

Advocacy and the Innocent Client: Defence Counsel Experiences with Wrongful Convictions and False Guilty Pleas

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Much of our knowledge about wrongful convictions is derived from known exonerations, which typically involve serious violent offences and lengthy sentences. These represent only a small proportion of offences prosecuted in Canada each year, and little is known about how often innocent defendants may be wrongfully convicted of less serious offences. Relatedly, recent discussions have begun to focus on the problem of false guilty pleas, in which defendants knowingly plead guilty to a lesser offence due to the time and cost required to defend their innocence, which often outweigh the punishment itself. The majority of our knowledge of the factors contributing to wrongful convictions is based on American scholarship, with less empirical research exploring wrongful convictions within the Canadian context. The present research surveyed Canadian criminal defence lawyers about their experiences representing innocent clients, including their perspective on the underlying causes of wrongful convictions in Canada and recommendations for reform to the criminal justice system. Nearly three-quarters of respondents reported that they had represented at least one client who was convicted despite credible claims of innocence, with many reporting that they have personally seen probable wrongful convictions occur on a regular basis. Moreover, counsel described a system designed to elicit a guilty plea, with lengthy pre-trial delays, routine denial of bail, and inadequate funding of Legal Aid. This research expands our knowledge of wrongful convictions in Canada, their hidden prevalence, and systemic problems that increase the likelihood of their occurrence

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I Introduction and Literature Review

The Canadian criminal justice system is constructed around a sacrosanct assurance that those guilty of an offence will receive punishment for their crimes while the innocent will remain free from the pains of imprisonment.² This sentiment, originally proposed in Blackstone's celebrated maxim,³ is enshrined as the presumption of innocence guaranteed by subsection 11(d) of the *Canadian Charter of Rights and Freedoms*.⁴ Despite these assertions, we must consider the possibility of imperfection in any large social institution. Certainly, it is likely that true culprits go free, their guilt not established beyond the high threshold of reasonable doubt. Far more disconcerting is the possibility that the innocent become ensnared in the machinery of the law, convicted and imprisoned for another's crime or for a crime that did not occur at all.

An existing academic literature has attempted to explore the frequency of such wrongful convictions and their concomitant causal factors, with much of this knowledge coming from sensational and well-publicized cases, typically involving highly violent (but statistically rare) crimes such as aggravated sexual assault and murder.⁵ Less attention has been paid to the frequency

² *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, online: <<https://canlii.ca/t/1ftv6>>; *R v Seaboyer*; *R v Gayme* 1991 CanLII 76 (SCC), [1991] 2 SCR 577, online: <<https://canlii.ca/t/1fskf>>.

³ As in "it is better that ten guilty persons escape than that one innocent person suffers." in William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1765) at 358.

⁴ *Canadian Charter of Rights and Freedoms*, s.2, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11, online: <<https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-40>>.

⁵ Canada, Lamer Commission of Inquiry, *Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (2006), online: <<https://www.justice.gov.nl.ca/just/publications/lamerreport.pdf>>; Canada, Royal Commission on the Donald Marshall Jr Prosecution, *Commissioner's Report* (Halifax, NS: Queen's Printer, 1989), online: <<https://archives.novascotia.ca/marshall/report>>.

of wrongful convictions from less serious offences or those obtained through a plea bargain.⁶ Such estimates are extremely difficult to obtain. Given that most criminal convictions in Canada and the United States are the result of a guilty plea,⁷ it is unknown how many of these pleas may have resulted in a wrongful conviction. By pleading guilty, it becomes difficult to prove innocence *ex post facto*.⁸

Standing between the state and the accused is the defence lawyer, often the only person protecting the rights and interests of those accused of crimes. Defence counsel may be best positioned to know whether clients have been charged and convicted despite credible claims of innocence, and how often this might occur on a more day-to-day basis. The goal of the present research was to solicit the unique perspectives of Canadian defence counsel regarding their experiences representing clients with credible claims of innocence. Despite the critical role played by defence lawyers, little is known about their personal experiences with the innocent and the factors that counsel believe increase the risk of a wrongful conviction.

A. Empirically Based Estimates of Wrongful Convictions

Early discussions on wrongful convictions addressed whether they occurred at all, historically believed to be rare or improbable events.⁹ As early as 1912, the American Prison Congress Review concluded that there were no cases of innocent execution in America following a methodologically flawed survey of prison wardens across the country.¹⁰ In 1923, Justice Learned Hand described the possibility of an innocent man's conviction as a spectre and "an unreal dream."¹¹ These early attitudes were eventually challenged as indisputable stories of wrongful convictions emerged. For example, Edwin Borchard¹² identified 65 American and British cases wherein the crime for which the accused was convicted never occurred, the true culprit was later identified, or new evidence emerged to exonerate the inmate. Similarly, Edward Radin¹³ identified another 80 cases of wrongful conviction, and Adam Bedau and Michael Radelet¹⁴ assessed 350 convicted persons between 1900 and 1986 who were determined to be innocent, 139 of whom had been sentenced to death. Some were exonerated only hours or days before their scheduled execution.

⁶ See Allison D Redlich, Miko M Wilford & Shawn Bushway, "Understanding Guilty Pleas Through the Lens of Social Science" (2017) 4 Psychol Pub Pol'y & L 458, online: <<https://psycnet.apa.org/doi/10.1037/law0000142>>; Miko M Wilford & Allison D Redlich, "Deciphering the Guilty Plea: Where Research Can Inform Policy" (2018) 24 Psychol Pub Pol'y & L 145, online: <<http://dx.doi.org/10.1037/law0000169>>.

⁷ Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1 [Sherrin].

⁸ Sherrin, *ibid*; see also Kate Wynbrandt, "From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions" (2016) 126 Yale LJ 545, online: <<http://digitalcommons.law.yale.edu/ylj/vol126/iss2/6>> [Wynbrandt].

⁹ Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Injustice* (Garden City, NY: Doubleday, 1932) [Borchard]; Michael L Radelet & Hugo Adam Bedau, "The Execution of the Innocent" (1998) 61:4 LCP 105, online: <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1108&context=lcp>> [Radelet]; Robert J Ramsey & James Frank, "Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors" (2007) 53 J Res Crime & Delinq 436, online: <<https://doi.org/10.1177/0011128706286554>> [Ramsey].

¹⁰ Robert H Gault, "Find No Unjust Hangings" (1912) 3 J Crim Law 131.

¹¹ *United States v Garrison*, [1923] 291 F 646 at 649.

¹² Borchard, *supra* note 9.

¹³ Edward D Radin, *The Innocents* (New York, NY: William Morrow, 1964).

¹⁴ Radelet, *supra* note 9.

