

# LYRIC ESSAY

## The Imperfect Crime: Dealing with wrongful conviction

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It takes about eight years before people even start to listen to you.<sup>1</sup>

There is an increasing body of literature on wrongful conviction<sup>2</sup> and compensation for wrongful conviction.<sup>3</sup> There has also been substantial recent media attention devoted to these issues, including high profile cases such as Falconio<sup>4</sup> and Mickelberg.<sup>5</sup>

At present, no Australian jurisdiction has dedicated institutions in place for the review of criminal convictions after the normal appellate review process has been exhausted. While convictions may be referred by an Attorney-General for review, this process is strictly discretionary and utilised on a case-by-case basis.

The Australian Capital Territory (ACT) is the only Australian jurisdiction to have specific legislation regarding compensation for wrongful conviction where defendants are found guilty and exhaust their appeals but later manage to have wrongful convictions quashed.<sup>6</sup> Compensation, where it is paid at all, will be via ex gratia payments. These payments are generally confidential and are somewhat arbitrary in their use and quantification.<sup>7</sup>

A so-called right to compensation has been incorporated into the *Human Rights Act 2004* (ACT) under section 23. On paper, this would appear to have created a formal scheme for compensation. However, some doubts have been raised about the nature of the rights afforded under this provision.<sup>8</sup> The ACT Government's response to a recent question on notice has confirmed that compensation will be paid via ex gratia payments in a similar way to other Australian jurisdictions; there are no specific guidelines regarding wrongful conviction payments and the decision will be not be reviewable.<sup>9</sup> The regime for compensation for wrongful conviction in the ACT appears not to differ from that of other Australian jurisdictions despite its inclusion as a 'right' in the *Human Rights Act 2004* (ACT).

Rather than discussing the legalities of wrongful conviction and compensation for it, this essay instead focuses upon the experience of wrongful conviction for the defendant and other people involved in the criminal justice system, including jail, applying for parole, seeking compensation and life after release. In focusing on the experience of the wrongful conviction, the narrative will address many of the key legal and social issues that arise in these cases. The fact scenario is entirely fictional, though certainly shares similarities with a number of prominent cases.

### The Imperfect Crime

perfect crime *n.* an ingenious crime that cannot be detected or solved.<sup>10</sup>

If there ever was a perfect crime, this one was not it. This was the opposite.

Is there a term for something that is the opposite of a perfect crime? If there is an opposite of a perfect crime, what would one call it? An imperfect crime? An imperfect person? A stupid crime? A crime committed by a stupid person? A crime where the evidence points inexorably towards guilt? It does not have the same ring to it as its opposite. It lacks the same certainty and clarity in meaning.

Maybe the opposite of a perfect crime is a crime for which the police, society, or a jury do not need to pause, or do not feel they need to pause overlong in judging the offender. A crime for which the judgment comes swift and sure. Perhaps then, an imperfect crime is not assured of perfect justice.

In *The Trial*,<sup>11</sup> Kafka relates a parable about a villager who goes seeking the law. There is a door behind which the law can be found. In front of this door stands a doorkeeper who says that, while the law is open to all who seek it, he cannot let the villager pass as the time is not right for him to enter. He tells the villager that entry may be possible down the track. The doorkeeper intimates that the villager could try his luck at the next doorway inside, even though the doorkeeper is not meant to let him in at all. The doorkeeper explains that an even more powerful doorkeeper stands inside, guarding the law. The villager waits, year in, year out. The doorkeeper never moves and never falters. The villager, now old and sick and dying asks the doorman why in all this time no-one else has sought access to the law through this door. The doorkeeper looks down at the dying man and says, 'Nobody else could have got in this way, as this entrance was meant only for you. Now I'll go and close it.'

It is not entirely clear what the parable signifies.

