

# Compensation for Miscarriage of Justice

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## Introduction

Denial of liberty is the most serious state sanction available in the United Kingdom. That people who have suffered an unjustified loss of their liberty, together with all the consequential damage to themselves and their families, should be swiftly and justly compensated is a principle few would disagree with. Of course, consideration of the detail is far more complicated, in terms of why compensation should be paid, who should qualify and how much they should receive. This dissertation attempts to address these issues and compare our current compensation scheme against international obligations and wider principles of justice.

Chapter 1 defines miscarriage of justice, explores the theoretical basis for state compensation schemes and draws the scope of the dissertation.

Chapter 2 explains the history of the United Kingdom's compensation schemes, by reference to domestic and international developments.

Chapters 3 and 4 explore the current scheme in practice, comparing it against the aims defined for compensation identified in the work.

Chapter 5 concludes and provides recommendations for improvements to the current scheme.

## Chapter 1: Definitions and Justifications for Compensation

While there are many different ideas of what constitutes a miscarriage of justice, the Criminal Justice Act s 133, 'Compensation for Miscarriages of Justice' provides the only definition that will be of concern to those attempting to claim compensation. The legislation allows compensation to be paid to those who are pardoned or have their convictions quashed on an appeal out of time, where that quashing is on the basis that a new or newly discovered fact shows beyond reasonable doubt that there

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<sup>1</sup> Daniel Layne submitted this dissertation in part fulfilment for the LLB at the Nottingham Law School, Nottingham Trent University

has been a miscarriage of justice.<sup>2</sup> As such, it excludes *inter alia* those detained and released without charge,<sup>3</sup> detained on remand and acquitted at trial, discharged by the judge, detained on remand in excess of their sentence on conviction or who successfully appeal through the normal in-time process.<sup>4</sup>

This definition accords closely to the public understanding of miscarriages of justice;<sup>5</sup> exceptional, high profile cases, reversed by the Court of Appeal on reference from the Criminal Cases Review Commission (CCRC).<sup>6</sup> Of course, most of those processed by the criminal justice system do not trouble the courts, fewer still a jury, fewer still the Court of Appeal, and the narrowness of the statutory definition has been criticised.<sup>7</sup> While recognising the merit in these criticisms, it would be little use constructing a radical redefinition of the term, when the compensation scheme is constrained to a narrower frame of reference. It is submitted that any statutory scheme must necessarily reject categories of miscarriage complaining of the application of unjust laws or unfair processes, although it is recognised that these may increase the incidence of miscarriage of justice.<sup>8</sup> The coherence of the legal system necessarily prevents compensation for acts that do not contravene any statutory code. The legalistic miscarriage of justice is created by, and exists entirely internally to, the criminal justice system itself.<sup>9</sup> As such, while the width of the current statutory definition will be examined within the parameters of the criminal justice system, criticism involving extra-legal concepts is outside the scope of this essay. This excludes questions on morality of laws, the fairness of procedures such as plea bargaining, sentence canvassing, disclosure, etc. The compensation of those held on remand and acquitted at their first trial, practiced in many other European states,<sup>10</sup> in my submission belongs to these wider questions and is also excluded.

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<sup>2</sup> Criminal Justice Act 1988, section 133

<sup>3</sup> Although statutory compensation for pre-charge detention was proposed in clause 31 of the Counter Terrorism Bill: <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080611/debtext/80611-0005.htm>

<sup>4</sup> *cf.* JUSTICE, 'Compensation for Wrongful Imprisonment' (1982) para 36

<sup>5</sup> Naughton, M., *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (2007) p 39

<sup>6</sup> Or, prior to 1995, the Home Office

<sup>7</sup> *cf.* Naughton (2007) generally; Taylor, N. and Wood, J., *Victims of Miscarriages of Justice* in Walker, C., and Starmer, K. (eds), *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) p 256

<sup>8</sup> Greer, S., 'Miscarriages of Justice Reconsidered' (1994) MLR 57 (1)

<sup>9</sup> Naughton (2007) p 17

<sup>10</sup> Spencer, J.R., *Acquitted: Presumed Innocent or Deemed Lucky to Have Got Away With It*, (2003) CLJ 62(1) 50-53

### ***Miscarriage of Justice and Material Guilt***

Miscarriage of justice must be distinguished from the conviction of the innocent or the acquittal of the guilty; 'material innocence is an idle wheel in most of the machinery of justice'.<sup>11</sup> The aim of the criminal justice system, both at trial and pre-trial stages is not to identify absolute truth, but to deal in pragmatics.<sup>12</sup> With the starting point provided by the presumption of innocence, the prosecution, operating within the defined procedures, either reaches the required standard of proof, or it does not. That some factually guilty defendants are acquitted is therefore unavoidable; 'failure to prove X is never proof of not-X'.<sup>13</sup> Equally the rules and procedures of the system can never prevent the conviction of the innocent while the standard of proof is 'only' beyond reasonable doubt. Of course, any number of factors or behaviours on either side of the case may increase the risk of an incorrect decision.

From this, it can be seen that criminal convictions are more about *process* than culpability. This is particularly clear in the appeal procedure which is the prerequisite for a claim for compensation in the vast majority of cases. While an appeal from the Magistrates' Court to the Crown Court is by way of retrial, the exclusion of those successful on in-time appeals from the current statutory compensation scheme limits the impact of the Crown Court on this essay. All claimants under the current compensation scheme will have their convictions quashed by the Court of Appeal Criminal Division (CACD), which examines the safety of the conviction, not innocence or guilt.<sup>14</sup>

When the Court of Appeal quashes a conviction and does not order a retrial, the legal effect is to replace the trial court conviction with one of acquittal.<sup>15</sup> It might be assumed that the presumption of innocence would prevent the state from giving effect to any residual suspicion of the acquitted, but the true situation is not so clear cut. The impact of residual guilt on compensation will be examined later in the essay.

### ***Why Compensate at All?***

As recognised above, it is unavoidable that innocent people will be convicted by any practical criminal justice system. That individuals should be compensated when they are victim to a miscarriage of justice seems, in a liberal democracy where

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<sup>11</sup> Lauden, L., *Truth, Error and Criminal Law: An Essay in Legal Epistemology*, (Cambridge: Cambridge University Press, 2006) p 98

<sup>12</sup> McBarnett, D., *Conviction: Law, the State and the Construction of Justice*, (Basingstoke: Palgrave Macmillan, 1981)

<sup>13</sup> Lauden p 93

<sup>14</sup> *R v Pendleton* [2001] UKHL 66

<sup>15</sup> Criminal Appeal Act 1968 s 2(3)

compensation is sought more and more frequently for all manner of incidents, to be self-evident. As such, the simplest possible justification for such compensation is probably that it is widely held by society to be right, or at least expected.<sup>16</sup> While attractive in its simplicity, such a justification is of limited use; expert knowledge of compensation systems is required to answer questions on principle, quantum and scope of schemes, and the public at large does not hold this knowledge.<sup>17</sup> More generally, it is submitted that widespread belief is not a rational basis for law making; it is perhaps apocryphal that the reintroduction of capital punishment enjoys majority support, but it illustrates the point nonetheless. If it is accepted that the resources of the state are finite, then activities which exhaust those resources should be objectively justifiable.<sup>18</sup>

### *The Social Contract*

According to Rousseau, Locke, Hobbes et al the state's coercive power arises from the social contract, that is the sacrifice of the law of nature for the law of society, transferring the judicial power of the individual to the state, that the state may exercise it vicariously. The law of society requires the obedience of both state and citizens, embodied by Dicey as the rule of law. Where the state begins to exercise power without authority, the social contract is broken and citizens are no longer bound to obey:

Surely it must be admitted, then, that might does not make right, and that the duty of obedience is owed only to legitimate powers.<sup>19</sup>

Applying social contract theory to the current subject, compensation for miscarriage of justice can be considered as the damages payable for the state's breach of the social contract by its application of power ultra vires:

such victims are recognised as having suffered what may (as here) be a great injury at the hands of the state and it is accepted as just that the state, representing the public at large, should make fair recompense.<sup>20</sup>

A second justification can be found by extending the social contract analysis to examine not only the interest of the victim, but of society as a whole. Society certainly takes a keen interest in miscarriages of justice; many of the most famous cases were only finally overturned after years of campaigning, these campaigns also operating to induce many reforms e.g. the Court of Appeal, the abolition of capital

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<sup>16</sup> Cane, P., *Atiyah's Accidents, Compensation and the Law*, 7<sup>th</sup> Edition (Cambridge: Cambridge University Press, 2006) p 408

<sup>17</sup> *ibid* p 409

<sup>18</sup> *ibid* p 349

<sup>19</sup> Rousseau, J., *The Social Contract*, (London: Penguin, 1968) p 53

<sup>20</sup> *R (O'Brien and others) v Independent Assessor* [2007] 2 AC 312, 322 per Lord Bingham

punishment, PACE and establishment of the Criminal Cases Review Commission.<sup>21</sup> Examining the source of this interest in miscarriages of justice reveals, in my submission, a ‘common-interest’ justification for compensation. That there should be such disquiet over miscarriages of justice is not self-evident. There are errors in any system, and errors in the criminal justice system no longer result in death, unlike preventable deaths in the National Health Service, for example. It is submitted that social outcry is amplified in miscarriages of justice by the recognition, no doubt subconscious in the majority, that when the state prosecutes it is merely an agent for us all:

But though every man who has entered into civil society and is become a member of any commonwealth has thereby quitted his power to punish offences against the law of nature and in prosecution of his own private judgment, yet [...] he has given a right to the commonwealth to employ his force for the execution of judgments of the commonwealth, whenever he shall be called to it; which indeed are his own judgments.<sup>22</sup>

If this is accepted then society’s interest in the quality of the criminal justice system follows; as the misdeeds of an agent harm the principal, so the misdeeds of the state harm society, reducing its moral authority to require citizens to abide by the rules. Thus, society has an interest in seeing those who have been wronged by the state adequately and humanely compensated – in order that damage to its moral authority can be repaired, preserving the right to define the limits of acceptable behaviour.

### ***Purposes of Compensation Schemes***

Compensation schemes may contain a range of different features depending on their functions. There are many different definitions available,<sup>23</sup> but in my submission the most appropriate, offered as it was in the context of state liability, is provided by the UN Van Boven Report:

Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting

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<sup>21</sup> Naughton pp 82-83

<sup>22</sup> Locke, J., *Two Treatises of Government*, (New York: Hafner, 1947) p 164; JUSTICE, *Compensation for Wrongful Imprisonment*, paragraph 2

<sup>23</sup> cf. Cane (2006) pp 422-458; Walker, C., *The Agenda of Miscarriages of Justice in Walker, C., and Starmer, K. (eds), Miscarriages of Justice: A Review of Justice in Error (London: Blackstone Press, 1999) p 23.*

damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>24</sup>

Although not all of the features in the second half of this definition will be examined in detail, all will be touched on at some point, with the exception of guarantees of non-repetition, which are of limited relevance where as noted above, miscarriages of justice are inevitable. Of course, where specific problems with the prosecution system are highlighted by a case, there should and has been pressure for change,<sup>25</sup> but these changes can never eliminate the conviction of the innocent or acquittal of the guilty.