In a perfect world, we would be able to separate the guilty from the innocent with precision. However, we know that factually innocent people have been tried, convicted, and sentenced for crimes they did not commit. We must thus acknowledge that wrongful convictions occur, but how often? Unfortunately, this is a profoundly difficult question to answer. If we could easily detect when wrongful convictions occurred, presumably they would not have occurred in the first place. We simply do not have a litmus test by which to identify a wrongful conviction. Despite these challenges, some American scholars have attempted to produce estimates based on data collected from known exonerations. These estimates include 2.3% for death row cases,¹⁵ 2% to 5% for rape and murder cases,¹⁶ 3% to 5% for capital rape-murder cases,¹⁷ and 7% for death penalty cases.¹⁸ Similarly, James Liebman and colleagues¹⁹ determined that appellate courts detected serious and reversible errors in nearly 70% of capital cases reviewed between 1973 and 1995. Using survival analysis, Samuel Gross and colleagues estimated that 4% of defendants sentenced to death between 1973 and 2004 would have been exonerated if their sentence had not been commuted to life.²⁰ The authors offered this figure as a conservative estimate of the false conviction rate for death sentences in the United States.²¹ In addition, a forensic review was undertaken of 714 sexual assault convictions in Virginia in the 1970s and 1980s for which there was physical evidence and viable DNA present. In more than 11% of these convictions, the DNA of the man convicted did not match the DNA recovered from the victim.²²

B. A Focus on Severe Offences

Our knowledge of exonerations is largely based on convictions for rape and/or murder, relatively rare offences within criminal law. Far less is known about possible wrongful convictions associated with less serious offences. For instance, 95% of known DNA exonerations occurred in murder or rape cases, although these cases represent only 2% of convictions in the United States²³

¹⁵ Samuel R Gross & Barbara O'Brien, "Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases" (2008) 5 JELS 927, online: <<https://doi.org/10.1111/j.1740-1461.2008.00146.x>> [Gross 1].

¹⁶ Samuel R Gross, "Convicting the Innocent" (2008) 4 Annu Rev Law Soc Sci 173, online: <<https://doi.org/10.1146/annurev.lawsocsci.4.110707.172300>> [Gross 2].

¹⁷ Michael D Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate" (2007) 97 J Crim L & Criminology 761, online: <<http://www.jstor.org/stable/40042842>> [Risinger].

¹⁸ James S Liebman, James S, Jeffrey Fagan & Valerie West, "A Broken System: Error Rates in Capital Cases, 1973-1995" (2000) 15 Public Law & Legal Theory Working Paper Group, online: <<https://dx.doi.org/10.2139/ssrn.232712>>.

¹⁹ *Ibid*.

²⁰ Samuel R Gross, Barbara O'Brien, Chen Hu & Edward H Kennedy, "Rate of False Conviction of Criminal Defendants Who are Sentenced to Death" (2014) 111:20 PNAS 7230, online: <<https://doi.org/10.1073/pnas.1306417111>> [Gross 3]. The authors note that the death sentence is associated with the highest exoneration rate (12%) compared to other offences, likely due to the extremely high stakes for the accused. As many death sentences are commuted to a life sentence upon appeal or upon state legislation abolishing the death penalty, the author employed survival analysis to estimate how many of those commuted sentences would have resulted in an exoneration if still subject to the death penalty.

²¹ *Ibid* at 7230.

²² Kelly Walsh, Jeanette Hussemann, Abigail Flynn, Jennifer Yahner & Laura Golian, "Estimating the Prevalence of Wrongful Convictions" (2017) The Urban Institute Technical Report, online: <<https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>> [Walsh].

²³ Gross 1, *supra* note 15.

and Canada.²⁴ Similarly, Gross and colleagues²⁵ report that 96% of exonerations between 1989 and 2003 involved convictions for murder and/or rape; the remaining four percent involved other violent offences such as kidnapping or assault. This finding is of interest, as only approximately 10% of prisoners in the United States are incarcerated for rape or murder, whereas the majority are incarcerated for property, drug, or public disorder offences.²⁶ Very little is known about how often innocent persons are convicted or falsely plead guilty to these less severe offences.

One reason that known exonerations have been identified primarily in the most serious of offences pertains to the significant amount of time, emotional energy, and cost involved in pursuing an exoneration. The average length of time required to obtain an exoneration is more than a decade,²⁷ far beyond the length of most sentences. A person who is wrongfully convicted of a less serious offence may be unwilling or simply unable to pursue an exoneration. Moreover, in less serious offences such as theft or drug possession, there is unlikely to be any DNA evidence available to exculpate the defendant. These less serious crimes are nonetheless susceptible to eyewitness errors, police tunnel vision, and other factors known to contribute to miscarriages of justice.²⁸ Gross and colleagues note that the vast majority of innocent defendants go undetected, a figure that is “not merely unknown but unknowable.”²⁹ The purpose of the present research was to find alternative ways to explore wrongful convictions in Canada, both in terms of frequency and nature, by exploring the experiences of defence counsel.

C. Known Causes of Wrongful Convictions

To understand the occurrence of wrongful convictions, it is first necessary to discuss the factors that are frequently associated with their occurrence. We note that much has been written on this topic in great detail elsewhere, so the present discussion provides only a brief overview of some of the factors commonly identified as contributing to wrongful convictions. Prominent among these are eyewitness misidentifications, which are particularly common among sexual assault and child sexual abuse cases.³⁰ A number of elements can contribute to eyewitness errors, including suggestive police questioning, problematic lineup procedures, and poor interview techniques.³¹ The National Registry of Exonerations notes that perjured or false testimony is also

²⁴ Ashley Maxwell, “Adult Criminal Court Statistics, 2014/2015” (2015) Juristat catalogue No 85-002-X ISSN 1209-6393, online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/161031/dq161031e-eng.htm>>.

²⁵ Stephen R Gross, Kristen Jacoby, Daniel J Matheson, Nicholas Montgomery & Sujata Patil, “Exonerations in the United States 1989 through 2003” (2005) 95 J Crim L & Criminology 523, online: <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7186&context=jclc>> [Gross 4].

²⁶ *Ibid.*

²⁷ Walsh, *supra* note 22.

²⁸ Gross 4, *supra* note 25.

²⁹ Gross 3, *supra* note 20 at 7230.

³⁰ National Registry of Exonerations (2019), online: <<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>>. Reviewing more than 250 exonerations made through the Innocence Project, Garrett (2011) determined that 76% could be attributed to mistaken identification: Brandon L Garrett, *Convicting the Innocent: When Criminal Prosecutions Go Wrong* (Cambridge, MA: Harvard University Press, 2011). Similarly, Gross *et al* observed that 66% of the exonerations under study between 1989 and 2003 involved at least one eyewitness misidentification: Gross 4, *supra* note 25.

³¹ *Ibid.*

a common factor in documented wrongful convictions.³² The power of forensic science before a jury is considerable, as many jurors perceive evidence such as fingerprints or hair samples as unambiguous and infallible.³³ There are, however, concerns about more interpretive forms of forensic science, such as hair/fiber evidence and bite mark analysis, as well as errors such as inadvertently switched samples, clerical errors, or contamination of samples.³⁴

Noble cause corruption may occur where the adversarial system becomes psychologically transformed into a win-lose game mentality for police and prosecutors, wherein the ends (i.e., a conviction) justify the means (i.e., misconduct).³⁵ It may be characterized by the police withholding or suppressing evidence that would enable a full and proper defence, such as confirmed alibis, exculpatory evidence, or the existence of other suspects.³⁶ Standing against the prosecution and police are defence lawyers, the vast majority of whom provide competent and professional representation.³⁷ Many defendants are indigent or impecunious, relying on self-representation or public defenders,³⁸ with substantially less funding attributed to Legal Aid than to Crown prosecutors, the scales may seem heavily tipped against the accused.³⁹

Despite the almost universal belief that no one would confess to a crime they did not commit, a consistent minority of exonerations have involved a false confession.⁴⁰ False confessions have been a regular contributory factor in wrongful convictions. The most common causes of false confessions include coercive interrogation techniques used by police⁴¹ and

³² Of the more than 2,500 exonerations in the Registry, approximately 58% involved some form of false accusation or perjured testimony, compared to 28% that involved an honest but mistaken eyewitness identification.