It could be that we imprison ourselves of our own free will — the villager always had the choice to cease his pursuit of the law or take it elsewhere. It may also be that the 'even more powerful doorkeeper' is society itself, with its norms and beliefs. The message may be simpler — it could signify that we are beholden to bureaucrats, whether or not the practices of those bureaucrats are actually logical, whether or not they understand the purposes they serve and despite the

#### REFERENCES

1. According to Rubin Carter this is how long one has to protest one's innocence before anybody will take it seriously. Rubin Carter spent 20 years in jail for a crime that he did not commit. See Sandy McCutcheon, *The Innocence Project* (2003) Perspective, ABC Radio National <abc.net.au/rn/talks/perspective/stories/s865590.htm> at 10 November 2008.
2. See for example, Lynne Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Conviction?' (2007) 40(2) *Australian and New Zealand Journal of Criminology* 179.
3. Adrian Hoel, *Compensation for Wrongful Conviction* (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2008) <aic.gov.au/publications/tandi2/tandi356.pdf> and Tom Percy, 'Despised Outsiders: Compensation for Wrongful Convictions' (2007) 81 *Precedent* 21.
4. 'DNA Controversy Sparks Call for Falconio Review', *The Age* (Melbourne) 23 December 2007 <theage.com.au/news/national/call-for-falconio-evidence-review/2007/12/23/1198344871862.html> at 10 November 2008.
5. 'Mickelbergs to Receive \$1 Million Ex Gratia Payment', *The Age* (Melbourne) 16 January 2008 <abc.net.au/news/stories/2008/01/16/2139438.htm> at 10 November 2008.
6. See *Human Rights Act 2004* (ACT) s 23. This is discussed in Hoel, above n 3, 3–4. The Queensland Government has put together a working party to consider possible solutions for dealing with wrongful convictions: see Fiona Taylor, *Queensland moves closer to a fairer justice system* (2008) Griffith University <www3.griffith.edu.au/03/ertiki/tiki-read\_article.php?articleid=16162> at 10 November 2008.
7. For a full discussion these issues, see generally Hoel above n 3.
8. See Hoel, above n 3, 3.
9. See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3558–9 (Mr Corbell) <hansard.act.gov.au/hansard/2008/pdfs/20080821.pdf> at 10 November 2008.

fact that they contradict the majestic egalitarianism of the institutions they purport to preserve. Perhaps the doorkeeper himself is a prisoner also, forced by the system to guard the door, paradoxically forced to deny to all who come what they have a right to enter and seek. His role is defined by those people as well as by the pointlessness of his brief. Society incarcerates both the doorkeeper and the villager without physical restraints.

Are the exits from the law the same as the entries? Is the door leading *from* the law also guarded by a doorkeeper? Does the discovery that the door was open, paradoxically, involve one's own destruction? Is there something else which guards the door, beyond the walls and the guards that attend them? Can one leave the physicality of the law yet still be locked inside, waiting...?

### Trial and Error

*Occam's Razor*, *n.* The principle that in explaining anything no more assumptions should be made than are necessary.<sup>12</sup>

A whole range of things may have led to Tim Smith being convicted.

Starting with the most general, he may have been in the wrong spot at the wrong time. In other words, he may have simply been unlucky. He had also had some trouble controlling his temper in the past. He had a few assaults on his record. He was one of those people that the newspapers refer to as being 'known to the police'. It could have been overzealous police investigators. It could also have been the eyewitness evidence or the expert evidence. It could have been an overzealous prosecutor. It was probably not entirely any of these things, but at the same time a little bit of them all.

The other thing that could have led to Smith being convicted was that maybe he did it. That was what the jury was banking on. I certainly was.

When I brought the charges against him, when I stood up on the right-hand side of the courtroom and began my prosecutor's address, that's what I believed. At least, I believed that there was enough evidence to get a conviction.

It turns out that I was wrong. Perhaps not wrong about there being enough evidence to convict — the fact that he was convicted shows there was enough. I was wrong about the other bit — the bit about him having actually done it.

By the time the file landed on my desk at the Office of Public Prosecutions, it contained a number of witness statements as well as an autopsy report prepared by a forensic pathologist. Two witnesses admitted to seeing Smith drinking mid-evening on the day in question at an inner-city pub with the deceased, Scott Johns. Two more admitted to seeing Smith leave shortly after with Johns. Lastly, a passer-by, Laura Brown, gave evidence that she had seen Smith standing with the deceased and a group of men twenty minutes later, a short distance from Johns' flat. Brown gave evidence that they left together heading towards Johns' place. Smith alleged they had parted company before reaching Johns' flat.

Johns was later found lying dead in his flat. The forensic pathologist estimated that Johns died within two hours of leaving the pub. Her report concluded that he had suffered a trauma to the head consistent with a fist striking the front of his skull and then fallen to the ground, suffering another more serious trauma to the back of the skull. This second trauma led to serious internal bleeding inside the skull from which Johns never recovered. There were a number of beer bottles in the room, one of which had Smith's fingerprints on it. The report indicated that, though there were traces of Johns' fingerprints on the bottle, the fingerprints were predominately those of Smith.

