Law reform essay competition 2025: highly commended – Niccola Parkes

'Recalled to life'; the landscape of compensation for miscarriages of justice in the 21st Century

Introduction

"No one should have to wait this long to be able to start to rebuild their life, and too many innocent people are being denied compensation altogether."[1]

Recently there have been several high profile miscarriage of justice cases, including those of Andrew Malkinson and Peter Sullivan. Both spent decades in prison for offences they did not commit. Following their release from prison they would have received £46 and a travel voucher (JUSTICE, 2018, [8]). Those who are wrongfully convicted have just £46 to resume their lives: find suitable accommodation, employment, access benefits and reintegrate back into their social networks. There is a financial and social lottery as to whether they will have somewhere to stay or a network to support them in readjusting back to their life. There is little recognition of the associated trauma of a wrongful conviction. It disrupts and 'spoils the identity' (Hoyle and Tilt, 2018, [495]) of self and how they should operate in the world; they remain with the stigma of having spent time in prison.

However, there is hope of compensation for victims of miscarriage of justice under s.133 of Criminal Justice Act 1988 ('CJA'). Those who have been wrongfully convicted can apply for financial compensation for the time spent serving a custodial sentence. Only if they can show they 'did not commit the offence' (CJA, s.133(1)). This reverse burden or threshold to prove innocence means that there are very few successful compensation applications. Between 2017 and 2022, there were only 3.75% successful applications (King, 2025, [105]). Currently, there is little state recognition that a fundamental error occurred in the system. More importantly, victims of miscarriages of justice are 'recalled to life'[2] without any financial assistance or compensation.

On that basis, not only does there need to be reform to section 133 CJA to change the

[1] Andrew Malkinson speaking on his wrongful conviction, *Wrongly jailed Andrew Malkinson gets first payout*, BBC News, 12 February 2025

[2] In 'A Tale of Two Cities' by Charles Dickens, one of the characters is wrongfully imprisoned and he is 'recalled to life' by his daughter.

threshold for compensation, but there needs to be greater reform in how compensation is determined. Instead, a more holistic approach to compensating and supporting victims of miscarriage of justice should be adopted. Therefore, I will argue that the Criminal Appeal Act 1995 should be reformed to establish an independent panel that is empowered to determine not only financial compensation but can propose a package of support. This is to ensure that those being 'recalled to life' have the requisite state support to effectively rebuild their lives.

Current Legislation

Those who have had a conviction quashed by the Court of Appeal can apply for compensation under the statutory scheme set out in section 133(1) CJA:

'1...] 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 1...]'

In 2014, section 133 was amended following the case of Adams v Secretary of State for Justice ([2012] AC 13), where the Court considered four categories of cases which could fall within the meaning of 'miscarriage of justice'. It was held that all cases falling into category 1 (cases where fresh evidence shows clearly that the defendant is innocent of the crime of which he was convicted) would necessarily fall into the definition of 'miscarriage of justice'. However, to exclude cases falling into other categories, namely category 2 (cases where *fresh evidence so undermines* the evidence against the defendant that no conviction could possibly be based on it) would assume a test of innocence, which would set the bar too high for applicants.

The Government at the time, however decided that compensation should only be available for those who only fall into category 1. Therefore, a change to the compensation regime came in 2014 with the amendment under section 175 of the Anti-Social Behaviour, Crime and Policing Act 2014 (s.133 1ZA). This changed the test used to consider applications for compensation. Instead of the applicant having to show that a 'fact or newly discovered fact shows beyond a reasonable doubt that there has been a miscarriage of justice', the applicant must go further and provide evidence and persuade the Secretary of State for Justice that they did not commit the offence:

'1...] the new or newly discovered fact shows beyond a reasonable doubt that the person did not commit the offence.'

It is important to note the political climate that this amendment happened in. Austerity was in full force and significant cuts came to the criminal justice system by way of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). Prior to the 2014 amendment, the government made average annual payouts of £5.9 million and after 2014, there was a 95% drop with the average annual payout being £297,000 (*Hansard, 2025*). The change to the test for compensation resulted in a drastic decrease to the number of successful compensation applications almost overnight. It is hard to view this change without cynicism: it appears that the greatest driving force behind s.133 (1ZA) is financial; it has resulted in a disproportionate number of compensation applications being dismissed because the applicant has not met the relevant threshold.