³³ William C Thompson, “Forensic DNA Evidence: The Myth of Infallibility” in Sheldon Krinsky and Jeremy Gruber (eds) *Genetic Explanations: Sense and Nonsense* HUP, online: <<https://escholarship.org/uc/item/41j6x7v6>>.

³⁴ Brandon L Garrett, “Judging innocence” (2008) 108 Colum L Rev 55, online: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6558&context=faculty_scholarship>; Gerald LaPorte, “Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science” (2018) 279 NIJ Journal 1, online: <<https://www.ncjrs.gov/pdffiles1/nij/250705.pdf>>; Joelle Vuille & Christophe Champod, “Forensic Science and Wrongful Convictions” in Quentin Rossy, David Decary-Hetu, Olivier Delemont & Massimiliano Mulone (eds), *The Routledge International Handbook of Forensic Intelligence and Criminology* (London: Routledge, 2017).

³⁵ Bruce Macfarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 Man LJ 403, online: <<http://netk.net.au/Canada/MacFarlane.pdf>> [Macfarlane].

³⁶ Michael Caldero & JP Crank (eds), *Police Ethics: The Corruption of Noble Cause* (New York, NY: Elsevier, 2011); Jonathon A Cooper, “Noble Cause Corruption as a Consequence of Role Conflict in the Police Organisation” (2012) 22 Polic Soc 169, online: <<https://doi.org/10.1080/10439463.2011.605132>>; John Crank, Dan Flaherty & Andrew Giacomazzi, “The Noble Cause: An Empirical Assessment” (2007) 35 JCJ 103, online: <<https://doi.org/10.1016/j.jcrimjus.2006.11.019>>; Kim Loyens, “Rule Bending by Morally Disengaged Detectives: An Ethnographic Study” (2013) 15 Police Pract Res 62, online: <<https://doi.org/10.1080/15614263.2013.770941>>.

³⁷ Jerome P Kennedy, “Writing the Wrongs: The Role of Defence Counsel in Wrongful Convictions” (2006) 46 Can J Crim 197, online: <<https://doi.org/10.3138/cjccj.46.2.197>>.

³⁸ Sherrin, *supra* note 7.

³⁹ *Ibid*; Ronald F Wright, “Parity of Resources for Defence Counsel and the Reach of Public Choice Theory” (2004) 219 Iowa L Rev 219, online: <<https://www.uclalawreview.org/pdf/58-6-5.pdf>>.

⁴⁰ Professor Saul M Kassir, Sara C Appleby & Jennifer Torkildson Perillo, “Interviewing Suspects: Practice, Science, and Future Directions” (2011) 15 Legal Criminol Psychol 39, online: <<https://doi.org/10.1348/135532509X449361>> [Kassir 1]; Saul M Kassir & Gisli H Gudjonsson, “The Psychology of Confessions: A Review of Literature and Issues” (2004) 5 Psychol Sci Public Interest 33, online: <<https://doi.org/10.1111%2Fj.1529-1006.2004.00016.x>> [Kassir 2].

⁴¹ Kassir and Gudjonsson identified a number of these problematic techniques, which may include questioning the suspect for long periods of time, withholding food or water, denial of bathroom facilities, refusing access to counsel, harsh interrogation style, presentation of false evidence, and promises of leniency: Kassir 2, *ibid*.

defendant vulnerabilities such as intellectual impairment, youth or intoxication.⁴² Many wrongful convictions may be associated with a false guilty plea, in which an innocent person may elect to plead guilty in exchange for a lesser sentence than they may face at trial.⁴³ One factor contributing to the propensity of false guilty pleas is the plea bargain process itself, wherein a defendant facing a lengthy incarceration may be offered a lenient sentence or even a guarantee of no jail time for entering a guilty plea.⁴⁴ Little empirical research has explored the estimated prevalence of false guilty pleas, or the prevalence of these contributing factors.

D. Practitioner Estimates of Frequency and Causes of Wrongful Convictions

Only a handful of studies have explored the attitudes and experiences of criminal justice professionals regarding the prevalence of, and factors contributing to, wrongful convictions. An early attempt at estimation was conducted by Ronald Huff, Arye Rattner, and Edward Sagarin⁴⁵ who surveyed U.S. criminal justice actors in Ohio. Participants were asked to estimate the frequency of wrongful convictions and to rank order four causes of wrongful convictions by frequency. More than 5% of the sample believed that wrongful convictions never occur and 72% believed it happened less than 1% of the time. Eyewitness errors were identified as the most common cause, followed by police error, prosecutorial error, and finally judicial error. Ramsey and Frank⁴⁶ replicated and extended Huff *et al*'s research, surveying criminal justice professionals in Ohio, where sixty percent of defence counsel believed wrongful felony convictions occurred between 1-10% of all cases and in more than 20% of felony cases. Respondents also rated the frequency with which four types of professional errors occurred, including those attributable to police, prosecutors, defence counsel, and judges. Defence errors were rated to be the most common form of professional error, even as reported by defence lawyers themselves. Marvin Zalman, Brad Smith, and Angie Kiger⁴⁷ surveyed Michigan criminal justice professionals, finding that defence lawyers believed that wrongful convictions occur quite frequently, with 84% selecting a frequency estimate between 4% and 25% of all cases. Relying on the same sample, Marvin Smith, Brad Zalman and Angie Kiger⁴⁸ focused on perceived frequencies of professional and witness errors, with defence errors again perceived to be the most common form of error. Nearly all defence lawyers surveyed believed that wrongful convictions were frequent enough to require changes to

⁴² Hugo A Bedau & Michael L Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 Stan L Rev 21-179, online: <<https://doi.org/10.2307/1228828>>; Steven A Drizin & Richard A Leo, "The Problem of False Confessions in a Post-DNA World" (2004) 82:3 North Carolina L Rev 891, online: <<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://scholar.google.ca/&httpsredir=1&article=4085&context=nclr>>; MacFarlane, *supra* note 35; Gross *et al* commented: "False confessions don't come cheap. They are usually the product of long, intensive interrogations that eventually frighten or break the will of a suspect to the point where he will admit to a terrible crime that he did not commit. Some of these interrogations stretch over days and involve relays of police interrogators." Gross 4, *supra* note 28 at 545.

⁴³ Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56 Crim LQ 116 [Brockman].

⁴⁴ Added to these considerations are financial constraints and the prohibitive cost of maintaining your innocence to trial: Sherrin, *supra* note 7.

⁴⁵ Ronald Huff, Arye Rattner & Edward Sagarin, "Guilty until Proved Innocent: Wrongful Conviction and Public Policy" (1986) 32 Crime Delinq 518, online: <<https://doi.org/10.1177%2F0011128786032004007>>.

⁴⁶ Ramsey, *supra* note 9.

⁴⁷ Marvin Zalman, Brad Smith & Angie Kiger, "Officials' Estimates of the Incidences of "Actual Innocence" Convictions" (2008) 25 Justice Q 72, online: <<https://doi.org/10.1080/07418820801954563>> [Zalman].

⁴⁸ Brad Smith, Marvin Zalman & Angie Kiger, "How justice system officials view wrongful convictions" (2011) 57 Crime Delinq 663, online: <<https://doi.org/10.1177%2F0011128709335020>> [Smith].

the criminal justice system.