According to Smith's own police statement, he admitted to having drunk with Johns whom he had met early on in the evening. He admitted to leaving the pub with Johns at the time indicated by the witnesses. On the way out of the pub, Smith alleged that Johns had bought a half dozen bottles of beer. Smith stated that they had planned to drink them together in a local park. On the way to the park they came across a number of youths who were involved in an argument. Smith attempted to intervene. In the process, Johns, who was quite drunk, attempted to offer the group a beer, to try to placate them.

It was at this point that the stories diverged. According to Smith, Johns had proffered one of the bottles which they had bought leaving the pub and Smith had put the bottle back into the carton a number of times telling Johns to pipe down. Brown gave evidence that Johns was irritating Smith as well as the other youths. Importantly, according to Brown, Johns had offered a beer and Smith had given it back to him but the beer had been in a can rather than a bottle. The youths were not known to Brown and they were never identified or called as witnesses. If the jury accepted Smith's evidence that Johns had been carrying bottles of beer and had attempted to give them away, that would explain how Smith's fingerprints were found on the bottle without placing him at the murder scene itself. If Brown's evidence was accepted, then there was no rational way for Smith to have caused his fingerprints to be on the bottle without him having gone to Johns' flat.

As I said in my opening and closing address to the jury, most of the facts were agreed between the prosecution and the defence. On one view, Smith was a violent, drunk, aggressor while on the other he was a friendly pub patron, intervening in an argument, incredibly yet innocuously close to the scene of the crime but not actually involved. The jury had the task of deciding which view was to be believed. Did the evidence prove that he was the assailant? To what did the circumstantial evidence of the witnesses and of the pathologist point? It pointed both to guilt and to innocence.

There was something that did not strike me at the time of the trial. That something turned out to be at least one of the factors that led to Smith being convicted. The fingerprints were a key piece of circumstantial evidence and, clearly, the evidence of Brown was crucial as to what the fingerprints actually proved.

10. *Oxford English Dictionary* (2008) *Oxford English Dictionary* (Online) <oed.com/(subscription site)> at 23 May 2008.

11. Franz Kafka, *The Trial* (1956).

12. *Oxford English Dictionary* (2008) *Oxford English Dictionary* (Online) <oed.com/(subscription site)> at 23 May 2008.

That something was that Brown was pregnant. She was literally weeks away from giving birth at the time of the trial. She was radiant and glowing. The defence counsel was a fairly green barrister, maybe on his first murder trial. In cross-examining Brown, he kept putting it to her that she was mistaken about the beer being in a can. She disagreed. After a few repetitions she became agitated and started to become short of breath, whereupon I interjected and called for a recess. After the recess, the judge directed the defence barrister to move on. The issue of whether Brown was lying or whether she was just plain mistaken was left to rest. People can be honestly and vocally sure, yet still be mistaken. The barrister did not insist on taking it further. Who knows, maybe it would have made no difference.

The jury and an appeal court formed the view, unanimously, that Smith had murdered Johns. In sentencing, the trial judge referred to Smith's history of low level violence and the circumstances of the offence. The trial judge indicated that the sentence would have to reflect this history. Smith was sentenced to imprisonment for 21 years with a minimum term of 17 years.

I will not keep you in suspense. After the trial and appeals had taken their course, Smith was sent to gaol. Ten years later, when I had all but forgotten about the whole thing, an extraordinary appeal was ordered by the Attorney-General. We call it extraordinary because it is where the court process is exhausted and the defendant has no further right to appeal. The law permits the Attorney-General the discretion to request that the Court of Appeal of the Supreme Court review a case as if it were on appeal again. This happens very, very rarely and only when some very persuasive new evidence crops up. I was not involved in the appeal.

A career criminal, Andrew Barton had been put away for a double murder — a contract hit. He was in for life and never to be released. At this time he decided to fess up to murdering Johns — a debt collection blunder. Johns had owed some money and Barton had been called in to try to persuade Johns to pay. That persuasion had gone awry and Barton had kept mum about it all this time. He figured that now it did not make much difference if he confessed. The Court of Appeal ordered that the conviction be quashed in light of the new evidence.