### ***Restitution and Compensation***

Atiyah identifies four categories of compensation, split into two pairings; corrective and redistributive compensations on one hand and equivalent and substitute/solace compensation on the other.<sup>26</sup> Corrective compensation represents the act of putting a claimant back to the position they were in prior to the act complained of; redistributive compensation aims to bring the claimant back to the position enjoyed by other people, e.g. Social Security funds.

While corrective compensation only offers backward-looking redress, equivalent compensation also includes forward-looking redress by attempting to account for future losses. Substitute and solace compensation are used as devices to financially compensate a non-financial loss. Substitute compensation is targeted at replacing satisfaction denied by a loss of amenity, solace compensation at providing the claimant with comfort for unpleasant experiences which do not actually result in a loss of amenity.<sup>27</sup>

In the context of compensation for miscarriage of justice, the equivalent compensation will firstly include wages lost while incarcerated. While this will be somewhat of an estimate, the amount arrived at, if calculated reasonably, cannot said to be more or less accurate than any other reasonable estimate. It is submitted that the earlier in life a person is incarcerated, the less accurate this estimate will be, broadly speaking, and in the case of those incarcerated as children<sup>28</sup> or very young adults any amount will be little more than speculation. The second type of equivalent compensation identified is the replacement of monies spent as a result of the wrong. This will obviously include the defence costs, if privately funded, of the victim

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<sup>24</sup> Van Boven, T., *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report*, UN Doc E/CN.4 Sub.2/1993/8, 2 July

<sup>25</sup> *supra*

<sup>26</sup> Cane (2006) pp 411-414

<sup>27</sup> *id*

<sup>28</sup> The age of criminal responsibility in the UK is ten.

themselves, but also some costs incurred by the family of the victim during the trial and incarceration.<sup>29</sup> The third type of equivalent compensation acts to replace the loss of future earnings. Again, the assessor will have to make an estimate of these, and the younger the victim, the more difficult an accurate assessment will be.

While calculating future elements of pecuniary compensation may involve degrees of speculation, attempts to provide substitute/solace compensation are even less intellectually respectable:

The calculation of damages for non-pecuniary loss has an air of unreality about it. Something that cannot be measured in money is 'lost', and the compensation principle requires some monetary value to be placed on it.<sup>30</sup>

The fundamental problem 'is that like is not being compared to like',<sup>31</sup> whether attempting to put a price on loss of liberty, the loss of a limb or loss of reputation. Guidelines are in place, both administrative and contained in judicial decisions, to assist assessors, whether professional or lay persons,<sup>32</sup> in making more consistent, and therefore just, awards.<sup>33</sup>

### ***Specific Justification for Pecuniary and Non-pecuniary Compensation***

If it is accepted that compensation for miscarriage of justice should be paid, then in my submission, equivalent compensation is immediately defensible. Removing or redressing the tangible consequences of the wrongful act is so fundamental to the idea of compensation that failure to do so would render the compensation scheme ineffectual. While it is recognised that some compensation schemes do not provide total protection against losses,<sup>34</sup> civil claims for loss of earnings do aim to provide full compensation<sup>35</sup> and on the basis that there is no fundamental distinction between loss of earnings in tort and in miscarriage of justice, I submit that total compensation for primary pecuniary loss is justified.

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<sup>29</sup> Taylor and Wood (1999) p 257

<sup>30</sup> Cane (2006) p 162

<sup>31</sup> *Hall and another v The Independent Assessor* [2008] All ER (D) 137 (Nov) para 18

<sup>32</sup> In the case of jury trials for defamation

<sup>33</sup> For personal injury the Guidelines on General Damages, for defamation the judgment in *John v MGN Ltd* (1996) 2 All ER 35 and for false imprisonment and malicious prosecution the judgment in *Thompson v The Commissioner of Police of the Metropolis, Hsu v The Commissioner of Police of the Metropolis* [1997] 2 All ER 762

<sup>34</sup> e.g. the Bank Deposit Protection Scheme, certain insurances, etc.

<sup>35</sup> Cane (2006) p 156

It has been suggested that substitute/solace compensation may require much greater justification than equivalent compensation.<sup>36</sup> Apart from the difficulty in arriving at the 'correct' amount, the main objection is that generally it will not be the wrongdoer who will personally pay the compensation, but the public at large, through insurance premiums or taxation. This drain on resources needs to be weighed against competing claims on public funds, which is more difficult when expending money to 'make good' intangible losses. However, if the state as agent argument is accepted, then in the case of miscarriage of justice, the wrongdoer, society, is also required to pay the compensation, which may then be justified on grounds of fairness,<sup>37</sup> an opinion this author respectfully supports. Further, without payment for non-pecuniary loss, compensation will not meet the Van Boven requirement of satisfaction, nor restore society's right of control under the social interest construction. Therefore, it is submitted that in the context of miscarriage of justice, substitute/solace compensation is also objectively justifiable.

## **Chapter 2: The History of Compensation for Miscarriage of Justice**

### ***The Ex Gratia Scheme***

Even before the creation of the Court of Appeal, compensation had been offered to victims of wrongful conviction. The receipt of a royal pardon did not automatically bring compensation; consistency was not present even between the cases that helped bring about the appellate court system. George Edalji, victim of an injustice just as great as Adolph Beck, himself generously compensated, received nothing.<sup>38</sup> While the establishment of the Court of Appeal in 1907 put appellate justice on a formal and procedural footing, the same could not be said for provisions to compensate people whose convictions were quashed. In fact, it would be a further 81 years before a statutory right to compensation for miscarriages of justice came to pass.

Until then, claimants had to rely on the ex gratia scheme, administered by the Home Secretary, who decided on both eligibility and quantum. The scheme was entirely discretionary, with little guidance being offered to the procedure or criteria for claims.<sup>39</sup> While the quantum of any compensation was subject to independent assessment, the Home Secretary was not bound to accept any figure and was free to substitute his own judgment.<sup>40</sup>

In a 1977 statement to the House of Commons by way of clarification, it was explained that in 'exceptional cases' a payment may be made but normally only where 'there had been some misconduct or negligence on the part of the police or

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<sup>36</sup> *ibid* p 413

<sup>37</sup> *ibid* at p 414

<sup>38</sup> Whittington-Egan, R. 'Beast of the Field: or Pure Sadism' (1993) 143 NLJ 1242

<sup>39</sup> Taylor, N., 'Compensating the Wrongfully Convicted' (2003) JoCL 67 220

<sup>40</sup> HC Debs, Vol 916, 29 July 1976, Col 330



some other public authority'.<sup>41</sup> No further detail was given on what would constitute an 'exceptional case'.

As might be expected, this arrangement did not offer much in the way of consistency. Victims of very similar miscarriages of justice had compensation awarded or refused for no discernable reason.<sup>42</sup> The judiciary were very reluctant to impose requirements for transparency on an *ex gratia* scheme. The Home Secretary was supported in refusing compensation without providing reasons,<sup>43</sup> and in refusing compensation based on criteria not disclosed to the applicant.<sup>44</sup> Chapter 4 highlights the inconsistency in amounts paid under the scheme.

### ***European Convention on Human Rights***

Ratified by the United Kingdom in 1953, the European Convention on Human Rights (ECHR) contains provisions of apparent relevance to compensation for miscarriage of justice. Article 5(1) provides that:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

One of the permitted reasons for deprivation of liberty is conviction by a competent court.<sup>45</sup> For those who are unlawfully deprived of their liberty, Article 5(5) provides a right to compensation:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Any imprisonment which is unlawful under domestic law will automatically be unlawful under Article 5, and lead to a right of compensation.<sup>46</sup> However, Article 5 does not apply where an appellate court overturns a conviction:

A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention.<sup>47</sup>

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<sup>41</sup> Hansard HCD 1977

<sup>42</sup> *e.g.* the cases of Roy Binns and James Stevens, JUSTICE, 'Compensation for Wrongful Imprisonment' (1982) pp 8 -9 and Beck and Edalji, *supra*.

<sup>43</sup> *R v Secretary of State for the Home Department, ex parte Chubb* [1986] Crim LR 809

<sup>44</sup> *R v Secretary of State for the Home Department, ex parte Harrison* [1988] 3 All ER 86

<sup>45</sup> ECHR Article 5(5)(a)

<sup>46</sup> *R v Governor of Her Majesty's Prison Brockhill ex parte Evans* [2000] UKHL page 13

<sup>47</sup> *Benham v United Kingdom* (1996) 22 EHRR 293

Therefore, these provisions did not provide any redress for victims of the adopted definition of miscarriage of justice.

### ***The International Covenant on Civil and Political Rights***

The ICCPR was ratified by the United Kingdom in 1976. Article 14(6) of the covenant provides that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>48</sup>

At the time of ratification, the UK government's official view was that the ex gratia scheme met the requirements of the ICCPR, although it has been suggested that was not the view held behind closed doors.<sup>49</sup> Nevertheless, the UK did not notify any declaration or reservation to Article 14(6) upon ratification and continued to express the view that the ex gratia scheme complied with its requirements in communications with the Human Rights Commission.<sup>50</sup>

On both the first (1979) and second (1985) periodic reports to the United Nations Human Rights Committee (HRC), the HRC expressed doubts that the scheme fulfilled the requirements of Article 14(6),<sup>51</sup> a view echoed by JUSTICE in their 1982 report, which criticised the lack of transparency and independence in the ex gratia scheme, as well as calling for the establishment of a statutory right to compensation, administered by an independent compensation board.<sup>52</sup> In answer to questioning after the second periodic report to the Human Rights Committee, the UK representative informed the HRC that the situation was under review.<sup>53</sup>

### ***The 1985 Statement***

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<sup>48</sup> An identical provision was added to the ECHR by Protocol 7, Article 3 in 1984

<sup>49</sup> Anthony Lester Q.C., 'Fundamental Rights: The U.K. Isolated', (1984) Public Law 53, cited in Klug, F., 'The British way of doing things: the United Kingdom and the International Covenant of Civil and Political Rights, 1976-94' (1995) Public Law 504

<sup>50</sup> McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford: Oxford University Press, 1994)

<sup>51</sup> *ibid* p 412

<sup>52</sup> JUSTICE, 'Compensation for Wrongful Imprisonment' (1982)

<sup>53</sup> McGoldrick (1994) p 412

The results of the review were reported in a parliamentary written answer on November 1985, by the then Home Secretary, Douglas Hurd. In his letter, he quoted Article 14(6) in full and announced that, in addition to those falling within the statement of 1977, he would henceforth 'pay compensation to all such persons where this is required by our international obligations'.<sup>54</sup> In addition, he would sacrifice his discretion on quantum and be bound by the Assessor's judgment; although it was also pointed out that the Assessor's advice had always in fact been followed.<sup>55</sup>

This additional statement was recognised as an attempt to comply with the ICCPR requirement to compensate 'according to law':

The Statement sought to implement the U.K.'s obligations under Article 14.6 of the International Covenant on Civil and Political Rights to provide compensation in cases of wrongful conviction.<sup>56</sup>

However, the new provisions were criticised. It was suggested that they did not have the force of law, could be amended by future Home Secretaries, did not improve transparency by requiring reasons to be given on refusal, and did not provide for an independent body to resolve the conflict of interest between the Home Secretary's roles as judge of misdeeds by the police and judiciary, and his administrative responsibility for them.<sup>57</sup> In my submission, not all of these criticisms were valid. European Court of Human Rights (EctHR) jurisprudence recognises that law does not necessarily take the form of statute,<sup>58</sup> and indeed in the UK large parts of our law are extra-statutory. Under the UK constitution the ability to repeal the provision would apply equally to any legislative measure. The HRC had in fact already questioned whether any of the obligations of the ICCPR could be met by states operating the principle of Parliamentary supremacy, as without a constitution or bill of rights standing above the legislature, provisions may always be revoked.<sup>59</sup> Given the jurisprudence on the *ex gratia* scheme,<sup>60</sup> the lack of improvement to transparency and independence were, it is submitted, much more likely to be of practical concern to prospective claimants and their advisors.