Despite the accumulating evidence that factually innocent persons have been sent to prison and in some cases to their death, many state actors incredibly deny its occurrence. Justice Antonin Scalia of the United States Supreme Court opined in 2006 that the American system had an “error rate of 0.027% - or to put it another way, a success rate of 99.973%.”⁴⁹ Morris Hoffman, a district court judge in Colorado, criticized what he called the “myth” of wrongful convictions.⁵⁰ He argued that occurrences of factually innocent defendants being convicted are exceedingly rare and disagreed with the implication that there is a problem inherent in the criminal justice system. He claimed to be at odds with “the Chicken Littles of Innocence” who overestimate the prevalence of wrongful convictions.⁵¹ Oregon District Attorney Joshua Marquis shared these sentiments, invoking comments made by Justice Jed Rackoff that cases of true exonerations of factually innocent persons may be in the range of 25 to 30 persons in all of American history.⁵² It is hard to reconcile such incredibly low estimates with the fact that hundreds of people have been exonerated by DNA evidence alone since the mid-1980s.

Currently, there are few estimates regarding Canadian legal professionals, although Anthony Doob⁵³ provides a rare exception. Canadian defence lawyers ($n = 219$) were asked to report whether they believed that they had represented a client who was factually innocent, but who lost a contested trial and was sentenced to at least one year in prison. Nearly half of respondents believed that they had personally experienced at least one wrongful conviction in their career, most occurring in cases of homicide, sexual assault, or robbery. Approximately 70% of respondents identified at least one police factor (e.g., pressuring witnesses, perjury, mishandled evidence), and more than 40% identified at least one Crown factor (e.g., inadequate disclosure, pressuring witnesses, inflammatory opening/closing remarks) as contributing to a wrongful conviction. Eighty percent also believed at least one judicial factor had been at work (e.g., prejudice against the accused, error in law, errors in jury instruction), and more than 40% believed that defence errors were at fault (e.g., inexperience, lack of preparation). Nearly 25 years have passed since this single study provided a Canadian perspective in an already rare research area.

II Present Research

The present research provides an estimate of the scope and prevalence of wrongful convictions in Canada from the perspective of defence counsel. We chose to focus on defence counsel in particular as they have the best awareness of a defendant’s claims of innocence, a party to the privileged solicitor-client communications with the accused. Defence lawyers also have unique insight into how frequently an innocent accused person might decide to enter a false guilty plea and the factors associated with this decision. As noted above, it is essentially impossible to

⁴⁹ *Kansas v Marsh*, 2006, 548 U.S. 163, at 188.

⁵⁰ Morris Hoffman, “The Myth of Factual Innocence” (2007) 82:2 Chi-Kent L Rev 663, online: <https://scholarship.kentlaw.iit.edu/cklawreview/vol82/iss2/10>.

⁵¹ *Ibid* at 664.

⁵² Joshua Marquis, “The Myth of Innocence” (2005) 95:2 J Crim L & Criminology 501, online: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7185&context=jclc>.

⁵³ Anthony Doob, “An Examination of the Views of Defence Counsel of Wrongful Convictions” (1997) Centre of Criminology, University of Toronto [Doob].

obtain exact figures on the actual prevalence of wrongful convictions, and thus practitioner insight is necessary to understand the potential scope of the problem. Although we do have some estimates derived largely from sexual assault and murder cases,⁵⁴ little is known about wrongful convictions for less serious offences (i.e., the vast majority of cases). To our knowledge there is no known research assessing professionals' perception of the prevalence of false guilty pleas in Canada, which have been identified by some as a potential epidemic in the justice system.⁵⁵ Given the scarcity of data on false guilty pleas, the present study explored whether they are perceived as a common phenomenon among defence lawyers, and the possible factors predictive of their occurrence.

A. Participants

Data were solicited from criminal defence lawyers working within the province of Ontario. We enlisted the assistance of the Canadian Criminal Defence Lawyers Association (CDLA) to distribute the survey to all Ontario members of the organization. This was done on three occasions across an 18-month period (Nov 2016, Jan 2017, and Jul 2018). An unknown percentage of the individuals affiliated with the CDLA were outside of our target sample, as this group included articling students, paralegals, clerks, professors, and non-practicing lawyers. Only responses from practicing lawyers were collected and analyzed. In total, 158 defence lawyers responded to the survey, with 121 giving complete responses. The sample had a mean age of 40.32 years ($SD = 11.80$), comprised of 67 men, 52 women, and 2 preferring not to answer. The majority of the sample identified as White ($n = 93$), with the remainder identifying with a variety of ethnic identities, including East Asian ($n = 4$), South/West Asian ($n = 3$), Black ($n = 2$), and mixed or other ethnicity ($n = 9$). The majority of the sample worked in large municipal settings, with two-thirds working in cities with 1 million or more persons ($n = 78$), fourteen percent in cities of 500,000 to 1 million residents ($n = 17$), and the remainder in smaller cities or towns ($n = 26$). Respondents had an average of 11.59 years of experience as defence counsel ($SD = 11.33$), ranging from 0.5 to 45 years.

B. Materials and Procedure

After providing informed consent, participants completed all study materials in an online format through the Qualtrics survey platform. Several study items were adapted from earlier studies addressing professionals' estimates of wrongful convictions, including Robert Ramsey and James Frank,⁵⁶ Brad Smith *et al.*,⁵⁷ and Marvin Zalman *et al.*,⁵⁸ and were modified for application in a Canadian context. Importantly, we made the novel addition of exploring counsel experiences with and estimates of false guilty pleas, which are understudied in Canada. We also solicited feedback from defence counsel regarding their recommendations for reform to the Canadian justice system, based on their personal experiences representing whom they thought were innocent clients. Participants were first presented with the following definition of a wrongful conviction:

⁵⁴ Gross 1, *supra* note 15; Gross 4, *supra* note 25; Risinger, *supra* note 17.

⁵⁵ Sherrin, *supra* note 7.

⁵⁶ Ramsey, *supra* note 9.

⁵⁷ Smith, *supra* note 48.

⁵⁸ Zalman, *supra* note 47.

We are considering cases in which a person was convicted and sentenced when they did not in fact commit the crime. This may include persons who pled guilty or falsely confessed, as long as they did not actually commit the crime for which they were charged. This definition excludes any cases in which the defendant may have been legally innocent (e.g., acting in self-defence, suffering from mental illness), which is a more ambiguous category.

Following the response format of Robert Ramsey and James Frank and Marvin Zalman *et al*, respondents were asked to estimate the frequency of wrongful convictions in Canada, with a series of response options between 0% and 25% or more. Using the same frequency metric, participants indicated how often they believe innocent clients falsely plead guilty. Participants were asked whether they had ever personally been involved in a conviction that involved a defendant with credible claims of innocence (Yes/No), and if yes, how often this occurred (open-ended). Participants also reported on the frequency of various professional errors and to what extent they believed these errors contribute to wrongful convictions and false guilty pleas.

Finally, participants were asked whether they believed wrongful convictions occurred frequently enough to warrant changes to the criminal justice system and were invited to provide their recommendations for changes to the criminal justice system. The open-ended recommendations for reform were explored thematically for frequent concepts and commonly identified problems. Upon completion of all materials, participants were debriefed and thanked.

III Results

The results are presented below descriptively, with comments and insight from counsel included to provide additional context and perspective on each issue.