Current Problem

There are three main problems with the current legislation for compensation for victims of miscarriage of justice: (i) the discordant tests for those appealing their convictions and those applying for compensation; (ii) the determination of compensation applications; and (iii) a disjointed support framework for victims of miscarriage of justice.

Conflicting tests

The legislative change in 2014 to compensation has created a catch-22, with disparate frameworks operating throughout the appellate and compensation procedures. For example, when the Court of Appeal (Criminal Division) ('CACD') is determining an appeal, the court looks only at the safety of a conviction, not whether the appellant is guilty or not guilty and least of all the question of innocence. In *Adams v Secretary of State for Justice*, Lady Hale stated that "innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty [...] Otherwise he is not guilty. Irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial, and it seems wrong in principle that he should be required to prove his innocence now".

At no other point in the criminal justice system do we switch the burden and standard of proof onto the defendant. However, in this one and only instance in the criminal justice system, we expect those applying for compensation, to not only provide evidence to the CACD that their conviction is unsafe, but to go further and provide

additional evidence to prove their innocence to the Secretary of State. This problem of disparate tests is exacerbated by the CACD's reluctance to move beyond their jurisdiction of 'safety' and pronounce an appellant's innocence.

The current case law from both the UK and the European Court of Human Rights ('ECtHR'), which recently decided the case of *Allen v UK*, is confused and contradictory. Domestic and foreign case law 'demonstrates a lack of understanding of the lived experience of the individuals who have been wrongfully convicted in cases where the criminal justice safety nets have failed' (*Hoyle and Tilt, 2020 [31]*). The state seems to have forgotten the fundamental purpose of compensating those that have been harmed by the state through the administration of law, and therefore there is a societal and moral duty to rectify this harm: 'the basis of the duty to compensate is social solidarity, not fault' (*J.R Spencer, 2010 [817]*).

Determination of compensation applications

Currently the compensation and the potential amount awarded is determined by the Secretary of State and an Independent Assessor through a non-judicial process. The Secretary of State when making decisions about eligibility may look at the Court of Appeal judgment, the grounds of appeal, the Criminal Cases Review Commission's Statement of Reasons for the referral and other relevant case documents. However, the fundamental issue with this system is a lack of transparency and accountability; 'there is no way to know how the Secretary of State makes the decision or what exactly is taken into account' (*Hoyle and Tilt, 2020 [33]*). Applicants applying for compensation are not clear on exactly what documents are needed, how they are considered by the Secretary of State nor how much weight is attributed to each document. This does not provide a clear framework for those applying for compensation to know exactly what material is needed to show 'that they did not commit the offence'.

The current system is highly arbitrary with the potential for the outcome of decisions to vary depending on different Secretary of States, this is exacerbated by the lack of a standard and consistent framework. For example, there are no rules of evidence that are applied and no procedural safeguards in place to ensure consistency.

Support Framework

Whilst s.133 threshold provides the main challenge to victims of miscarriage of justice; there is an issue with a lack of individual and personalised support for those

who have been wrongfully convicted. Whilst compensation can and will help those to financially recover what was lost and can be an effective way of symbolising public accountability for the harm caused, there needs to be a holistic approach to helping the wrongfully convicted rehabilitate and reintegrate back into their communities to fully address the harm caused by the state.

It is recognised that long-term imprisonment is damaging, not only to the sense of self and identity, but also causes estrangement from social networks; 'the impact on social capital can be far more destructive as an undeserved penalty' (*Hoyle and Tilt, 2018 [496]*). Currently, the state provides a non-statutory support service that is run by Citizens Advice based out of the Royal Courts of Justice. However, the non-statutory nature of this service and the limited remit determined by the level of funding, makes it difficult for victims of miscarriage of justice to fully get the level of support required; with much of the service delivered over the phone. The Miscarriage of Justice Support Service ('MJSS') 'is not designed nor required to assist with resettlement generally, but only to provide advice and support with practical elements of post-exoneration life, such as housing, benefits and opening bank accounts' (*ibid, [501]*). Whilst this is an extremely important aspect to reintegrating someone back into the community, it does not go far enough to provide counselling and psychiatric assessment or face-to-face links with caseworkers.

The state has forgotten its moral obligation to recompense those who have been harmed and the benefits of compensation to victims; there is a societal amnesia as to the fundamental purpose and aim of compensation. The problem is, not only have the government made it almost impossible to successfully receive compensation, but the system is not personalised or resourced enough to properly recognise those who have been wrongfully convicted as victims of miscarriage of justice.