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<sup>54</sup> HC Debates, Vol 87, Written Answers 29 November 1985 Col 689

<sup>55</sup> *ibid* Col 690

<sup>56</sup> *R v Secretary of State for the Home Department, ex parte Garner and linked applications* [1999] All ER (D) 392

<sup>57</sup> Ashman, P., 'Compensation for Wrongful Imprisonment' (1986) NLJ 136

<sup>58</sup> *Sunday Times v. United Kingdom* 2 EHRR 245

<sup>59</sup> Annual Report of the U.N. Human Rights Committee to the U.N. General Assembly, Communication No. 83/1981 cited in Klug, F. at p 507

<sup>60</sup> *supra*

### *Criminal Justice Act 1988 Section 133*

In a judgment delivered in the same year as Mr Hurd's statement, the EctHR resolved any ambiguity around its compliance with the ICCPR requirements to provide compensation 'according to law' by directly considering that phrase, finding:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>61</sup>

This requirement for accessibility, which was not met by law in the form of parliamentary statement, together with the 1990 deadline for the third periodic report to the HRC may have inspired the amendment to the Criminal Justice Bill which became section 133 of the Criminal Justice Act 1988 and finally provided a statutory basis for compensation.<sup>62</sup> Under section 133(1) of the Act compensation will be paid:

when a person has 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 beyond reasonable doubt that there has been a miscarriage of justice.

The only change from the wording of Article 14(6) is the substitution of 'beyond reasonable doubt' for 'conclusively', a change made to reflect the standard of proof in domestic criminal proceedings.<sup>63</sup>

Campaigners were not enthused by the new legislation, highlighting the narrow range of cases that would be eligible under it. The 1988 JUSTICE annual report described it as 'disappointingly restrictive', seeing the failure to extend statutory support to a wider class of victims as an opportunity missed.<sup>64</sup> However, given the existence of the ex gratia scheme, applicants who were ineligible under s 133 were not without an alternative course of action.

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<sup>61</sup> *Malone v UK* (1985) 7 EHRR 14

<sup>62</sup> Amendment 181, HL Debates 22 July 1988 Columns 1630-1631

<sup>63</sup> *ibid* Col 1633

<sup>64</sup> JUSTICE, *Annual Report* (1988)

### *The 2006 Announcement*

On the 19th of April 2006 Home Secretary Charles Clarke announced that he was making a number of changes to compensation for miscarriages of justice.<sup>65</sup> The most dramatic change was the immediate withdrawal of the *ex gratia* scheme. His justifications drew comparison to the compensation offered to victims of crime, claimed that the cost of over £2M per year could not be countenanced for the small number of beneficiaries, and pointed out that the UK was acting beyond its international obligations. He also reduced the legal aid payment for work on compensation cases to the lowest category, imposed a six-month time limit on the provision of evidence supporting a claim, a twelve-month limit from notification of eligibility to decision, and announced that the assessor would take greater account of previous convictions and acts contributing to the conviction when deciding claims. Further, he outlined his intention to bring into force a £500,000 cap on payments, a cap on loss of earnings compensation of 1.5 times gross average earnings and the ability of the assessor to make deductions for previous convictions and contributory conduct from the entire award, rather than only the non-pecuniary part, enabling compensation to be reduced to zero in some cases.<sup>66</sup> Under the heading ‘A Single Scheme’, the Home Secretary described the existence of the *ex gratia* scheme as ‘confusing and anomalous’<sup>67</sup>, implying that it was rendered obsolete by the statutory scheme. It is submitted that this view is not supported by the history of the schemes.

To come to a true understanding of the situation, it is necessary to recognise that the 1985 statement provided three distinct heads of eligibility; firstly under international obligations, secondly due to ‘serious default on the part of a member of a police force or other public authority’ and thirdly in ‘other exceptional circumstances’. As discussed above, the introduction of the international obligations head is recognised as an attempt to implement the obligations under Article 14(6) and as such this head cannot properly be considered part of the *ex gratia* scheme. In my submission the statement of 1985 created a hybrid scheme, combining mandatory compensation under Article 14(6) obligations, with a continuance of the foregoing *ex gratia* provisions under the serious default and exceptional circumstances heads. The differing natures of the provisions are reflected in the 1985 statement itself, where the Home Secretary ‘shall’ pay compensation under Article 14(6) but remains ‘prepared’ and ‘may’ pay compensation under the other two heads.

If this interpretation is correct, the abolition of the *ex gratia* elements of the scheme created by the 1985 statement could not be justified by reference to section 133. Section 133 should be considered as a codification of the international obligations head of the 1985 statement, undertaken for administrative rather than substantive reasons, and as such replaced the 1985 statement *pro tanto* (author’s emphasis):

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<sup>65</sup> Home Office, ‘Compensation for Miscarriages of Justice’ (2006)

<sup>66</sup> *id*

<sup>67</sup> *id*

It is plain that section 133 was intended to supersede that part of the statement.<sup>68</sup>

The importance of the ex gratia aspects of the scheme were referred to extensively during the passage of the Criminal Justice Bill. Earl Ferrers, speaking against an amendment that would have seen all three heads of the 1985 statement codified, warned against losing the flexibility of the scheme by putting it on a legislative footing.<sup>69</sup> Later in the same debate a further amendment was moved proposing that all three heads referred to in the 1985 statement should be afforded statutory status.<sup>70</sup> Arguing successfully that the amendment should be rejected, Earl Ferrers offered, inter alia, an assurance that 'We have already made it clear that the arrangement set out in the statement [of 1985] to which I have referred will be retained'.<sup>71</sup> Nine years after the introduction of s 133, Home Secretary Jack Straw confirmed in a written answer that he would continue to be bound by the provisions for ex gratia payment.<sup>72</sup> The practical benefits of the ex gratia heads of the 1985 statement were also recognised by the judiciary.<sup>73</sup>

Given this widespread acceptance of the utility of the scheme, the criticism that Mr Clarke's statement attracted was unsurprising.<sup>74</sup> The proposals on time-limits, capping of awards and the 1.5 time gross industrial average rule were described as 'mean' and a 'cynical attack on people who have already suffered at the hands of the state'.<sup>75</sup> An application for judicial review on the grounds of legitimate expectation was made, but rejected.<sup>76</sup> Substantive expectation in relation to the statements made by prior Home Secretaries and Earl Ferrers during the debates on the CJA 1988 was, for unclear reasons, not argued.

The amendments implementing the caps and time limits to s 133 have now been enacted as part of the Criminal Justice and Immigration Act 2008, although they are not in force as at this date.<sup>77</sup> The amendments are in the terms of the 2006 statement,

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<sup>68</sup> *In Re McFarland (AP) (Northern Ireland)* [2004] UKHL 17 paragraph 12; cf. *R v Mullen* [2004] UKHL 18, 36

<sup>69</sup> HL Debates 22 July 1988 volume 1403 Col 1630

<sup>70</sup> *ibid* Col 1637

<sup>71</sup> *ibid* Col 1638

<sup>72</sup> HC Debates, 17 June 1997, volume 1757, Written Answers Col 99

<sup>73</sup> e.g. Lord Steyn in *R v Mullen*, generally and Rose LJ in *R v Secretary of State for the Home Department, ex parte Garner and linked applications* [1999] All ER (D) 392

<sup>74</sup> Langdon-Down, G., 'Miscarriages of Justice: State of Denial', (2006) LS Gaz 11 May, 20

<sup>75</sup> *ibid* p 21

<sup>76</sup> *R (Bhatt Murphy (a firm) and others) v Independent Assessor; R (Niazi and others) v Secretary of State for the Home Department* [2008] EWCA Civ 755

<sup>77</sup> May 2009

save that victims imprisoned for more than 10 years are subject to a higher cap of £1,000,000.<sup>78</sup>

In introducing the amendment that would become s 133, Earl Ferrers stated that ‘successive governments have acknowledged that legislation would be necessary to meet the letter as well as the spirit of the covenant’ (author’s emphasis). In my submission, the statement of April 2006 has left the United Kingdom complying in letter but not spirit, a poorer situation than under the original *ex gratia* scheme. The scheme was not without problems, as discussed earlier in this chapter, but it did provide the flexibility to deal with the wide range of wrongful imprisonment cases. Amendment 181A, which would have put the entire *ex gratia* scheme onto a statutory footing seems, with hindsight, an opportunity sorely missed.

### **Chapter 3: The current system in practice - eligibility**

This chapter examines the jurisprudence relating to entitlement under s 133 to establish more precisely the characteristics that may disqualify a case which *prima facie* falls within the scheme. The statutory provision is reproduced here for convenience (author’s emphasis):

when a person has 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 beyond reasonable doubt* that there has been a *miscarriage of justice*, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.<sup>79</sup>

#### ***Reversal***

Applicants who have a conviction substituted on appeal for a conviction on a lesser charge will not be eligible for compensation under s 133. The Criminal Appeals Act 1968 section 3 is as follows (author’s emphasis):

The Court may, *instead of* allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and may pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.