A. Prevalence Estimates of Wrongful Convictions

The estimated prevalence of wrongful convictions in Canada is presented in Figure 1. No participant selected the 0.0% frequency option, indicating that all defence counsel in our sample believed wrongful convictions occur at least some of the time. Rather, the majority of participants endorsed prevalence estimates at much higher frequencies. The modal response for wrongful convictions was 6% to 10% of all cases, although a large proportion of the sample selected prevalence rates at the higher end of the scale, with approximately 15% of the sample estimating that wrongful convictions occur in more than 20% of criminal cases.

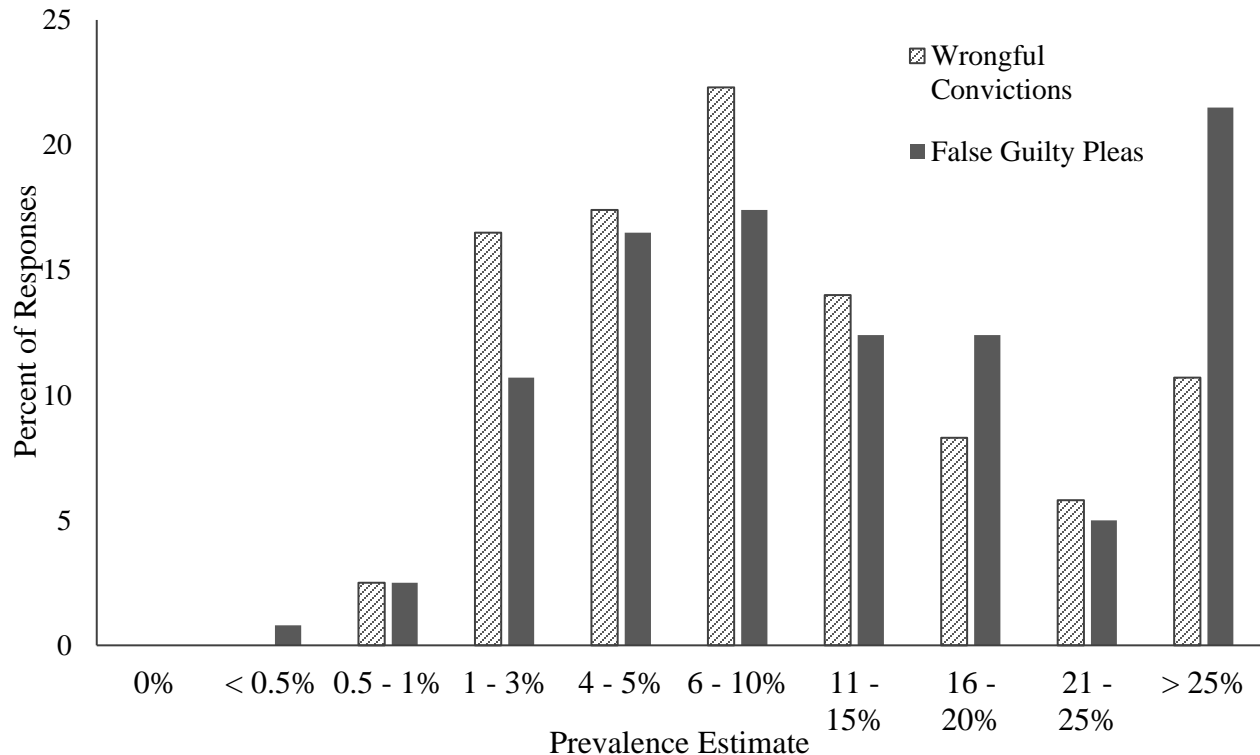
Seventy-two percent of our sample reported that they had personally been involved in a conviction that they strongly believed involved an innocent client. In an open-ended format, many reported that they occurred “frequently,” “regularly”, “dozens of times”, were “relatively common,” and that there were “100s of suspected cases over the years.” One lawyer tragically recalled an innocent client who spent 12 years in jail for a murder he did not commit, and another reported a decade-old case that “still haunts me.” There were some qualifications as well regarding severity of the offence. As one lawyer explained, “In serious murder cases, about 6 times. In less serious matters, especially when it comes to credibility-based verdicts, about 10-15%.” These

experiences are not merely a function of having worked many years in defence. One respondent reported two cases while articling, and a newly called lawyer reported two cases despite having worked only five months. Another reported having five innocent clients convicted in their two years of defence work, and yet another suspected three clients of innocence in their three years.

B. Prevalence Estimates of False Guilty Pleas

Similar trends were observed with the estimated rate of false guilty pleas (see Figure 1). Again, no participant selected the 0.0% frequency. The most commonly selected rate was 25% or higher of all guilty pleas, with more than 20% of the sample selecting this highest prevalence estimate. Another 25% of the sample selected a false guilty rate of either 11-15% or 16 - 20% of all cases. These rates suggest that defence counsel believe they are encountering false guilty pleas on a regular and frequent basis. Some defence counsel reported that they had intentionally declined to represent innocent clients because they refused to knowingly commit a fraud against the court by admitting a false guilty plea. For example, one duty counsel lawyer reported “I would estimate that on an average day I decline to assist one to two clients on the grounds that they are not guilty of their charges. They proceed self-represented.” Similarly, another lawyer explained that they had encountered credibly innocent clients “quite often because clients want to get out of jail. I can't assist them ethically of course, but they proceed self rep and plead.” Another explained the ethical challenges of representing an innocent client who wants to enter a false guilty plea, noting that this occurs “...frequently. I tell them I can't assist with the plea, but I assist with sentencing.” In this way, we see that defence counsel may be reporting an unacceptably high frequency of wrongful convictions, many driven by a high prevalence of false guilty pleas. One lawyer explained the difficulty with traditional definitions of wrongful convictions as occurring at trial, noting that “...anecdotally, it appears that the vast majority occur at the guilty plea stage, before a trial date is even scheduled.” This reflects the concerns expressed in the scholarship that our current forensic estimates, based largely on known exonerations after contested trials, may largely underestimate the scope of the problem.

Figure 1: Counsel Estimates of the Frequency of Wrongful Convictions and False Guilty Pleas in Canada



C. Frequency of Various Errors and Contributory Causes

Frequency estimates are first presented in a descriptive manner, exploring general patterns in responses, followed by comparisons of means and inferential statistical analyses. Participants were presented with a series of professional errors and other factors that have been found to contribute to wrongful convictions and asked to estimate how frequently each occurred based on their own experiences. Recall that ratings were made on a 9-point scale, ranging from 1 (*Never*) to 9 (*Always*). Please see Table 1 for complete means and standard deviations of these measures. The highest prevalence rates were given to good faith eyewitness misidentifications, good faith forensic expert errors, and a variety of police errors such as overstating/bluffing about the strength of the evidence against the defendant, laying additional charges in order to leave room for bargaining, and failing to properly investigate a case due to tunnel vision.

The frequency estimates of prosecutorial errors were rated around the midpoint of the scale, including the use of undue pressure during plea bargaining, inadequate investigation, and prompting witnesses. Rated as far less common were practices such as bad faith eyewitness misidentification, bad faith forensic expert errors, police suppression of evidence, and the prosecution knowingly using false testimony. Judicial errors were also around the midpoint of the scale, showing that judges were believed to make errors on occasion regarding the admissibility of physical evidence, eyewitness evidence, and expert testimony. Defence lawyers believed that judges made errors resulting from pro-prosecution bias much more often than errors resulting from pro-defence bias, $t(117) = 14.17, p = .001$.