My man had got away, thankfully. I cannot say that this could not happen again. Most cases do not involve diametrically opposed evidence — they generally involve much the same evidence but have conflicting views about what the evidence actually proves. The gang of twelve, the prosecutors and even the defence are all bound to play their role based on what is put before them, relying on what evidence is proffered. Sometimes the evidence itself, or the implication arising out of the evidence, is wrong. Even if the defence had managed to cast doubt on Brown's evidence under cross-examination, it may have made no difference. The story itself just seemed a little too slim. If truth is stranger than fiction, then fiction is easier to believe.

The most unusual part of the whole thing, way more unusual than the guilty verdict, is that new evidence was found and that the extraordinary appeal was allowed at all. In the normal run of things, such evidence would be unlikely to come to light. Even if it did, after the standard appeal process has run its course, there is no formal or regular procedure for review of such cases.

This could happen again and we may never find out.

### The Burden of Innocence

The first day of prison was always the hardest  
The first day of prison, the hallways the darkest  
Like a gauntlet the voices haunted  
Faggot, sissy, punk, queen, queer  
Words he used before had a new meaning in here.<sup>13</sup>

The first thing that hits you is the smell. Think of the rankest locker-room, or the stench of an abandoned toilet block. Then multiply it by ten. That's it. That kind of foul odour multiplied by ten. The fragrance of hundreds of males living in close proximity. And despite the smell, there is the unrelenting sickly tang of industrial cleanser all around; somehow everywhere, but at the same time somehow poured nowhere that actually needed to be cleaned. Omnipresent and oppressive, yet impotent.

The smell that hits you as you are led in from the wagons, from your former life, is what finally tells you that you are here and not there. Once you are smelling that particular eau de toilet, any illusion or any denial you may have had before about avoiding prison is out the window. Away from that stench.

Prisoners tend to give the new guys a wide berth. They are a disruption at best and prisoners don't like disruptions because that means a break in the order of things. Order means predictability and predictability means relative safety. One way or another, new guys make ripples in the water but no-one is ever sure up-front whether they are a big or a small rock.

The time to make an impression is when you arrive, when everyone is watching. Some of the new guys, the big timers or the wannabees are just about ready to clobber the first person they see. On the other hand, no-one knows who the new guy is and what he did. You do not want to accidentally pal up with a rock spider. This can go both ways. As a new bloke you want to be careful not to take on more problems than some older hand can help you out with.

Generally, the only inmates who make any effort are the guys with no reputation to lose, or the scammers. Or somebody who knows the new guy. The scammers are looking for a small win, a cigarette or a favour. They may also offer you something in order to call in the favour down the track. In terms of the guys who know the new bloke, they may be friends, they may be enemies or they may just have heard of the guy. For this reason, it's sometimes better not to know anyone.

So the first few days and weeks are the major hurdle to get through. Not so much lonely — you are lonely either way — but desperately alone. Calculating and

13. From the song 'Language of Violence' by Disposable Heroes of Hiphoprisy, *Hypocrisy is the Greatest Luxury* (1992).

being calculated. The blokes are working out where the new bloke will fit, if he fits at all. At the same time, the new guy is finding out where to go and where not. Who to avoid. Who to ignore and who not. With some, it will take hours while others will wait for weeks and weeks until their existence in the pond becomes clear. Even for those right at the bottom of it, just knowing how it is going to be will still be a kind of relief. Even those guys who have done time before have to endure this, but at least they know what it is all about.

I remember when Tim arrived in our block. Someone knew him though Tim did not know the someone. Apparently the bloke Tim had off-ed was known to people inside. These guys inside owed him money which they weren't likely to owe anymore. Tim had just cancelled their debt. In prison terms, this might have been the start of something beautiful for them and Tim. These types of friendships can be hard to rebuff.

As Tim was led to his cell, some of this mob stood watching, nodding at him slowly as he walked by. Inside, being a murderer does not guarantee you respect but it can help, especially if respect is what you are after. If the victim happens to have enemies inside, then more so.

In those first weeks, Tim was working out how he was going to spend his time; who he was going to be. Part of doing this was nailing down in his own mind exactly what it was he had done to get in there. The respect he could demand as a murderer had to be backed up one hundred per cent by what he said and did inside, and who he associated with. Most murderers are not killers by temperament, not psychos, and so not worth much more than casual caution.

In my time inside, I have seen many people make these early decisions and live to regret them. Once regret arrives, it is usually too late to change your mind, too difficult.

I was never that tight with Tim but being his cell mate was close enough. You do not need to be best mates with a cell mate to know them. Apart from a few stints in solitary and in the prison hospital, I saw him every day, year in year out.