Criminal Justice Act s 133(5) defines ‘reversed’, for the purposes of s 133(1), as a conviction *quashed* on an out of time appeal. As such, a substitution for a lesser

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<sup>78</sup> Section 133 B Criminal Justice Act 1988

<sup>79</sup> Criminal Justice Act 1988 s 133

charge will not amount to a reversal for the purposes of s 133.<sup>80</sup> Compensation will never be payable in such a case, although an applicant may have spent a significant amount of time wrongfully imprisoned.<sup>81</sup>

### ***Fact***

Counsel for the Home Secretary have on two occasions submitted that there is a clear distinction between fact on the one hand and evidence on the other, seeking a narrow definition that would exclude evidence relating to circumstances in issue at the original trial.<sup>82</sup> While there has been acceptance of this as a matter of logic:

Evidence that ‘x’ is the case does not make ‘x’ a fact: for example, the evidence may not be credible [...] or it may in any event not result in relevant findings of fact.<sup>83</sup>

The courts have not accepted that such a simple distinction between the two can be made in practice. Where the strength of the evidence is such it leads to a fact, e.g. where written documents and court records combined to demonstrate the untrustworthiness of a key prosecution witness, it has been held that the new evidence can quite correctly be regarded as a fact, and will therefore fall within the ambit of section 133.<sup>84</sup> Additionally, where it is not the evidence *itself* but the existence of that evidence, e.g. where material has been withheld from the defence, that leads to a quashing, the criteria will also be met.<sup>85</sup>

### ***New or Newly-Discovered***

The fact leading to the quashing must be new or newly-discovered. A fact will not be new where it emerges before the conclusion of the final appeal:

[...] section 133, read in the light of article 14(6) of the ICCPR, is concerned only with facts that emerge after the ordinary appellate process has been exhausted.<sup>86</sup>

This decision has been questioned on the grounds that the nature of the ICCPR requires its terms to be given an autonomous meaning, such that its effect is the

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<sup>80</sup> *R (Christofides) v Secretary of State for the Home Department* [2002] EWHC 1083 (Admin)

<sup>81</sup> Seven years in the case of *Christofides*

<sup>82</sup> *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin) para 14; *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin) paras 45-46

<sup>83</sup> *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin) para 50

<sup>84</sup> *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin) para 14

<sup>85</sup> *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin) para 51

<sup>86</sup> *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin) para 58



same in all states which are signatories to it.<sup>87</sup> Therefore, an interpretation of new or newly discovered which relies on the appellate process of an individual state might not be correct.<sup>88</sup> In my submission, this technical point can have no practical effect on the operation of s 133.

The current interpretation of the ‘newly-discovered’ criteria may be of more practical concern to applicants. It has been submitted in argument that facts which were available to the defence at trial, but had never been examined by the defence or the accused, could be considered as ‘newly-discovered’:

Although the material was theoretically available to the defence before trial, it was not ‘discovered’ on behalf of the Claimant until the CCRC review many years after the trial and first appeal. Section 133(1) cannot be construed so as to impose on a defendant constructive knowledge of facts of which both he and his legal representatives were unaware.<sup>89</sup>

This argument was rejected by the court, holding that ‘new or newly-discovered’ was

inapt to describe something which is available to be discovered by the legal representatives, but was not.<sup>90</sup>

In my respectful submission, this decision can be criticised. Clearly, and implied in the quote directly above, there is a difference between something being available for discovery and its discovery. If this was not the case, it would have been wrong to describe penicillin as a ‘new discovery’ in 1928 on the basis that it was, theoretically, *available for discovery* previously. Such an unnatural construction cannot be correct. The purpose of the ‘newly-discovered’ head must be to allow claims where the evidence existed before the final appeal, but was undiscovered, thus distinguishing it from ‘new’ evidence. Therefore, by definition, the material must always be ‘available to be discovered’ prior to the conclusion of the in-time appeal. It seems that the current position places undue weight on the proximity of the material to the defence, rather than whether or not it is newly-discovered, something that is not supported by the statute. Following the reasoning in *Adams* to its logical conclusion would mean that no claim could ever succeed on the ‘newly-discovered’ head. As that cannot have been the intention of those implementing the ICCPR, I submit that on this ground as well, the decision must be incorrect.

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<sup>87</sup> *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, 26

<sup>88</sup> *R (Adams) v Secretary of State for Justice* [2009] EWHC 156 (Admin) para 44; *R v Secretary of State for the Home Department, Ex parte Adan* [2001] 2 ACC 477 512

<sup>89</sup> *R (Adams) v Secretary of State for Justice* [2009] EWHC 156 (Admin) para 42

<sup>90</sup> *ibid* para 47

### ***Beyond Reasonable Doubt***

It will not be sufficient for the new or newly-discovered fact to contribute to a totality of evidence which leads the appeal court to find the conviction unsafe. The new or newly-discovered fact must:

be the principal, if not the only, reason for the quashing of the conviction. Only then could it be said that the new or newly-discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice.<sup>91</sup>

Therefore, where ‘expert evidence *might* need adjustment in the light of new medical research’,<sup>92</sup> or knowledge of a witnesses dishonesty *might* have led the jury to acquit,<sup>93</sup> a miscarriage of justice will not be proven beyond reasonable doubt.

In my submission, the courts have correctly interpreted the s 133 requirements. The wording of the section clearly requires more than the overturning of a conviction for compensation to be payable. The difference between the standard of proof required to quash a conviction and that required by s 133 has been highlighted in *R v Andrew Adams* (author’s emphasis):

We are not to be taken as finding that if there had been no such failures the appellant would *inevitably* have been acquitted. We are however satisfied for the reasons given that the verdict is unsafe. The appeal will be allowed and the conviction quashed.<sup>94</sup>

### ***Miscarriage of Justice***

In the first section of this essay, the adoption of the legalistic interpretation of miscarriage of justice was described as a matter of necessity when considering a compensation scheme that is itself part of the legislative framework. Questions of interpretive width *within* the legalistic definition are certainly valid, and have been considered in a number of cases.

Two significantly different constructions have been proposed by the judiciary, both in the House of Lords appeal *R (Mullen) v Secretary of State for the Home Department*.<sup>95</sup> The narrow definition limits the phrase, in the context of s 133, to the ‘conviction of the innocent’; those cases where the claimant is been completely

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<sup>91</sup> *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin) para 64

<sup>92</sup> *R (Allen, formerly Harris) v Secretary of State for the Home Department* [2008] EWCA Civ 808 para 37

<sup>93</sup> *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin)

<sup>94</sup> [2007] EWCA Crim 1

<sup>95</sup> [2005] UKHL 18

exonerated of the crime, *e.g.* by way of new DNA evidence.<sup>96</sup> The wider and more technical interpretation includes not only those cases, but also those who:

whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interferences. It may be because of judicial unfairness or misdirection.<sup>97</sup>

Both views were supported by a detailed analysis of the history behind s 133, but as the appeal was in fact decided on different grounds, no concluded opinion was formed. To date, resolution of this issue has not been necessary to decide an appeal against refusal to grant compensation and as such the issue remains unresolved.<sup>98</sup> However, the narrow definition has recently been supported in the Court of Appeal, in a case again decided on a different point, where it was held that if necessary, the appeal would have been dismissed on the grounds that the narrow construction was correct, and the claimant therefore did not fall within the remit of s 133.<sup>99</sup> Subsequently, in a High Court decision, an acceptance was made that Counsel for the claimant could not succeed in a challenge [to the definition of miscarriage of justice] in the light of the Court of Appeal judgment.<sup>100</sup> Therefore, in my submission, until another appeal reaches the Court of Appeal or the House of Lords, the narrow construction will be preferred.

### ***The Narrow Construction and the Presumption of Innocence***

The main argument advanced on behalf of the applicant in *Mullen* was that for the state to deny compensation on the basis of the requirements in s 133 amounted to a breach of the ECHR Article 6(2) presumption of innocence.<sup>101</sup> The argument posits that once a verdict has been quashed, which has the effect of substituting the original verdict with an acquittal,<sup>102</sup> the claimant is restored to a position of innocence,

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<sup>96</sup> [2005] 1 AC 1, 48 per Lord Steyn

<sup>97</sup> *ibid* page 24; *cf.* Taylor (2003) for support for the wider construction

<sup>98</sup> *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin) para 20; *R (Allen, formerly Harris) v Secretary of State for the Home Department* [2008] EWCA Civ 808 para 37

<sup>99</sup> *R (Allen, formerly Harris) v Secretary of State for the Home Department* [2008] EWCA Civ 808 para 41

<sup>100</sup> [2009] EWHC 156 (Admin) para 40

<sup>101</sup> *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18 pp 18-20

<sup>102</sup> *supra*

making the requirement of s133 to prove ‘innocence’ incompatible with Article 6(2). If this were correct, then the quashing of a conviction on the basis of a new or newly-discovered fact would always lead to eligibility for compensation.<sup>103</sup>

This argument has twice been rejected, in *Mullen* on the ground that where the acquittal was not based on the merits of the accusation, European jurisprudence permitted the state to continue to give effect to residual suspicions.<sup>104</sup> Recently more detailed reasoning was given, based on Article 14(2) of the ICCPR, which is in identical terms to ECHR Article 6(2):

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The court held that the co-existence of this provision in such proximity to the deliberately narrow wording of Article 14(6) showed that the legislators required more than the quashing of a conviction before the right to compensation could be invoked.<sup>105</sup>

Despite these decisions, the final paragraph of the most recent s 133 judgment is, in my submission, evidence that the Article 6(2) submission have been noted:

The fact that this claim fails is entirely based up the restricted nature of the scheme for compensating those who suffer miscarriages of justice. It is, however, important to underline that nothing in this analysis is intended to undermine, qualify or cast the slightest doubt upon the effect of the decision of the CACD: Mr Siddall is presumed to be and remains innocent of the charges that were brought against him.<sup>106</sup>

### ***Conclusion***

The jurisprudence on section 133 amply demonstrates its narrow remit. It is notable that in cases decided both before and after the abolition of the *ex gratia* scheme, there has been judicial comment on the utility of it in covering cases that fall outside of the statutory provisions:

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<sup>103</sup> *R (Allen, formerly Harris) v Secretary of State for the Home Department* [2008] EWCA Civ 808 para 3

<sup>104</sup> *Leutscher v The Netherlands* (1996) 24 EHRR 181

<sup>105</sup> *R (Allen, formerly Harris) v Secretary of State for the Home Department* [2009] EWHC 156 (Admin) para 35

<sup>106</sup> *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin) para 59

There is a strictly-limited statutory right which tracks Article 14.6 of the ICCPR and there is a voluntary backup scheme by which Home Secretaries fill a limited part of the remaining gap.<sup>107</sup>

Parliament intended to give effect, by using the words ‘miscarriage of justice’ in section 133, to the international obligations under Article 14(6) and no more. That is hardly surprising; there was in the United Kingdom in place an ex gratia scheme, duly announced in Parliament, which was apt to cover cases outside the scope of section 133.<sup>108</sup>

Of course, it is not the place of the courts to resurrect the ex gratia scheme by applying a liberal approach to section 133, although there has been recent judicial comment on the arbitrariness of the scheme:

To no small extent, the compensation scheme is already artificial. It is not immediately obvious why those within the scheme are more deserving than those not included.<sup>109</sup>

In my submission it is clear that many deserving cases will now go uncompensated. The high-profile case of the Cardiff Three, compensated under the ex gratia scheme but ineligible under s 133 as they were released on first appeal, was one example chosen in commentary on the abolition of the ex gratia scheme.<sup>110</sup> The case of *Christofides*,<sup>111</sup> subjected to seven years wrongful imprisonment but ineligible under s 133 as his murder conviction was not quashed but substituted for a lesser offence is another salient example.