D. Factors Contributing to Wrongful Convictions

To get a rough comparison of defence attorneys' differential frequency estimates of errors as a function of profession, composite scores were computed by summing and averaging the frequency responses for each profession. We calculated a mean frequency for police errors ($\alpha = .77$), prosecutorial errors ($\alpha = .73$), defence errors ($\alpha = .84$), and forensic expert errors (combining good faith errors and errors due to incompetence; $\alpha = .77$). Eyewitness errors included those made in good faith and those made intentionally in bad faith; these were not combined as they were only moderately correlated ($r(119) = .30$) and were thus analyzed separately. Similarly, forensic errors made in bad faith were analyzed separately from the composite measure of good faith/incompetent forensic experts.

A repeated measures analysis of variance revealed that the estimated frequency of errors varied by error source, $F(5.28, 581.22) = 118.37$, $p = .001$, $\eta_p^2 = .518$ (Greenhouse Geisser corrections were used due to a significant Mauchly's test for sphericity). Good faith eyewitness errors were deemed to occur the most frequent of all sources measured ($M = 6.30$, $SD = 1.33$), followed by police errors ($M = 5.96$, $SD = 0.97$), defence errors ($M = 5.07$, $SD = 1.19$), prosecutorial errors ($M = 4.83$, $SD = 1.02$), good faith/incompetent forensic expert errors ($M = 4.79$, $SD = 1.39$), judicial errors ($M = 4.61$, $SD = 0.95$), bad faith eyewitness errors ($M = 3.71$, $SD = 1.35$), and bad faith forensic expert errors ($M = 3.24$, $SD = 1.52$).⁵⁹

⁵⁹ All means differed from each other significantly (all p 's $< .01$) with several exceptions: prosecutorial errors and good faith forensic expert errors received similar ratings ($p = .94$), good faith forensic errors were rated as marginally more frequent than judicial errors ($p = .077$), and defence errors were rated as marginally more frequent than prosecutorial errors ($p = .052$).

Table 1: Mean Frequency Estimates for Different Forms of Professional and Forensic Errors

	M	SD
Eyewitness Errors		
Misidentification in good faith	6.30	1.33
Intentional misidentification (bad faith)	3.71	1.35
Forensic Expert Errors		
Intentionally misrepresented evidence (bad faith)	3.24	1.52
Mean good faith/incompetent forensic expert errors	4.79	1.39
Misrepresented evidence in good faith	5.04	1.55
Misrepresented evidence due to incompetence	4.54	1.62
Police Errors		
Mean police errors	5.96	0.97
Overstating/bluffing about evidence during interrogation	7.53	1.35
Laying additional charges in order to leave room for bargaining	7.29	1.48
Failing to properly investigate a case due to tunnel vision	6.32	1.50
Conducting inadequate investigations	6.11	1.49
Using extreme pressure to obtain a confession	5.84	1.92
Laying charges prematurely due to departmental pressure	5.52	1.74
Coaching witnesses in pretrial identification procedures	5.23	1.73
Charging the wrong suspect due to good faith investigation errors	4.98	1.34
Suppressing exculpatory evidence	4.81	1.96
Prosecutorial Errors		
Mean prosecutorial errors	4.83	1.02
Using extreme plea-bargaining pressure	5.81	1.94
Inadequate investigation of case by the prosecutor	5.73	1.80
Prompting witnesses	5.56	1.51
Errors concerning the admissibility of expert testimony	5.07	1.47
Prosecuting the wrong person as the result of good faith errors	5.05	1.45
Suppressing exculpatory evidence	3.59	1.77
Knowingly using false testimony	2.93	1.52
Judicial Errors		
Mean judicial errors	4.61	0.95
Errors resulting from judicial bias in favour of the prosecution	5.72	1.56
Errors concerning the admissibility of expert testimony	5.12	1.43
Errors concerning the admissibility of eyewitness testimony	4.65	1.74
Errors concerning the admissibility of physical evidence	4.59	1.47
Errors resulting from judicial bias in favour of the defence	2.98	1.26
Defence Errors		
Mean defence errors	5.07	1.19
Failing to adequately challenge forensic evidence	5.53	1.48
Inadequate investigation	5.27	1.49
Making unwarranted plea-bargain concessions	4.96	1.59
Failing to file proper motions	4.96	1.44
Failing to adequately challenge witnesses	4.88	1.52
Encouraging innocent suspect to plead guilty to avoid trial or prison	4.81	1.97

E. Lawyer Insight and Experiences with Contributory Factors

Counsel took the opportunity to provide open-ended feedback and insight into the causes of wrongful convictions, based on their personal and professional experiences. A common theme emerging from counsel's open-ended responses was the issue of lengthy pre-trial detention, routine denial of bail, padded charges, and prohibitive costs of mounting a legal defence. Altogether, these factors make plea bargains particularly enticing even for the innocent client. For example, one lawyer explained that "many times, clients who are factually innocent plead guilty to offences simply to get out of custody after being denied bail." Given that pre-trial custody can often take a year or longer, many innocent persons elect to plead guilty just to go home. As one lawyer succinctly explained:

A fundamental problem is the process costs of being caught in the criminal justice system. If you don't make bail on a relatively minor offence and you have a record, then oftentimes the time you'd spend in custody awaiting trial is longer than the time the prosecution is seeking on sentence. It's patently irrational in those circumstances to expect an innocent person to wait for trial.

One lawyer further explained that this, coupled with restrictions on access to Legal Aid, make the plea bargain process heavily persuasive. They explain:

Pre-Trial detention is a major contributor to entice defendants to enter plea bargains. Changes to Legal Aid Ontario and its concerted effort to restrict defendants from getting a Legal Aid Certificate is resulting in an increasing amount of plea bargaining.

Other comments focused on police tactics that pressure an accused person into feeling they have no choice but to accept a plea bargain, even if innocent. As one lawyer outlined, a common and problematic practice involves the police laying additional charges against the accused to allow room to bargain downward. They explain:

Police shotgunning is an issue - they lay 100 charges knowing the accused will plead guilty to only one of them. If defence lawyers were funded, we could run proper trials and defeat all 100 sometimes, but no one can afford to pay a lawyer to run a trial that long, so defendants are forced to take a plea deal.

Counsel also pointed to strategies employed by Crown prosecutors as leading to false guilty pleas. One lawyer noted that "there is a real problem with prosecutors using the threat of the mandatory minimum sentences to coerce the accused to pass up their trial and plead guilty to a lesser offence and to receive a lighter sentence."

These comments and accounts reflect a systemic problem in the Canadian criminal justice system that prioritizes guilty pleas without adequate or accessible safeguards for innocent clients. Denial of bail even on minor or routine charges keeps potentially innocent persons in jail pending resolution of their case. When faced with multiple, often unrealistic charges laid by police, an offer to remove those charges in exchange for a lighter sentence, and the financial inability to retain legal defence, there may be little meaningful option for the innocent accused.