Proposed Reform

There is a two-fold solution: (i) amendment to s.133 (1ZA) to revert to the pre-2014 position; and (ii) wider reform of support (both compensation and reintegration) for the wrongfully convicted.

Reform to section 133

Whilst many campaigners are in agreement that there should be a change to s.133 of the Criminal Justice Act 1988, this should be the first step in an overhaul of the

compensation for miscarriages of justice scheme. The government could deal with this simply by reverting back to the pre-2014 test as mentioned above.

Wider Reform

Even with an amendment to s.133, this does not go far enough to ensure that those who are wrongfully convicted can effectively apply for compensation and reintegrate back into the community. Therefore, there should also be reform to the Criminal Appeals Act 1995 with the aim of ensuring a consistent and joined-up approach to compensation and support. Instead of compensation applications being dealt with by the Secretary of State and an Independent Assessor, this should be determined by an independent panel made up of lawyers and judges, psychologists and experts in criminal compensation.

The purpose of an independent panel would be to provide a clear framework for determining compensation, which includes clear guidance on rules of evidence and the materials considered; make determinations on compensation applications; and provide a full package of additional support, which could include psychiatric assessment, referrals to the MJSS. The independent panel could also help develop greater links with other government departments to ensure a joined-up approach to housing, benefits and pensions.

The independent panel would be able to look closely into offering both a financial and non-financial package of support; it can focus on a personalised support plan based on expert input to provide services and resources required by the applicant to resettle back into the community. Therefore, the independent panel would have greater links into the MJSS, with caseworkers prior to the appeal visiting victims of miscarriage of justice and assessing possible needs and requirements upon release.

The MJSS caseworkers would then be able to feedback to the panel what assistance is needed. There would then be continuity and a consistent point of contact for the applicant as the support package is delivered. Currently, the MJSS 'is a reactive, rather than proactive service that provides assistance at the specific request of the client' (*ibid, [504]*). Therefore, creating an independent panel with greater connection to the MJSS (which could also be made statutory in any amendment to the CAA 1995) would provide a clear pathway for those wrongfully convicted.

Benefits of the Reform

An independent panel would have several benefits. Firstly, any reform to the Criminal Appeal Act 1995 could ensure that the Criminal Cases Review Commission (the 'CCRC') would have a statutory obligation to refer potential victims of miscarriage of justice. This would ensure that potential miscarriages of justice are identified by the CCRC early on before referring to the Court of Appeal, which would provide a consistent level of support both pre and post-appeal that could look to resettlement at an earlier stage. This would be especially beneficial as exonerees typically do not have access to the same level of support as prison leavers prior to release.

Secondly, a quasi-judicial eligibility process would also be able to put in place a consistent framework with clear guidance on what material is considered, the weight attached to it when considering compensation and support and clear remarks following determination to help practitioners. The panel could consider rules of evidence and admissibility when determining an application for compensation and support. This would ensure a transparent and fair process.

Lastly, the panel would be able to advocate for those wrongfully convicted and push for a more streamlined bureaucratic process. For example, currently those wrongfully convicted do not get priority for housing or accommodation, which is a similar situation for those needing to access benefits. Greater links with other government departments could ensure that partnerships are formed to create and cater for specific arrangements, such as a dedicated unit to deal with Universal Credit or ensure a pathway to get secure accommodation. An independent body would also offer public accountability and a recognition of someone's status as a victim of wrongful conviction. It would be a start to re-building trust in state agencies for those wrongfully convicted.

Conclusion

The reality is that many victims of miscarriage of justice struggle to reintegrate back into their past life. The current compensation scheme does not acknowledge the irreparable harm that is caused to those who have been wrongfully convicted; instead, it treats them with a question mark. Whilst they are not guilty enough to have their conviction quashed, they are not innocent enough for the state to recognise them as deserving of compensation.

Society owes more to those who have lost years of their life than just the possibility of applying for compensation. That is why not only should the threshold in s.133 revert back to the threshold established prior to 2014, the government should reform the Criminal Appeal Act 1995 to create a more streamlined, transparent framework that looks at not only financial compensation but also other ways to provide assistance and support. Society owes those who have been wrongfully convicted the chance to be recalled to life and have another chance.

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