I further submit that the current jurisprudence shows that even for cases that fall, *prima facie*, within s 133 there remain many pitfalls on the route to compensation, primarily the adoption of the narrow construction of ‘miscarriage of justice’. It is respectfully submitted that while, with one exception relating to the interpretation of ‘newly-discovered’, the constructions adopted have been technically correct. The problem is not the wording or application of section 133, but the withdrawal of the scheme which catered for those who, for whatever reason, fell outside of the statutory entitlement.

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<sup>107</sup> *R (Christofides) v Secretary of State for the Home Department* [2002] EWHC 1083 (Admin) para 44

<sup>108</sup> *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, page 39 para 35

<sup>109</sup> *R (Siddall) v Secretary of State for the Home Department* [2009] EWHC 482 (Admin) para 33

<sup>110</sup> Langdon-Down, G., ‘Miscarriages of Justice: State of Denial’ (2006) LS Gaz, 11 May, 20

<sup>111</sup> *supra*

#### Chapter 4: The current system in practice - quantum

While the decision on eligibility is made by the Home Secretary, the quantum of any payment is evaluated by the Independent Assessor, currently Lord Brennan QC. The awards of interest are those for non-pecuniary loss. By definition, pecuniary loss is, more or less, calculable and therefore less subject to unjust variance. These calculations are made regularly in civil claims, *e.g.* personal injury, wrongful dismissal, etc. and are arrived at by a comparatively simple formula. Loss of earnings from the date of imprisonment to the award are said to be ‘calculated, not guessed at’<sup>112</sup> although of course the longer between imprisonment and award, the closer any award is to guesswork. However, this will also apply to civil claims, where many years may elapse between event and award. Future reduction in earning capacity is also regularly calculated in civil claims, and while this is naturally much more of an estimate than a calculation, the same applies equally to awards made under civil claims and through the statutory or *ex gratia* schemes. It is submitted that the choice to exclude pecuniary loss from the analysis is justified by the fact that none of the appeals concerning compensation for miscarriage of justice have challenged an award for pecuniary loss.

#### *Sample*

The data used for quantitative analysis comprise 29 awards made between 1905 and 2007. For ten of these cases, a breakdown of the award in varying degrees of detail was available, with the remainder having only a global award.<sup>113</sup>

Sixteen awards were made under the statutory scheme, with the remainder under the *ex gratia* scheme.

The length of incarceration ranged from 243 to 9131 days (25 years).

Six of the ten awards where a breakdown was available featured a reduction for previous convictions.

Four of the claims under the *ex gratia* scheme were paid after the introduction of s 133.

One of the s 133 awards related to a victim who had died in prison after serving 1 year. As the short incarceration period grossly inflated the per day rate, this award was excluded from all analysis of per day rates.

All awards were adjusted for inflation using the multiplier table from ‘Consumer Price Inflation Since 1750’.<sup>114</sup> All amounts referred to in the text are inflation-adjusted.

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<sup>112</sup> Cane (2006) p 132

<sup>113</sup> See Appendix A

### ***Estimating Technique***

The lack of detailed data for the majority of the sample necessitated a method for estimating the breakdown of a global award into pecuniary and non-pecuniary elements. A simple factor, the ratio between non-pecuniary and total award for those cases where a breakdown was available, was applied to the total award to arrive at an estimated non-pecuniary award. While the shortcomings of this method are recognised, without significantly more data both in breadth and depth, a better estimating method was not apparent.

### ***General Observations***

The range of awards made in the sample is very wide. The minimum per day non-pecuniary award, for a period of two years imprisonment was £3.88. The maximum per day award, for a period of five years imprisonment, was £217.53, or some 56 times the lowest amount.

There was a marked difference between the amount of non-pecuniary compensation paid under the ex gratia scheme and that paid under s 133. The minimum per day award for non-pecuniary loss was £3.88 under the ex gratia scheme, compared with £9.24 for the s 133 claims. The mean ex gratia payment was £37.32, compared with £74.14 for s 133 claims. The median ex gratia payment was £20.25, compared with £60.10 for the s 133 claims.

As can be seen, the statutory scheme is more generous to an *average* claimant than the ex gratia scheme, although the highest daily rate of £217.53 was paid under the ex gratia scheme, and after the introduction of the statutory scheme.

### ***Assessment***

The difficulty of assessing appropriate monetary compensation for non-pecuniary loss, discussed above, makes it impossible to come to any intellectually defensible conclusion on whether or not the amounts paid in the cases analysed are appropriate or not:

All such [non-pecuniary] awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.<sup>115</sup>

However, it is submitted that there are nonetheless yardsticks by which non-pecuniary compensation can be measured:

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<sup>114</sup> O'Donoghue, J., Goulding, L. and Allen, G., 'Consumer Price Inflation Since 1750' (2004) *Economic Trends* 604, pp 38-46

<sup>115</sup> Cane (2006) p 162

- a) By reference to the satisfaction of the recipient, identified as one of the purposes of reparation in the Van Boven definition.<sup>116</sup>
- b) By reference to the principle of ‘fair and reasonable compensation’. This can be further broken down:
  - i) The amount must be reasonable in the light of social and moral considerations.<sup>117</sup>
  - ii) Awards for similar incidences should be similar to achieve a uniform pattern of awards.<sup>118</sup>
  - iii) Awards as between different categories of victims e.g. miscarriages of justice, personal injury, defamation, should be defensible.
- c) By reference to academic opinion.

### ***Recipient Satisfaction***

Evidence of satisfaction with the awards made by the Assessor proved very hard to find. Clear evidence can be found in only one of the cases in the s 133 sample, where the claimant appealed to the High Court arguing, *inter alia*, that the amount awarded for loss of liberty was ‘unreasonably and irrationally low’.<sup>119</sup> Additionally, one of the ex gratia claimants appealed against his award.<sup>120</sup> As the Assessor’s decisions can only be appealed by way of judicial review, it would be, in my submission, a mistake to assume that all other applicants were satisfied with their payments, especially as a number of victims of miscarriage of justice and their representatives have made negative comments in the press on the quantum of compensation offered by the Assessor.<sup>121</sup>

In my submission, any conclusion based on reported recipient satisfaction would require extensive qualitative data, which was beyond the reach of this dissertation.

### ***Reasonable in the Light of Social and Moral Considerations***

The level of compensation provided by any scheme has an obvious and fundamental impact on its effectiveness. In the context of miscarriage of justice and the social interest justification for compensation, setting the correct level is, in my submission, especially important. If the compensation offered is grossly inadequate, then society’s rights under the social contract will not be restored. Neither will the victim feel the satisfaction necessary under the Van Boven definition. Equally, the level of

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<sup>116</sup> *supra*

<sup>117</sup> Ogus, I. A., ‘Damages for Lost Amenities: For a foot, a Feeling, a Function?’ (1972) 35 MLR 1

<sup>118</sup> *id*

<sup>119</sup> *Hall and another v The Independent Assessor* [2008] EWHC 2758 (Admin)

<sup>120</sup> *The Independent Assessor v O'Brien and others* [2004] EWCA Civ 1035

<sup>121</sup> Langdon-Down, G., ‘What Price Loss of Liberty’ (2002) *Independent* 5<sup>th</sup> March; Taylor, N., ‘Compensating the Wrongfully Convicted’ (2003) *JoCL* 67



compensation cannot be as high as to materially affect the cost of living, or to offend social morality.<sup>122</sup> Different economic circumstances should be reflected:

It is, of course, obvious that the conventional sums [...] cannot be good for all times and all places. They are relative to the prevailing social and economic conditions. Thus the level of awards must keep pace with inflation, and may vary from country to country.<sup>123</sup>

Further, compensation schemes do not exist in isolation. One argument deployed by the Home Secretary in his 2006 announcement of the abolition of the ex gratia scheme was that the awards made under it were significantly greater than those paid to victims of crime under the Criminal Injuries Compensation Scheme (CICS).<sup>124</sup> Large payments in defamation cases have been criticised by reference to the damages guidelines for personal injury claims.<sup>125</sup> This comparative approach has been adopted by the Assessor:

It would be similarly offensive [re the defamation awards] to public opinion for a person who has suffered a miscarriage of justice but who has been vindicated and is healthy, [...] to be awarded non-pecuniary compensation which is greater than he would receive if rendered [a helpless cripple or an insensate vegetable].<sup>126</sup>

It is submitted that simple comparisons between different categories of victim are not necessarily intellectually coherent. It has been argued that in fact, someone whose injuries prevent them having any awareness of their misfortune should not be compensated for loss of amenities.<sup>127</sup> On this basis, the victim of miscarriage of justice would indeed be 'entitled' to a larger award than the unconscious accident victim. In the context of CICS, a distinction can be made as in a miscarriage of justice is it the state that commits the act giving rise to compensation.<sup>128</sup> Victims of crime have not been harmed directly by the state, and as such any compensation offered is in sympathy rather than obligation.<sup>129</sup> This special relationship between the state and victims of miscarriage of justice should be explicitly recognised in the assessment of compensation and provide a moral imperative to be more, rather than less, generous when assessing non-pecuniary compensation.<sup>130</sup> Society also has a

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<sup>122</sup> Ogus, A.I., 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' (1972) MLR 35 4

<sup>123</sup> *ibid* p 9

<sup>124</sup> Home Office, 'Compensation for Miscarriages of Justice' (2006)

<sup>125</sup> *John v MGN Ltd* (1996) 2 All ER 35

<sup>126</sup> Brennan, D., 'Re Michael O'Brien: Further Assessment' (2005) para 9

<sup>127</sup> Ogus (1972) pp 7-8

<sup>128</sup> Langdon-Down, G., 'Miscarriages of Justice: State of Denial' (2006) LS Gaz, 11 May, 21

<sup>129</sup> Cane p 308

<sup>130</sup> Cane (2006) p 414

special interest, not present in CICS cases, in ensuring victims of miscarriage of justice are satisfactorily compensated, as discussed in the first section of this essay. Further, most applicants to the CICS will have been subjected to a short, albeit possibly extremely unpleasant incident and this should not be equated with any miscarriage of justice involving extended procedural failure across multiple state bodies, a distinction supported by judicial recognition in the context of deductions for saved living expenses:

In all the situations envisaged by Parliament [...] the wrong is over and done with, even though its effects remain. By contrast, in the appellant's situation the wrong was not over and done with. On the contrary, their enforced but unjustified maintenance in prison at public expense for years on end is the very worst part of the injury which has been done to them and for which they are entitled to compensation.<sup>131</sup>

In my submission this principle can be extended to distinguish the entire basis for compensating victims of miscarriages of justice from claimants under personal injury claims or CICS.