F. Reform Recommendations

Approximately two-thirds of respondents in this study ($n = 78$, 64.5%) suggested recommendations for criminal justice reform that they believed might reduce the likelihood of wrongful convictions. Many respondents discussed the issue of false guilty pleas specifically (29.5%), and the requirement that a guilty plea be accompanied by an admission of all facts and charges. Presently in Canada, there is no option to enter a guilty plea while maintaining one's innocence, such as the Alford plea (available in many American states) or a plea of no contest.⁶⁰ The requirement that the accused admit guilt to all charges when entering this plea creates several problematic consequences for defence counsel. For instance, a defence lawyer who knows that their client is innocent must recuse themselves from representing that client at the plea stage. As officers of the court, defence counsel are not permitted to knowingly mislead the courts. As one lawyer explained:

Oftentimes accused persons want the benefit of the plea but are adamant they did not commit the offence. In cases such as these, ethical considerations force me to fire that client (as I cannot knowingly assist a client in misleading the Court). Most often, these same clients retain other counsel to enter their plea of guilty, but this time elect to tell them only what they need to know.

Reform to the bail system was identified by one quarter of participants (25.6%). Many recounted examples of bail being denied for minor offences or cases with weak evidence of guilt. Coupled with this regular denial of bail was the problem of lengthy pre-trial custody, which was identified by 15% of respondents as a specific area in need of reform.

Roughly one-quarter (24.4%) recommended expanding eligibility and increased funding for Legal Aid. Many expressed frustration at the inability to properly explore and examine a case, conduct interviews, hire experts, research case law and prepare pleadings. They noted that the Crown, in opposition, does not face the same financial constraints or burdens, stacking the deck strongly in favour of the prosecution. One lawyer explained the difficulty this way:

Defence counsel have their hands tied by Legal Aid tariff of hours to expend on a case, so they cannot do proper jobs. As such, accused innocent people are Underrepresented - they appear to have lawyers but the representation is woeful...If Legal Aid pays 10 - 12 hours of prep for a case, how can defence have a lengthy interview with client and LISTEN to all his rambling (some of which is very important), plus go through all the evidence with a

⁶⁰ In the United States, defendants are allowed to enter an *Alford* plea, in which they enter a plea of guilty but maintain that they are innocent of the crime (see *Brockman*, *supra* note 43; *North Carolina v Alford*, [1970] 400 US 25). The defendant does not admit any guilt for the action but believes that the state has enough evidence against him/her to convict. The logic and desirability of such a plea is beyond the scope of this discussion, other than to note that there is no corresponding plea in Canadian law. Rather, within Canada, s 606(1.1) of the *Canadian Criminal Code* seems to prevent a defendant to plead guilty if they are innocent. That provision states:

606 (1.1) A court may accept a plea of guilty only if it is satisfied that the accused

- (a) is making the plea voluntarily; and
- (b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

fine-tooth comb to get the gems that will exonerate the client?!

The use of padded and unwarranted charges (9.0%) was described as a form of “extortion,” to force the accused to plead down to a lesser charge. Others suggested that there be disincentives for the state to use such pressure tactics, perhaps creating punishments and accountability for prosecutors who abusively pad charges and use pressure tactics to coerce a false guilty plea.

A number of lawyers (15.4%) called for meaningful consequences for police and witnesses who knowingly lie on the stand, and the development of an arms-length investigatory body to handle such complaints. For example, one lawyer explained:

When police give misleading evidence there should be reports sent to the respective police tribunals for Disciplinary action that is meaningful to prevent recurrence. False evidence even by a police officer should be subject to criminal charges because they have violated both their oath as an officer as well as their testimonial oath.

Another argued that “we must remove all immunity afforded to police/crown in order to make the playing field less uneven.” Presently, there is little if any consequence where police engage in misconduct, padded charges, or coercive interrogation techniques.

Some recommendations focused more on the law itself, with 16.7% identifying a specific change to the law. There were calls to eliminate the Reid Technique of interrogation, which has been associated with eliciting known false confessions but remains standard police procedure in Canada.⁶¹ An overturning of *R v Oickle*⁶² was also invoked, referring to a Supreme Court of Canada ruling that upheld the police’s authority to engage in deceptive practices to elicit a confession. Pursuant to *Oickle*, police may misrepresent the nature of evidence against the accused and overstate the accuracy and strength of that evidence. Such dishonesty may mislead an innocent accused into thinking their case is hopeless, persuading them to take a plea deal they would never contemplate if provided with accurate evidence. Finally, some respondents expressed frustration with the use of mandatory minimums, which they believed were used strategically to ensure a guilty plea.

IV General Discussion

The present research provides a rare exploration into Canadian defence counsel’s personal experiences with wrongful convictions. Although much is known from an academic perspective, the voices of frontline workers have rarely been heard. In both the present research and prior American studies,⁶³ the majority of defence lawyers believe that wrongful convictions occur between 1 – 10% of the time, with roughly ten percent of the sample estimating that they occur in 20% or more of cases. We make the novel introduction of estimating false guilty pleas, with nearly half of defence lawyers in our sample estimating they occur in 4-15% of all guilty pleas and nearly

⁶¹ Timothy E Moore & C Lindsay Fitzsimmons, “Justice Imperiled: False Confessions and the Reid Technique” (2011) 57 Crim LQ 509 [Moore].

⁶² *R v Oickle*, 2000 SCC 38 (CanLII), [2000] 2 SCR 3, online: <<https://canlii.ca/t/525h>> [Oickle].

⁶³ Ramsey, *supra* note 9; Smith, *supra* note 48; Zalman, *supra* note 47.

40% believing they occur even more frequently. These figures, even if reduced by half, are staggering and suggest a criminal justice system in crisis.

Anthony Doob⁶⁴ found that just under half of his sample of Canadian defence lawyers reported having first-hand experiences with a wrongful conviction, compared to 72% of the present sample. This discrepancy may be related to Doob's more restricted analysis, soliciting experiences with contested trials resulting in a sentence of one year or more. The present study imposed no such limitation, allowing lawyers to also discuss any experiences in which an innocent person pled guilty to avoid a trial or was convicted of less serious offences. Although it is difficult to draw firm conclusions from studies conducted more than twenty years apart, these results do suggest that wrongful convictions are occurring in a wide range of offences and with greater frequency than indicated in earlier forensic estimates. It appears that, from a defence lawyer's perspective, many of the factors known to contribute to wrongful convictions are indeed prevalent in Ontario, with the most common being good faith misidentifications by eyewitnesses, police/prosecutorial tunnel vision, and inadequate investigation of the case. Several other concerning items were rated as occurring with high frequency by participants, including police overcharging defendants, bluffing about the evidence against the accused, and using extreme pressure during plea bargaining.

There was discrepancy between the present data and the American data with regard to estimates of the frequency of defence errors. In the work of Robert Ramsey and James Frank,⁶⁵ Marvin Zalman *et al.*,⁶⁶ as well as Brad Smith *et al.*,⁶⁷ American defence lawyers estimated that defence errors were the most frequent form of professional error. This was not the case in the present study, in which defence errors tended to attract midpoint ratings of frequency, but police errors and good faith eyewitness errors received the highest frequency ratings. Interestingly, Doob⁶⁸ similarly found that Canadian defence lawyers did not rate defence errors as the most frequent form of professional error. The reasons that the Canadian and American data may diverge on this issue is unclear and warrants further investigation.

A. Recommendations for Reform

Defence counsel responses indicate that the day to day operations of the justice system create an ideal environment for eliciting guilty pleas, false or otherwise. These conditions involve denial of bail even for weak cases or minor charges, extreme pre-trial delays served in custody, police who misrepresent evidence and the likelihood of not succeeding at trial, padded charges with mandatory minimum sentences, very restrictive access to Legal Aid, and insufficiently funded Legal Aid certificates. Increased provision of bail and reduction in pre-trial custody were the most commonly identified areas in need of immediate improvement. This issue was considered recently by the Supreme Court of Canada in *R v Antic*⁶⁹ where Justice Wagner issued several directives to bail courts. Unconditional release on bail is now to be the default position of a bail court; anything more restrictive must be explained and failure to do so would amount to an appealable error of

⁶⁴ Doob, *supra* note 53.

