, reflecting on our earlier comparative analysis, that when this decision was taken in 2005 the only clear approach emerging from other jurisdictions was to focus on factual innocence. While it may have taken them a decade to get to that point from the initial applications, to strike out so innovatively against the emerging international trend in this way sets Ireland apart in its dedication to due process. It was not until 2011 that the UK would move in this direction.

Further, in our initial analysis of the tensions generated by these cases, we noted that one issue regarding the inclusion of cases where it might be contended that the victim of the miscarriage of justice did commit the crime in question was that it might generate such a number of cases that the criminal justice system is brought into disrepute. However, in spite of the breadth of the Irish definition there have in the (almost) two decades since the introduction of the Act been only a handful of cases. This hardly represents the opening of floodgates. Nor have the Irish decisions and their repercussions suggested that Quirke is correct in asserting that a hierarchy of victims would be created by such broadening of the definition. The reason for both is that while the definition is broad, it still requires a very high standard of failure from the criminal justice system, and the burden of proof on the applicant to prove a miscarriage of justice occurred is equally onerous. Phrases such as 'never been brought', 'irreconcilable with constitutional procedure', and 'grave defect' all reserve the label of miscarriage of justice for the most extreme cases and the worst failures on the part of the system. It is not a standard that will be easily met by applicants. This is as it should be. The worst failures will be labelled as such. Thus the integrity of the system is reinforced and not diluted.

This approach leaves many issues unresolved: What evidence will be needed to reach that standard? Do individuals have appropriate access to the courts? Are those who secure a certificate actually getting compensation? Even within Ireland there is much we can still question. But, by rejecting the populist agenda of 'innocence' the Supreme Court have placed constitutional rights and values four-square at the heart of the criminal justice system. While the layperson might

142. David Langwallner, 'Miscarriages of Justice in Ireland: A Survey of the Jurisprudence with Suggestions for the Future' (2011) 2(1) *IJLS* 22, 32.

indeed associate a miscarriage of justice with innocence, the legal definition of the term must reject any finding of guilt supported by evidence that disrupted the carriage of justice. The Irish Courts must be commended for this approach to an internationally thorny issue. It vindicates the position of those victims and gives them a right to compensation while protecting due process values and ensuring the integrity and accountability of the criminal justice system.