### ***Consistency of Award***

Equal treatment is desirable in the calculation of damages not only on the basis that it is central to fairness and justice, but also in that it increases certainty and reduces costs caused by challenges to awards.<sup>132</sup>

However, it has been recognised that consistency is:

only one facet of [of justice], and the imperative of consistency may have to yield to the larger imperative of justice in the particular case achieving a result which is proper and fair to the interests of both payer and recipient.<sup>133</sup>

While this qualification has not been tested in relation to the quantum of awards it has been recognised that developments in jurisprudence between two applications to the statutory scheme may give valid reason for allowing one application and refusing the other.<sup>134</sup> Additionally, it is recognised that no two cases of miscarriage of justice will ever be identical, and further that the effect of a wrongful conviction may vary considerably from person to person. The question is not therefore whether there the awards in the sample reveal an underlying tariff, an approach already rejected,<sup>135</sup> but

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<sup>131</sup> *O'Brien and others (FC) v Independent Assessor* [2007] UKHL 10 para 82

<sup>132</sup> Cane p 167

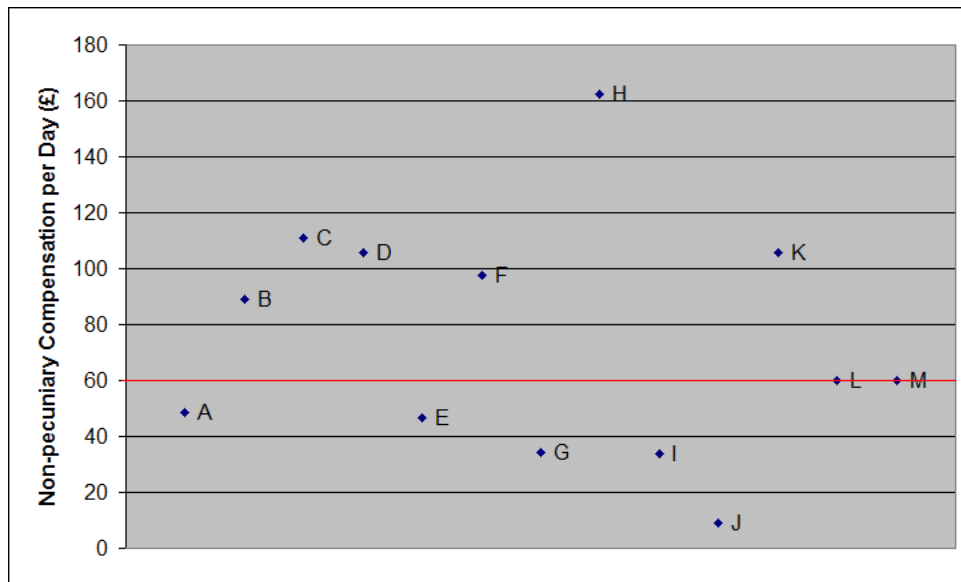
<sup>133</sup> *O'Brien v Independent Assessor* [2007] UKHL 10

<sup>134</sup> *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin) para 54

<sup>135</sup> *Hall and another v The Independent Assessor* [2008] EWHC 2758 (Admin) para 23; *O'Brien v Independent Assessor* [2007] UKHL 10

whether the variance in compensation is or is not consistent with the principle of equal treatment.

The section 133 cases in the sample have a median per day non-pecuniary compensation rate of £60.10. However, the standard deviation of the sample is £41.94, 70% of the median value. The ex gratia cases have an even larger standard deviation, £52.62, 250% of the median value. The data sample was not large enough to determine whether this reflects a trend of increasing consistency in recent years, affecting both s 133 and ex gratia awards, or is indicative of some difference in assessment between the two schemes.



**Figure 1 - Distribution of s 133 non-pecuniary payments around median value**

In my submission, such a significant variance is not consistent with the principle of equal treatment. There will of course be specific circumstances which will justify variation of an award in either direction, but it is difficult to see how one miscarriage of justice can vary enough from another to justify the variances observed in the data. Reference to the only Assessor's report available to the author supports this opinion; submissions on behalf of the victim that 'unpleasant aspects of involuntary incarceration, loss of family life and conditions of hardship' required separate consideration being rejected as they formed part of 'loss of liberty simpliciter', that is, the usual consequences of being wrongfully imprisoned.<sup>136</sup> This conclusion, which in my submission is correct, should result in a lower, rather than a higher, deviation; if loss of liberty, loss of family life and conditions of hardship are present in all miscarriage of justice cases, what objective variables are left to explain such a large variation in awards?

### ***Comparison with Analogous Torts***

<sup>136</sup> Brennan (2005) p 17

Having submitted above that loss of liberty is a special type of loss that cannot be equated with personal injury, the fact remains that currently, the Assessor makes his assessment by reference to principles used to assess damages in tort.<sup>137</sup> For non-pecuniary compensation, his ‘yardstick’ is the Guidelines on General Damages, introduced to promote consistency in personal injury awards.<sup>138</sup> During his abolition of the ex gratia scheme in 2006, the Home Secretary argued that those who now fell through the gaps of the statutory scheme could seek redress through tort, implying a substitution relationship and therefore a functional similarity between the two.<sup>139</sup> It is submitted that there is a more compelling and fundamental reason why state liability should be assessed as closely as possible to individual liability; that the rule of law demands the ‘subjection of the state and its officials to the ordinary principles of civil liability’.<sup>140</sup>

This naturally invites comparisons between payments made in miscarriage of justice cases and those made in tort cases, and claimants have indeed raised comparisons with awards made in civil actions when appealing against assessments.<sup>141</sup> The torts most closely aligned to the wrongs suffered during a miscarriage of justice are wrongful arrest, false imprisonment and defamation. Claims for psychiatric harm caused by the imprisonment will be assessed by reference to the Guidelines on General Damages and should not differ significantly whether arising from miscarriage of justice or civil negligence.<sup>142</sup>

### ***Malicious Prosecution and False Imprisonment***

In both of the appeals against awards for non-pecuniary loss, references were made to the guidance given by the Court of Appeal for civil claims. The guidance was offered to improve consistency between awards, cases previously having shown ‘no logical pattern’.<sup>143</sup> The Court suggested that:

In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and

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<sup>137</sup> Home Office, ‘Compensation for Miscarriages of Justice – Note for Successful Applicants’

<sup>138</sup> Brennan (2005); *Hall and another v The Independent Assessor* [2008] EWHC 2758 (Admin)

<sup>139</sup> Langdon-Down (2006) p 22

<sup>140</sup> Harlow, C., *State Liability: Tort Law and Beyond* (Oxford: Oxford University Press, 2004) p 7

<sup>141</sup> *Hall and another v The Independent Assessor* [2008] EWHC 2758 (Admin), Langdon-Down, G., ‘What price loss of liberty?’, (2002) *The Independent*, 5<sup>th</sup> March

<sup>142</sup> Brennan (2005) paragraph 19

<sup>143</sup> *Thompson v The Commissioner of Police of the Metropolis, Hsu v The Commissioner of Police of the Metropolis* [1997] 2 All ER 762

because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for twenty four hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate should be on a progressively reducing scale.<sup>144</sup>

In a subsequent case the Court of Appeal rejected submissions that clarity would be served by indicating a daily or weekly amount, while supporting the view that awards should taper:

No two cases are the same. The shorter the period, the larger can be the pro rata rate. The longer the period, the lower the pro rata rate.<sup>145</sup>

By reference to these decisions, the Assessor has consistently rejected submissions that his own awards should be based on any guideline rate issued by the court in relation to civil claims. Further, he has also rejected submissions that there should be a rate *not* derived from civil claims to be applied, by reference to the principle of tapering outlined in *Thompson* and *Evans*:

There is no reason why the principle of reducing scale or tapering down which is found to an extent in personal injury general damages as well as in these cognate torts should not apply equally to the award in this case.<sup>146</sup>

In my submission, the application of tapering can be criticised both in its particular application to miscarriage of justice cases involving long periods of imprisonment, and from a general position.<sup>147</sup> The explanation given in *Thompson*, that tapering is used to reflect the initial shock of being arrested does not, it is submitted, lend itself easily to long periods of imprisonment. Certainly it can be seen that the initial hour of a twenty-four hour detention may be more distressing than the second, third or fourth hour. However, it is my submission that this additional distress is due to the initial shock of arrest rather than any variance in the 'worth' of the first hour of detention, compared to any other. Instead of tapering subsequent periods down to reflect initial shock, it would be more intellectually coherent to apply instead a separate award to reflect the initial shock, on top of a constant rate paid for loss of liberty.

An alternative position would recognise the higher value of later periods of significant detention by virtue of the decreasing proportion of life expectancy left to

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<sup>144</sup> *ibid* p 774

<sup>145</sup> R v Governor of HM Prison Brockhill, ex parte Evans [1999] QB 1043 p 1060

<sup>146</sup> Brennan, D., 'Re: Michael O'Brien Further Assessment' (2005) para 10

<sup>147</sup> Nogah Ofer describes it as 'fundamentally unfair and just a way of reducing awards for long sentences'. Langdon-Down, G., *What Price Loss of Liberty*

the victim. The laws of supply and demand show that exhaustion of a finite resource should, all else being equal, result in an increased rather than a decreased price. For a person with forty years of expected life ahead of them, the loss of their first year in prison represents  $1/40^{\text{th}}$  of their remaining life. Their tenth year would represent  $1/31^{\text{st}}$ ; as the person ages in jail, each year forms a greater proportion of their remaining life, and therefore is 'worth' proportionally more:

Year	% of remaining life expectancy	Ratio to first year	Annual rate (£)
1	2.50	1.000	13,000
2	2.56	1.024	13,312
3	2.63	1.052	13,676
4	2.70	1.080	14,040
5	2.78	1.112	14,456
6	2.86	1.144	14,872
7	2.94	1.176	15,288
8	3.03	1.212	15,756
9	3.13	1.252	16,276
10	3.23	1.292	16,796
11	3.33	1.332	17,316
12	3.45	1.380	17,940
13	3.57	1.428	18,564
14	3.70	1.480	19,240
15	3.85	1.540	20,020
16	4.00	1.600	20,800
17	4.17	1.668	21,684
18	4.35	1.740	22,620
19	4.55	1.820	23,660
20	4.76	1.904	24,752
21	5.00	2.000	26,000
22	5.26	2.104	27,352
23	5.56	2.224	28,912
24	5.88	2.352	30,576
25	6.25	2.500	32,500

**Table 1 - Compensation by reference to remaining life expectancy for a person imprisoned for twenty-five years at life expectancy minus forty years, with a baseline annual rate of compensation of £13,000 per annum.**

As the rate of compensation increases exponentially, it is submitted that public policy may require a cap on the per-annum rate, although this should always ensure that the value of liberty is recognised.