⁶⁵ Ramsey, *supra* note 9.

⁶⁶ Zalman, *supra* note 47.

⁶⁷ Smith, *supra* note 48.

⁶⁸ Doob, *supra* note 53.

⁶⁹ *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, online: <<https://canlii.ca/t/h41w4>>.

law. Similarly, lengthy pre-trial delays were addressed by the Supreme Court of Canada recently in *R v Jordan*,⁷⁰ where the court placed an upper limit of 30 months for Superior Court trials and 18 months for provincial court trials. Provided the delays were not caused by the defence, any delay exceeding these limits is presumptively unreasonable and in violation of the accused's right to be tried within a reasonable time. It remains unclear whether these rulings have had a meaningful impact on the daily administration of justice.

Only those who are severely impecunious qualify for Legal Aid assistance, leaving a very large portion of the middle class unable to afford legal representation at all (or without serious hardship). For example, under the current Legal Aid guidelines,⁷¹ a single person without children will not be eligible for Legal Aid assistance if his/her gross annual income is more than \$14,453. Income between this amount and \$16,728 may qualify the accused for a repayment plan, but anything above this will render the accused ineligible for assistance. A 2015 survey of Ontario lawyers indicated that the cost of a one-day criminal trial averaged \$8,000, with the upper range as high as \$50,000.⁷² Costs will vary depending on the complexity of the case and the expertise and seniority of counsel, with a seven-day contested trial ranging from an average of \$81,000 to a higher end of several hundred thousand dollars.⁷³ Appeals from trial decisions are additional to these expenses. One can imagine the financial hardship a full trial might impose on a person earning \$17,000 per year (or even \$60,000 per year), for whom a fully defended trial may be far out of reach.

The use of false evidence during the interrogation phase, sometimes termed a false evidence ploy,⁷⁴ is a problematic but legal tactic available to police. Following the Supreme Court of Canada's 2000 ruling in *Oickle*,⁷⁵ police retain wide latitude in the conduct of an investigation or interrogation. This includes presenting the accused with false evidence and exaggerating the reliability or accuracy of evidence. The use of misleading or fabricated evidence has been widely criticized by scholars as substantially increasing the possibility of a false confession or a false guilty plea.⁷⁶ The Reid Technique, considered the gold standard for police interrogation methods,⁷⁷ mandates similarly problematic tactics that increase the possibility of a false confession or plea. This technique allows for the use of false evidence, describing it as "clearly the most persuasive tactic within the area of deception,"⁷⁸ while simultaneously promising that it will not lead to a false admission of guilt. These assertions are in direct contradiction to well-established psychological research, which has found time and again that people do make false confessions and that false

⁷⁰ *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, online: <<https://canlii.ca/t/gsds3>>.

⁷¹ Online: <http://legalaids.on.ca/en/getting/eligibility.asp>.

⁷² Michael McKiernan, "The Going Rate" (2015) *Canadian Lawyer*, online: <https://www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>.

⁷³ *Ibid*.

⁷⁴ Richard Ofshe & Richard Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 *Denver L Rev* 979 [Ofshe].

⁷⁵ *Oickle*, *supra* note 62.

⁷⁶ See Ofshe, *supra* note 74 and Wynbrandt, *supra* note 8 for excellent reviews of the use of false evidence ploys in false confessions and false guilty pleas.

⁷⁷ Fred E Inbau, John E Reid, Joseph P Buckley & Brian C Jayne, *Criminal Interrogation and Confessions*, 4th ed (Gaithersburg, MD: Aspen, 2001). The Reid Technique has been widely criticized by the psycho-legal community. See Moore, *supra* note 61 for an excellent overview of the risks associated with this technique.

⁷⁸ *Ibid* at 255.

evidence is a strong contributor to this outcome.⁷⁹ Due to the demonstrated risk of false confessions and false guilty pleas, a profound curtailment or abolition of such practices may be long overdue.

B. Research Limitations and Future Directions

As with all research, this study was not without limitations, many of which pertain to the difficulty of recruiting professional participants. Our present focus was on the experiences of defence counsel, although other members of the legal profession likely have insight and experiences with wrongful convictions. There were considerable constraints on accessibility of Crown counsel, police, and judges as well as institutional barriers to accessing these members. As our key interest focused on the experiences of advocates of the accused, we elected to focus our attention and resources on this group. In addition, the voluntary nature of participation in this study may have resulted in a selection bias, such that lawyers who experienced wrongful convictions or who had strong views about the subject might have been more likely to take part in the survey. Even if a selection bias is at work, the responses from this subset of lawyers alone reflect an unacceptably high number of wrongful convictions in Ontario. Relatedly, we note that the overall response rate was relatively low for this study. Given the importance of this research topic and the difficulty in recruiting participation, we have compiled the largest sample of defence lawyers possible. The prevalence estimates are not intended to provide objective or precise estimates of the occurrence of wrongful convictions. Rather, we were interested in the subjective experiences of defence counsel who have engaged with clients they believe to be innocent of the offence for which they were convicted, including their beliefs about ways to improve the legal system to avoid similar experiences.

Due to the survey nature of this study, we were not able to probe for more information or to allow participants to expand or clarify their responses. Future research may benefit from in-person interviews or small focus-group studies, where participants can discuss the subject at length, highlighting the issues they perceive to be most important. We designed many of our closed-ended measures to reflect the items employed in previous research⁸⁰ to allow for comparison of results across years and jurisdictions. Some scholars have raised concerns about this methodological approach to estimating prevalence. Gross and O'Brian described the process of surveying legal professionals as "collective guesswork"⁸¹ unlikely to produce a verifiable count of exonerations. We note that the objective of this study was not to quantify prevalence rates with precision but to assess the more qualitative experiences of defence counsel and their experiences representing clients with credible claims of innocence. We were particularly interested in the recommendations for reform based on these experiences, and the value of the insight provided outweighs concerns of sampling bias and overall response rates.

C. Concluding Remarks

The present research provides insight into Ontario defence lawyers' experiences and perceptions of wrongful convictions. It appears that the face of wrongful convictions may be changing. Past discussions of wrongful convictions summoned images of innocent men

⁷⁹ *Kassin 1 & 2, supra* note 40.

⁸⁰ *Ramsey, supra* note 9; *Zalman, supra* note 47; *Smith, supra* note 48.

⁸¹ *Gross 1, supra* note 15 at 929-930.

languishing for decades in prison for a murder they did not commit. Although these miscarriages of justice remain true, there may be a silent epidemic of wrongful convictions for lesser offences: innocence that was not asserted through a full trial but waived in an interrogation room or lawyers' chambers. What emerges from this study of defence counsel is a system in need of reform. All respondents expressed beliefs that wrongful convictions and false guilty pleas occur in the criminal justice system, with most believing they occur quite regularly. Counsel pointed to a number of common factors contributing to this outcome, which largely involve systemic issues and good faith errors. Rather than malicious and bad faith practices, it seemed that counsel experiences involved a criminal justice system stacked against defendants in general, innocent or otherwise. These results suggest that wrongful convictions are an ongoing problem in Canada and will remain so unless significant efforts at reform are made.