Down the track — I mean years down the track, when Tim got let out — it all made sense. He was no murderer. But a lot of water, cold, dark and dirty water, had passed under the bridge before that came out. It may never have come out. In Tim's case, that never could have been his entire gaol term. A long time to plead innocence, particularly when no-one who mattered was listening.

Despite the temptation of a ready-made friendship and the bit of safety it offered, Tim did not bite. Maintaining that he was not a murderer meant that Tim could not very well take the credit for it.

They were, at first, just surprised that he kept denying he had done it. Later came the scorn. Murderers who deny their crimes do not rate high. But dissing a murderer was a way of getting some cheap points. It also just passed the time. So, that's what they did.

This cost Tim and, it should be said, a few of them, a number of visits to the hole and to hospital.

Sometimes, the burden of innocence is heavier than the burden of guilt.

### The Door to the Law is Always Open

There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

'That's some catch, that Catch-22,' Yossarian observed.

'It's the best there is,' Doc Daneeka agreed.<sup>14</sup>

Sooner or later, all the crims pay me a visit. They have to if they want to get out after their non-parole period rolls around. Even some of the very worst long-termers have a non-parole period that is slowly ticking away. Once it comes up, they can try to talk the Parole Board into letting them out. Letting them out gives society a chance to keep them on a short leash by easing them back into the mainstream. It was my role to liaise between prisoners and the Parole Board.

The Parole Board looks at everything. It is not a court and there is not much about the person, not much that can be observed or written down, that the board does get to look at. A decision on parole is not like a decision of a court on guilt, where the court can only look at certain types of evidence. The board will look at whatever was brought up in the trial, things from other trials relevant to the person. It will look at psychiatric reports, reports on the offender's behaviour on remand or serving his sentence. Basically the lot, and 'the lot' means a lot more than what the jury is allowed to see at trial.

The prisoner will normally get to have their say at a parole hearing. As well as this, the parole board will pay particular attention to the nature of the offence which put the prisoner inside and the interests of any victims. If the offender has done any courses inside, educational or rehabilitative, then the board will look at that too. All these things go towards an assessment of whether the prisoner will observe the parole conditions and whether they are likely to pose a risk of re-offending while on parole.

Tim Smith only fronted once to talk to me. What can I say? He did not impress me at all. He had various disciplinary breaches on his prison record for fighting. He was a convicted murderer who had pleaded not guilty right through. When I saw him, he was still pleading his innocence.

As a parole officer, I will tell you what this suggested to me — a lack of remorse, a failure to accept responsibility for his actions and a general tendency toward blame transference.

<sup>14</sup> Joseph Heller, *Catch-22* (2004) 52.

In terms of translating into an assessment of risk it did not stack up very well. The general view is that this type of prisoner, a denier, is likely to breach his conditions and is also likely to exhibit similar behaviour as that which put him in prison in the first place. Put against the backdrop of his previous history of minor criminal assaults, as well as continuing discipline problems in gaol, there was nothing pointing towards granting parole.

Smith's claims of being innocent, yet in prison, simply confirmed his suitability for staying in there a bit longer. As I said to him at the time, parole might be possible if there were a subsequent change of attitude, but just not now. Society was not ready for him to come out just yet.

### Paying the Bill at Checkout Time

#### Accommodation

Budget...

Midrange...

High end...

#### Getting there and away<sup>15</sup>

Strangely enough and despite all the time that Tim had spent on remand, in jail and fighting to get somebody to reconsider the case, the government did not rush to try to contact him about compensation. They were on notice that we would be seeking compensation because, as Tim's solicitor, I mentioned this in my statement to the press on the way out of the court. In any case, most people who have been wrongfully convicted have a go at getting something back.

You know how some of those people who have been wrongfully convicted write books? Well, you know what? They are generally not good writers. So, why would they write a book, do you think? For fame and fortune? Probably not. Most likely, they will write a book because they either have not received any compensation from the government or, if they did, because the amount they got is hardly enough to start a new life. 'Not got any compensation?', you say. That's right. 'Not got any compensation.'

You can get harassed at work as a government employee and get a payout. You can get run over by a council van and sue the government. You can even have a crack at suing the government for slipping on an uneven piece of pavement. All these situations are ones where you have a right to take the government to court. You may not be assured of a win, but you have a right to give it a shot.