## *Defamation*

Given the social stigma associated with serious criminal convictions, an obvious parallel with defamation exists and has been recognised by the judiciary, as well as victims of miscarriage of justice and their families.<sup>148</sup>

The appeal for claimants of an analogy with the awards made in defamation is obvious: if the defamatory effect of the conviction can be held out as a distinct head of damage, then applying the principle of reference to civil compensation would result in a large addition to any award. However, the Assessor considers that only rarely will an applicant be able to benefit from an analogy with defamation as generally, loss of reputation is an intrinsic part of malicious prosecution and false imprisonment:

Therefore, if one is starting from an analogy with those torts [false imprisonment and malicious prosecution], which are considered as ‘far better fits’ then defamatory effects cannot be regarded as a separate topic.<sup>149</sup>

The Assessor also refers to the non-financial remedies offered in defamation cases, highlighting the vindication of the quashing by analogy to a public statement or apology.<sup>150</sup> Further, he posits that defamation cases ‘seldom involve allegations of serious criminal conduct’.<sup>151</sup>

In my submission this final point is not a valid distinction; allegations of serious criminal conduct being as capable as any other type of allegation of giving rise to a defamation action. In fact, the more serious the allegations, the higher one would expect any award to be. The argument that any loss by defamation is usually an inseparable component of malicious prosecution or false imprisonment should, in my submission, be considered by reference to tort. There is no doubt that a person subjected to both false imprisonment and defamation by a single tortfeasor could recover damages under both heads in a civil court, and on that basis it is hard to see what justification there is for treating victims of miscarriage of justice differently.

It is submitted that where appropriate, damages for defamation should be considered separately from the basic component of loss of liberty, the quantum of any award being in the range suitable for a comparable civil claim, recognising that an exact equivalence is unachievable, and taking into account the analogy between the public vindication of a quashing and a public statement or apology where appropriate.

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<sup>148</sup> Taylor and Wood (1999) p 249

<sup>149</sup> Brennan (2005) para 8

<sup>150</sup> *id*

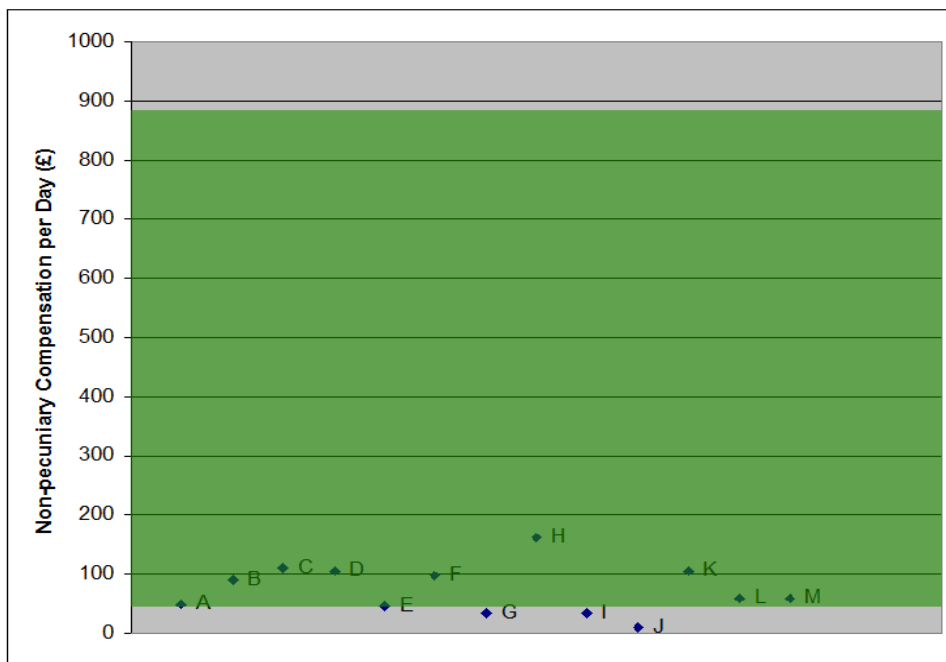
<sup>151</sup> *id*

**Academic Opinion**

Academic opinion is very limited. Treschel proposes daily compensation for non-pecuniary loss of between €50 and €1000,<sup>152</sup> in the context of a scheme to cover all signatories to the ECHR and taking account of:

the circumstances, the conditions of detention, the impact it had on the applicant's health, his or her professional, social and family life and its duration [and] the cost of living in the relevant state.<sup>153</sup>

Median compensation of the s 133 cases in the sample is £60.10. The lowest award is £9.24, with the highest per day award being £162.17, in a case where police concealment of exculpatory evidence lead to six years wrongful imprisonment.<sup>154</sup>



**Figure 2 - s 133 non-pecuniary daily compensation with Treschel range highlighted**

Taking account of the UK's position as the 9<sup>th</sup> most expensive EU country in terms of cost of living,<sup>155</sup> I would submit that the compensation offered under s 133 is clearly inadequate when measured against the range suggested by Treschel. However, without wider academic opinion on an appropriate range, it is submitted

<sup>152</sup> £44 and £883 respectively at an exchange rate of 0.883429 €£ as at 19<sup>th</sup> April 2009

<sup>153</sup> Treschel, S., *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) p 501

<sup>154</sup> *R v Browning* [1995] Crim LR 227

<sup>155</sup> Eurostat Comparative Price Levels 2007



that a conclusion on whether the current rates are acceptable by reference to general academic opinion cannot be reached.

### *Deductions for Past Criminality*

As mentioned above, six out of the ten cases where a breakdown of award was available featured a deduction for past criminality. These deductions are made on the basis of s 133(4A):

In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to

- a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;
- b) the conduct of the investigation and prosecution of the offence; and
- c) any other convictions of the person and any punishment resulting from them.

The Assessor has chosen to implement this provision by applying a global reduction to the non-pecuniary section of the award; with the proviso that any award for personal injury whether physical or mental, will not be affected by the reduction.<sup>156</sup> This approach has been subject to judicial criticism, as has the logical basis for some deductions to be made at all.

One obvious danger of the Assessor's current approach is that of a double deduction: the previous criminality being taken into account once when assessing the loss, and then being affected again by the global reduction.<sup>157</sup> It is to be hoped that the Assessor would be careful not to deduct twice for the same reasons, and if that is accepted then it must be the case that initial awards do not currently take into account previous criminality; the hardened criminal would be initially awarded no less for say, damage to reputation, than the man of impeccable character, the difference between them being recognised by the global deduction applied to the whole non-pecuniary element.<sup>158</sup> This approach has been criticised as it does not allow the Assessor to properly reflect the impact of past criminality on each individual head of damage;

Past convictions may be very relevant to the sum awarded for loss of reputation. Past imprisonment may be relevant to the degree of suffering occasioned by being in prison. The sum to be awarded in respect of individual types of suffering or harm that go to make up the total sum to be awarded for non-pecuniary loss may be less

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<sup>156</sup> *O'Brien and others (FC) v Independent Assessor* [2007] UKHL 10

<sup>157</sup> *ibid* para 31

<sup>158</sup> *ibid* para 112

because, by reason of past convictions or past imprisonment, the suffering or harm can be adjudged to be less.<sup>159</sup>

Thus, a person with previous convictions but who had never been imprisoned should have his award for damage to reputation reduced, as he would in a civil claim,<sup>160</sup> but not his award for loss of liberty.<sup>161</sup> This principle of modifying only those elements of the award logically affected by previous criminality was supported by four of the five Law Lords in *O'Brien*, and in my respectful submission, correctly. The current approach of the Assessor has a somewhat punitive implication; the compensation is reduced not to recognise that the claimant's past criminality has left them *e.g.* less shocked by the initial experience of prison, but as a general expression of disapproval of their past. This, as also pointed out in *O'Brien*, cannot be supported; the claimant having already been sentenced for their previous offences.<sup>162</sup>

Further, it was questioned whether past criminality should have any bearing on awards made in relation to s 133(4A)(b): the conduct of the investigation and prosecution of the offence. Where especially malicious or oppressive behaviour is a feature of a miscarriage of justice, this may be recognised by the Assessor in an additional payment analogous to aggravated damages,<sup>163</sup> which, as an element of non-pecuniary loss, will be affected by any global reduction. This position implies that a person with previous criminal convictions is less harmed by oppressive or malicious state actions than one without. Again, the object of the Assessor's approach appears to be punitive rather than a reflection of varying circumstances.

### **Conclusion**

It is submitted that the current practice of assessing non-pecuniary compensation in miscarriage of justice cases does not adequately recognise the unique nature of loss of liberty. While the cross-referencing of awards to those for non-pecuniary loss in personal injury cases may have apparent merit in attempting to avoid gross disparities between claimants in these different areas, the fact remains that the comparison simply has no logical basis. If the assessment of non-pecuniary loss in general is a 'barely respectable intellectual exercise',<sup>164</sup> adding further illogicality by attempting to equivalence loss of liberty with personal injuries cannot help matters. This appears to be recognised by the Assessor, who is forced in the same paragraph to cross-check awards against the Guidelines on General Damages while also claiming that no comparison or equi-paration is intended.<sup>165</sup> At the same time,

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<sup>159</sup> *ibid* para 48

<sup>160</sup> Carter-Ruck, P.F., *Carter-Ruck on Libel and Slander* (London: Butterworths, 1992) p 172

<sup>161</sup> *O'Brien and others (FC) v. Independent Assessor* [2007] UKHL 10 para 47

<sup>162</sup> *ibid* at para 49

<sup>163</sup> Brennan (2005) para 13

<sup>164</sup> *Independent Assessor v Michael O'Brien and others* [2004] EWCA Civ 1035 paras 37-38

<sup>165</sup> Brennan (2005) para 15

comparisons with the awards made for civil claims of false imprisonment and malicious prosecution, which *are* fundamentally comparable, are rejected on the distinction that a longer period of imprisonment somehow justifies paying less by way of compensation.

Harlow's suggestion that the rule of law requires state liability to be assessed on the same basis as private liability has been supported above. Further to this, it is submitted that compensation for miscarriage of justice should be assessed judicially rather than administratively. The fact that s 133 assessments are conducted privately and make 'no provision for the sort of scrutiny to which a court would subject a contested claim involving hundreds of thousands of pounds',<sup>166</sup> is not only a hindrance to fairness and justice in compensation, but an affront to the rule of law.

If compensation for miscarriage of justice is to be carried out in accordance with principles of tort, then in my submission the adoption of a tariff is unavoidable. The Guidelines on General Damages were introduced in response to inconsistent awards, and judicial guidelines have been issued covering defamation, false imprisonment and malicious prosecution for the same reason. The fundamental similarity between these torts and miscarriage of justice justifies, in my submission, a single set of guidelines for all loss of liberty cases. While it is impossible to identify any particular range of figures as 'correct', it is submitted that this approach would at least provide the advantage of consistency and therefore fairness. The guidelines would cover not only quantum but also the kind of deductions allowable and how these should be calculated in a manner to avoid illogical deductions or further punishment for spent convictions. On this point, it is finally submitted that punitive deductions for past criminality would contravene ECHR Protocol 7 Article 4, which the United Kingdom has committed to ratifying.<sup>167</sup>

## Chapter 5: Overall Conclusion and Recommendations

Fundamental to the understanding of compensation for miscarriage of justice is acceptance of the fact that the criminal justice system is about due process, rather than establishing guilt or innocence. No realistic system could avoid the conviction of the innocent; this is made explicit in the standard of proof. Equally, it may be impossible to provide strong enough evidence to convict a person who is materially guilty of the most terrible crime. Further, it has been proposed that compensation for miscarriage of justice has a very specific subsidiary purpose in repairing the damage to state authority and maintaining the social contract by ensuring those who are unavoidably wronged by the criminal justice system are swiftly and fairly compensated. It is submitted that it is wrong to see miscarriages of justice as an

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<sup>166</sup> *O'Brien and others (FC) v. Independent Assessor* [2007] UKHL 10 para 12

<sup>167</sup> Joint Committee on Human Rights, *Seventeenth Report*, accessed on 04/05/2009 at <http://www.parliament.the-stationery-office.com/pa/jt200405/jtselect/jtrights/99/9906.htm>

exceptional event;<sup>168</sup> and once their inevitability is accepted, a satisfactory compensation scheme becomes as fundamental as fair court proceedings or adequate prison accommodation.