Oftentimes, the government will try to settle out of court by offering a payment the size of which will depend on the circumstances of what went on. The baseline for a settlement will be what you would get if you decide to argue it in court. Lost income, lost opportunities and medical expenses are the big ticket items with a smattering of cash for pain and suffering.

Wrongful conviction, despite the word 'wrongful' is not 'wrong' in Australia. When I say this, I mean that no law has been broken so you do not have the right to go to

court and sue the government. Unlike those situations I have mentioned, being imprisoned as a result of a wrongful conviction does not give rise to a legal claim. Even the tort of 'false imprisonment' does not apply. Though it sounds like wrongful conviction, it is different. False imprisonment is where someone deliberately intends and does restrain you. A court and the jury, in the absence of some kind of malicious intent to imprison, do not act outside the law — they are acting honestly but mistakenly. So it is an entirely different non-legal kettle of fish.

The idea is that these things do not happen very often. When they do, so the logic goes, they are normally corrected on appeal. That is why there is no routine way of having cases appealed after the normal appeal process has run out. For the poor unfortunate souls that fit through the cracks, well, they are left to bear the burden of the imperfection of the system. A judge and jury, unless they deliberately and knowingly wrongfully convicted someone, are not breaking the law. From the law's point of view, they are not acting like a harassing boss, nor are they falsely imprisoning you, nor are they acting like a well-intentioned but negligent van driver, nor, for completeness, are they acting like the government when it doesn't fix the crack in the pavement.

So, that covers off legal action. There is no right to sue because nothing illegal has gone on. So, the next question is 'Do governments give payments to settle such claims?' You may be wondering how these payments go if the people don't have the option to run off to court. The answer is sometimes yes, but no. Sometimes governments make payments but they are not to settle a claim because there is no 'claim' to start with.

These payments, when they are made, are called 'ex gratia' payments meaning, roughly, 'out of gratitude' or 'out of grace' but really meaning that they are voluntarily made by the government, if made at all, and not for any legal reason. They give them out sometimes when there are natural disasters: 'Have this money to help you out even though it is not the strictly the government's problem' — that kind of thing.

When I explained the concept to Tim, he said, 'Out of gratitude, eh? Gratitude for suffering on behalf of the real offender? Gratitude for persisting with my case and, in doing so, showing the problems in the system? Out of grace? Will they be graceful, then? This should be interesting...'

I cannot say that what occurred matched his optimistic thoughts, though I did try to set him straight on this from the start.

So, the government was not exactly quick off the mark to contact Tim about compensation. In fact, I ended up putting a request in writing a month after the appeal. In response, I was asked to provide an explanation as to why Tim should get compensation. We were also asked to suggest a dollar figure we would put on the ten years in jail and how we would reach that figure.

The question of why he should get compensation seemed obvious. In terms of describing how we would reach that figure, funnily enough, we had to use the

15. This reflects the generic categories of information listed in Lonely Planet publications. <lonelyplanet.com>.



same measures that are used for working out damages in proper legal actions. Under the law, Tim did not have a claim, but we still had work out the compensation according to the law. Crazy.

The equation for Tim went something like this:

10 years in jail including remand = 10 x income at time of imprisonment plus probable amount of increase over period

The effect of 10 years in jail in terms of loss of opportunities to take up other employment, to invest, etc.

The probable effect of 10 years jail on his mental/physical health and cost of having any medical conditions treated.

Pain and suffering.

Then you get a subtotal which you then talk to the government about. I say subtotal, because the real total, if they pay at all, will always be less. I warned Tim that the lowest part of the claim would be pain and suffering rather than the highest. I also told him to expect that amounts would be taken away from that subtotal.

I cannot say too much more about what happened because the eventual compensation payment that Tim got is subject to a confidentiality agreement.

We sent something setting out our calculations and subtotal of compensation to the Department of Treasury. We were told that they had received the claim and had sent it off to an independent barrister to consider both whether a payment should be made and, if so, how much it should be.

A month later, we were invited to meet with lawyers from Treasury. They had received advice from an independent barrister but they were close-lipped about it. They said that they wanted to talk to us about the 'how much' issue rather than the 'if' issue. Regardless, they were at pains to remind us that we should not assume that the 'if' issue had been decided in our favour. In fact, it seemed to me that the 'if' was being used as leverage for working out the 'how much'.

They said that they had a problem with the amount of our claim. They were not prepared to say what figure they themselves would put on it and said that it would be inappropriate to tell us how much they had paid out in other wrongful conviction cases. Despite this, they

seemed sure as sure that we were trying to get more than we should. They went through our equation line by line, querying and generally casting around doubt as much as possible.