It is submitted that the current compensation scheme does broadly meet the obligations of the ICCPR Article 14(6). Section 133 has been interpreted strictly but, with the possible exception of the construction of one aspect of the provision, correctly. One of the criticisms of s 133 reveals, in my submission, where the problem with the scheme truly lies. The abolition of the ex gratia scheme, which was certainly not without fault in terms of transparency and consistency, has left those who fall outside of the narrow remit of s 133 to suffer what is currently the most serious state-sanctioned punishment without recourse. It has been said that 'arbitrariness is the antithesis of the rule of law'<sup>169</sup> and as the judiciary themselves cannot see why 'those within the scheme are more deserving than those not included',<sup>170</sup> who now have no right to compensation, this must damage any claim that the current arrangements recognise the rule of law. The administrative nature of the scheme which prevents proper scrutiny and oversight of awards is, it is submitted, a further obstacle to such a claim. The scheme also fails to meet its aims under the social contract justification. Not only are the general rights of the individual to be compensated for state malfeasance not recognised, but while those who suffer at the hands of state are not adequately and humanely treated, we all suffer in our loss of moral authority.

The Home Secretary's proposal that those outside of section 133 should claim through the civil court is criticised on several fronts. As a matter of principle, it is submitted that the state's moral obligation to the victims of miscarriage of justice is not met by forcing them to undertake a contested adversarial claim. The process can only prolong and inflame the victim's sense of injustice. On a technical level, certain types of procedural error will not be actionable, *e.g.* judicial error in computing sentence.<sup>171</sup> On a practical level, it is hard to see how resolving these cases through civil courts, with the state paying for both prosecution and defence, can be more cost-effective than a well-administered and fair compensation scheme.<sup>172</sup>

For those who are fortunate to enough to fall within section 133, it is submitted that only one of the four relevant Van Boven categories is met. Restitution, as far as it is ever possible to come to an 'accurate' figure, is currently fully made. Compensation is too irregular to be considered just and fair; while one claimant's liberty is valued

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<sup>168</sup> Naughton (2007) pp 41-42

<sup>169</sup> Lord Bingham, *The Rule of Law*, (2007) CLJ 66, 72

<sup>170</sup> R (Siddall) v Secretary of State for the Home Department [2009] EWHC 482 (Admin) para 33, *supra*

<sup>171</sup> Spencer, J.R., *Acquitted: Presumed Innocent or Deemed Lucky to Have Got Away With It*, (2003) CLJ 62(1) 50

<sup>172</sup> Langdon-Down (2006) 21

at £162 per day and another at £9.20 no serious claim to justice can be sustained. Rehabilitation, although not examined in this work, has been noted in sources only through reference to its complete absence within the system:

After 19 years, I was given a £46.75 discharge allowance and a London Transport pass that expired at 8pm and I was kicked out of the side-door of the court.<sup>173</sup>

Satisfaction has again only been found in the negative. The plans to prevent full recovery of even pecuniary losses, would, in my submission, disqualify the scheme from being regarded as a compensation scheme at all. For a victim to not even recover his full pecuniary loss would signify a total abandonment of recognition of the rights to liberty and property.

My final submissions outline a scheme that would better meet the needs of the claimant and society as a whole. When considering the features of the scheme, regard was had to theoretical considerations related to the criminal justice system and compensation systems, as well as practical matters, referenced to the checklist proposed by the Insurance Institute of London:

The group considered the functions of a good compensation scheme. We found the following to be important in this respect:

- 1) to make good to the victim as far as possible that which he has lost by distributing his loss among the many
- 2) fairness to both parties in handling the claim
- 3) certainty of payment, thus removing [...] fear and uncertainty
- 4) speed of payment
- 5) low administration costs.<sup>174</sup>

Of crucial importance is widening the statutory scheme to include those who are wrongfully imprisoned, regardless of the timing or reasons for the quashing of their conviction. This recognises the fact that the criminal justice system is not about guilt or innocence, but due process. Where due process has not been followed, and *this has resulted in a loss of liberty for the claimant*, they should be entitled to compensation. The requirement for the claimant to sustain a loss would not require the payment of compensation to those convicted at retrial.

The current system of individual assessment should be replaced by statutory guidelines for non-pecuniary loss, categorised by the major heads of damage. This

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<sup>173</sup> Taylor (2003); Taylor and Wood (1999) p 261

<sup>174</sup> Insurance Institute of London, *The Advantages and Disadvantages of the Tort System and Alternative Methods of Accident Compensation* (1978)

would improve both actual and perceived fairness, and enable both sides to more easily assess the likely size of any award.

The statutory compensation should be automatically payable on the quashing of a conviction.

Where the guideline amounts are inappropriate, an application could be made to the court for a variation. The court would have regard to the guidelines, both in terms of the allowable variations and their financial effect, when varying awards.

Any variations should have a logical, rather than a punitive basis; past criminality could reduce the amount payable for damage to reputation; past imprisonment could reduce the amount payable to reflect the initial shock of detention, but *e.g.* a person who has served previous non-custodial sentences would be entitled to the same compensation for loss of liberty as anyone else.

There would be no provision to apply 'across the board' reductions on the basis of spent convictions, recognising that a person should not be punished twice for the same crime.

Awards should be reduced where the accused concealed evidence that would have pointed to his innocence; reflecting the tort concept of contributory negligence and preventing people taking advantage of the compensation provisions.

Residual guilt should have no bearing on any award, thus recognising the Article 6(2) presumption of innocence and further highlighting the due process model of the criminal justice system.

There should be no provision for tapering reductions in compensation for loss of liberty. The amount payable should either remain constant or increase annually to reflect the higher proportion of the victim's remaining life each passing year accounts for. Finally, practical assistance, *e.g.* rehabilitation, assistance reintegrating into society, financial advice etc., should be provided; 'It must be stressed that true compensation is obtained not by the mere possession of money, but in the uses to which it may be put to improve the plaintiff's lot'.<sup>175</sup>

While these proposals would not make miscarriages of justice any less tragic, it is hoped that they would at least demonstrate that we, as a society, care about making full amends to those who are unfortunate enough to experience the fallibility of the criminal justice system at first hand.

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<sup>175</sup> Ogus (1972) p 17

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1968 Criminal Appeal Act

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Appendix I – Quantitative Data

ASSESSMENT_DATE	CASE_REFERENCE	ALLEGED_OFFENCE	PREVIOUS_CONVICTIONS	DAYS_IMPRISONED	NON_PECUNIARY_COMPENSATION	TOTAL_COMPENSATION	NON_PECUNIARY_PER_DAY	TOTAL_PER_DAY
01/01/1905	BECK	MURDER	NONE	2555	147420.00E	364000.00	57.70	142.47
01/01/1928	OSCAR SLATER	MURDER	MINOR	6752	114210.00E	282000.00	16.91	41.77
01/01/1955	EMERY, THOMPSON AND POWERS	UNKNOWN		730	2835.00E	7000.00	3.88	9.59
01/01/1965	CROSS BROTHERS	UNKNOWN		243	5467.50E	13500.00	22.50	55.56
01/01/1970	TOM NAUGHTON	UNKNOWN		1095	48600.00E	120000.00	44.38	109.59
01/01/1974	LASZLO VIRAG	UNKNOWN		1825	55282.50E	136500.00	30.29	74.79
01/01/1974	LUKE DOUGHERTY	THEFT		243	6318.00E	15600.00	26.00	64.20
01/01/1977	JAMES STEVENS	UNKNOWN		1095	16179.75E	39950.00	14.78	36.48
01/01/1977	PATRICK MEEHAN	MURDER		2190	14276.25E	35250.00	6.52	16.10
01/01/1979	ALBERT TAYLOR	MURDER		1825	32319.00E	79800.00	17.71	43.73
01/01/1980	TONY BURKE	UNKNOWN		547	9072.00E	22400.00	16.59	40.95
01/01/1994	ROBERT HAUGHTON	MURDER		2190	44347.50E	109500.00	20.25	50.00
01/01/1994	WINSTON SILCOTT	MURDER	MANY	1461	10327.50E	25500.00	7.07	17.45
01/01/1998	GEORGE LEWIS	ROBBERY		1825	105300.00E	260000.00	57.70	142.47
01/12/1999	A	MURDER	MANY	2191.5	195000.00	781950.00	88.98	356.81
01/01/2000	EDDIE BROWNING	MURDER		2191.5	355387.50E	877500.00	162.17	400.41
01/05/2000	B	MURDER	NONE	9131.25	443300.00	1209650.00	48.55	132.47
01/06/2000	C	MURDER	MANY	3652.5	405600.00	691901.60	111.05	189.43
01/07/2001	F	MURDER	2 MINOR	5965.75	630000.00	960000.00	105.60	160.92
01/07/2001	E	MURDER	YES	5965.75	630000.00	1224566.40	105.60	205.27
01/05/2002	I	MURDER AND AGG. BURGLARY	MANY	4991.75	231897.60	665468.40	46.46	133.31
01/05/2002	H	MURDER AND ROBBERY	NONE	4060.75	242970.00	243000.00	59.83	59.84
01/05/2002	G	MURDER AND AGG. BURGLARY	MANY	4991.75	300000.00	1001173.20	60.10	200.57
01/03/2004	J	MANSLAUGHTER	NONE	2084.75	204000.00	1124389.20	97.85	539.34
01/01/2006	STEPHEN DOWNING	MURDER	NONE	9861.75	334125.00E	825000.00	33.88	83.66
01/01/2006	ALEX ALLEN	ROBBERY		2191.50	75534.52E	186505.00	34.47	85.10
01/01/2006	RICHARD KARLING	MURDER	NONE	1826.25	397259.92E	980888.70	217.53	537.11
01/01/2007	STUART GAIR	MURDER	MINOR	4383.00	40500.00E	100000.00	9.24	22.82

Figure 3 - Selected Elements of Quantitative Data Sample<sup>176</sup>

<sup>176</sup> E against non-pecuniary compensation represents an estimated value per the methodology in Chapter 4.