'Salary per year... is that figure pre or post tax? Are you sure?' they said flicking over the papers.

Referring to an increase in the yearly salary that we had including in the working out, they said to Tim, 'You were working three years at that level, what makes you say that you would have got a promotion then? Do you think a promotion was probable or just possible? I am not sure that the compensation needs to reflect such a possibility.'

They started to query the costs resulting from mental conditions Tim had suffered from his time in jail, 'Depression, post-traumatic stress disorder... Do any of these disorders pre-date your time in jail? Did you attempt to seek assistance for them while in jail and, if so, how soon after developing them?'

I pointed out that some medical documents had been included with our submission and we could get additional specialist's reports, if it was a question of proof. At this, the lawyers gave us a long look and said, 'No. As you are aware, this is not a court case. Proof is not really relevant. It is not a question of what you can prove or what we can prove, it is a question of what we are prepared to offer. You may draw a different view from the surrounding facts but that does not relate to the view that we have formed.'

Pain and suffering drew very little comment from them at all. They did note though that any compensation, if paid, would need to be lowered to reflect what they referred to as 'deductibles'.

Tim's jaw dropped at this. They looked a bit taken aback. They stated quite matter-of-factly that the compensation payment was meant to reflect the loss that he had suffered financially and otherwise. This loss needed to be reduced to a single sum of money. As such, they said, that sum of money would need to reflect what he actually would have received had he not been in jail. Taxes would have been taken from his salary. He would have had living costs and other costs which also would have come out of that. They explained that it would be unfair for him to receive an amount that included these types of costs.

Unfair.

I saw Tim start to get a bit edgy at this point and tried to intervene. He waved me away and asked them, his voice becoming quite husky, to explain the nature of living costs. He said that he could understand how not paying tax would be unfair to them but that he wanted to hear some more about living costs. They appeared to take heart from him saying he understood some of what they were talking about, so they went on.

'Well, clearly, tax would need to come out of the income at the marginal rates for each of the relevant financial years. In terms of living costs, what we are looking at there is the cost of your food and other associated costs, board and lodgings, which normally

amount to fifteen to twenty percent of a person's annual salary.'

I saw the blood rush to Tim's head.

'Am I getting this correctly then? We are talking about a compensation payment for me being imprisoned. The courts now know that I did not do it. You do not *have* to give me anything and I cannot sue you if you don't. You will not say whether you intend to give one but are still here talking about how much. You will not tell me how other claims have been handled so I do not know how people who have done less or done more time than me have done in terms of money. You spend a lot of time talking about whether I do or don't have a condition but you have pointed out that it is not a question of proof. Unlike a court, we are not arguing in front of a judge who will decide what I have suffered and what proof there needs to be.'

In the course of saying this, Tim got to his feet.

One of the lawyers waved a hand at him dismissively. 'Come now, please take your seat, sir.' He gestured towards Tim's chair.

'Surely you can understand that, just like with taxes and so on, it is reasonable for the government to "charge" you for costs associated with your stay in prison, like food and laundering of clothes and so on. It would be like staying in a hotel and leaving without paying.'

Tim looked at this man for a long time, at his clean, pinstriped suit, his level gaze, his self-satisfied smirk. He asked in a flat voice, 'So, you think I should have to pay the government back for the costs of my cell in prison? Jeeze, I'm glad now they didn't give me the honeymoon suite. Either way, I can tell you for sure though, I won't be sending a fucking write-up to Lonely Planet.'

### Sufferer, Dupe or Sacrifice?

Victim ... a sufferer from any destructive, injurious, or adverse action or agency ... a dupe, as of a swindler ... a person or animal sacrificed, or regarded as sacrificed ...<sup>16</sup>

Brett, my lawyer, has told me to be a little careful what I say about the whole process. Confidentiality was one of the major aspects of the whole payout.

With this in mind, I can say that I got way less than I had hoped but more than I might have got. I can, however, safely say that I would have done better if I had been run into by a post office van. Funnily enough, that is what I feel like happened. Run into by a van and knocked right out of orbit. Now I am back, like a long lost traveller. Picking up with friends and family, many of whom stopped visiting me years ago. Everybody has that same tight-lipped 'smile for the stranger' friendliness — uneasily pleased to be companionable but equally pleased when it's home-time.

The government people had a list of what they referred to as 'strong reasons of public policy' as to why our little deal needed to be kept confidential. Public expenditure was one that sticks out. Apparently, public knowledge of how much the government pays to compensate might create a crazy situation where people like me might try to argue that they deserved

16. Macquarie Dictionary (3rd revised ed, 2003) 2092.

more than the next guy who got put in for a smaller number of years but managed to get a bigger payment. Perish the thought. How unfair. How ungrateful.

The other one that jumps out is that maybe we prisoners will do better than victims. Victims of crime do not fare very well, apparently. Victims of failures in the criminal justice system don't either except we do not get called 'victims of crime' and we do time for someone else's mistakes.

This is not a question of money; rather, it is a question of recognition. Recognition that I have been wronged, that I am a victim and that the government is sorry.

As it stands, I have been proven guilty of murder and that verdict confirmed on appeal. Years after the fact, I managed to get a re-hearing. To most people, a re-hearing under those circumstances is kind of like coming up with a technicality, or even 'manufacturing' a technicality. Nobody likes a murder mystery where the crime is not solved.

The court overturned my conviction and here I am out of prison, unleashed upon society. 'Unleashed', because I have never been proven innocent and never will be. I am still the guy who 'got put away' for murder and who got out of jail based on another crim's confession. Maybe we colluded, right?

I was lucky. The amount the government gave me was more than nothing. The fact that it was confidential though, really just made it a token and no more. Symbols can be important but I am not sure if this one was the type of symbolism that I was after.

I can say that I got a payment but I cannot say to people, 'Look, This is how wrong the government was. They have paid me *this* amount of money in recognising that this was not my error but theirs.' I have to say, 'The amount of the payment is confidential.' That does not seem to go too far in convincing people that the government really thinks it was to blame.

When I was released, I read an article in the local tabloid with the title 'Victim's Mother Speaks out on Appeal'. The paper had interviewed the mother of Scott Johns. She was quoted as saying that she saw the new appeal itself as being an interference with the decision of a properly directed jury and that this new evidence should never have been allowed to be heard in court at all. The judges had let a guilty man go free. I had put Barton up to it.

Unfortunately, I am not the person that she wants me to be. She needs a bad guy, a person to focus her sorrow and anger against. I have been that person but I cannot keep being that person. She, and perhaps society, wants to have closure, a way of making the front page become page three, then page six and to slip gently into oblivion. A miscarriage of justice is not conducive to this. This makes it very difficult for me to be anything other than a criminal to them because me *not* being a criminal would mean that all that hatred had been misdirected, that she had hated and suffered for nothing, that I had suffered for nothing. People always look only for the truth which confirms their own beliefs.

Right now, I am a convicted crim whose guilt has only been partially absolved — why else would the government not pay me big bucks? If they did pay out big, why else would it not be public knowledge? Where was the public apology? People get big dollars for tripping on the pavement, right? Confidential payments don't even make page six.

This is the unbelievable truth: I am not a murderer and I am also a victim. I may be worth more to society as a murderer in jail than as a victim, but I cannot do that.

I've physically left the prison and I'm outside. The law has told me that this is so; the door leading away from the law is open and I am free to pass through it. But at the same time, the doorkeeper is there telling me, just the same, that I cannot go out.

### Afterword

The above narrative sets out some of the ordeals that a wrongfully convicted person faces. It is not suggested that this is an exhaustive list, nor is it true to say that all wrongfully convicted people will face all of these privations. Some wrongfully convicted people may nevertheless be guilty of some lesser offence in relation to the crime for which they are wrongfully convicted. Despite this, it is fair to say that these people are likely to experience serious and ongoing effects of wrongful conviction and most of them are wholly innocent of any involvement in the offences for which they were convicted.

No Australian jurisdiction has an institutionalised mechanism for examining wrongful convictions. When a wrongful conviction is brought to light, there is no certain, transparent and accountable system for awarding compensation. There is no system for discovering wrongful convictions and no adequate system for properly compensating a wrongfully convicted defendant for an inadequacy of a legal system, albeit unwitting and perhaps often unavoidable. Currently, Australian law renders wrongfully convicted people as victims, but victims in the worst possible sense. They are sufferers, dupes and sacrifices: suffering from being wrongfully convicted in the first place, being sacrificed by bearing the loss for this perhaps inevitable but nevertheless grave failing in our legal system and being duped out of a fair process for compensation.

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