Miscarriages of Justice: Limits to Reparation

The harmful consequences of miscarriages of justice and the pressures on prisoners maintaining innocence to admit their guilt

Dr Michael Naughton
Innocence Network UK (INUK)
University of Bristol

MISCARRIAGES OF JUSTICE ORGANISATION

CMAC Building, 34 Albion Street, Glasgow, G1 1LH
t: 0141 552 5460 f: 0141 552 5460 / 01902 710348
e: mojoscotland@mac.com mojonational@aol.com

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How big is the 'iceberg'? a zemiological approach to quantifying miscarriages of justice

Michael Naughton

Introduction

Previous critical researches into miscarriages of justice in England and Wales' Criminal Justice System (CJS) have not generally addressed the question of the likely scale of the miscarriage phenomenon in any systematic way. Rather, they have generally been directed towards individual *exceptional* miscarriage cases, brought about through extra-judicial procedures, that have exemplified particular 'errors' or 'fallibility' in the CJS's legislative framework. Despite this, many critical analyses of miscarriages have routinely speculated upon the possible scale of England and Wales' miscarriage phenomenon by asserting that the exceptional miscarriage being 'exposed' is the 'tip' of some much greater 'iceberg'. But, just how big the iceberg might be has hardly received any critical attention at all.

In this context, this essay draws from zemiology the holistic study of the social, psychological, physical and financial harmful consequences of social phenomena. It argues that by focussing upon exceptional cases, those cases of criminal conviction that are routinely quashed by the Court of Appeal (Criminal Division) (CACD), or more mundanely quashed by the Crown Court from the magistrates' court have received no attention at all. As a result, the likely scale of England and Wales' miscarriage phenomenon that can be inferred from the official statistics, the size of the official iceberg, has been overlooked. In consequence, an extensive range of harmful consequences that also accompany *routine* and *mundane* miscarriages have also been neglected. In conclusion, it is noted that there are a number of legitimate structural rules, procedures and practices that can cause miscarriages that might never be acknowledged in the official statistics of successful appeal against criminal conviction. When these are also considered, the true number of miscarriages of justice may be higher than portrayed in the official statistics, as may the harmful consequences.

To this end, the essay is structured into three parts. Firstly, England and Wales' appellate structure is briefly outlined. Secondly, the Lord Chancellors Department's (LCD) official statistics of successful appeals against criminal conviction are analysed and three categories of miscarriage discerned the *exceptional*, the *routine* and the *mundane*. Finally, the third part discusses the zemiological approach to social phenomenon and the significance of incorporating even the most apparently routine and mundane of quashed criminal convictions within the critical miscarriage rubric.

The appellate structure

Within England and Wales' CJS there are a number of appellate opportunities available to those who receive criminal convictions. In order of ascending judicial superiority:

- the Crown Court deals mainly with appeals by persons convicted in magistrates' courts against their conviction or sentence or both;
- the Court of Appeal (Criminal Division) (CACD) hears appeals in criminal matters from the Crown Court;
- an appeal can be made to the House of Lords where it has been certified by the CACD that a point of law of general public importance was involved in a decision;
- the Attorney General has the power to refer what are thought to be unduly lenient sentences for offences triable on indictment to the Court of Appeal;
- the Criminal Cases Review Commission (CCRC) can refer cases that have already been through the appeals system and have not succeeded for any reason back to the appropriate appeal court' (Chapman and Niven, 2000, pp. 42-43); and,
- when all domestic appellate attempts have been exhausted, criminal appeal cases can also be taken to the European Court of Human Rights at Strasbourg (see European Court of Human Rights website: http://www.echr.coe.int/).

In terms of official miscarriage statistics, the LCD collects statistics from each of these appeal courts in terms of applications for leave to appeal and their success. Taken together, these statistics would provide a picture of the scale of England and Wales' miscarriage iceberg that can be inferred from the official statistics.

Exceptional miscarriages

Although the LCD publishes official statistics of *all* the criminal convictions that are successfully quashed upon appeal in the various appeal courts, current official definitions, public perceptions and critical miscarriage discourse have been almost entirely focussed upon the cases of *Stephen Downing* (see Vasagar, 2000; Vasagar, 2000b; Vasagar and Ward, 2001); *Derek Bentley* (see Campbell, 1998; Birnberg, 1998; Oliver, 2002); *Mahmood Mattan* (see Lee, 1998; Wilson, 2001), *John Kamara* (see Quinn, 1999; Carter and Bowers, 2000; Gillan, 2001), the *M25 Three* (see Hardy, 2000; Bird, 2000; Times Law Report, 2000), the *Cardiff Three* (see Carroll, 1998; Lewis, 1999); and so on. All of these were exceptional cases of successful appeal against criminal conviction that were referred back to the CACD by the CCRC having previously failed through routine appeal procedures.

Table 1 represents the number of criminal convictions that were quashed by the CACD as a result of being referred back to the CACD by the CCRC since it started handling casework in March 1997. In the year 1998, for example, there were 7 cases that were successfully quashed in the CACD after referral by the CCRC. This compares with a total of 341,000 criminal convictions from the Crown and magistrates courts in the same year, 1998 (Home Office, 2000). Thus, depicting only the minutest of icecubes.

Table 1: Criminal Cases Review Commission: Successful quashed convictions after referral back to CACD*

Year	1997**	1998	1999	2000	2001***	Total	Average per year
Number of quashed convictions	0	7	10	10	9	36	7

Source: Criminal Cases Review Commission, 2001. * The methodology upon which this analysis is based differs from the CCRC's own analysis in that it only includes those criminal convictions that were successfully quashed after referral back to the CACD that involved no further action. That is, this analysis does not include

those 'quashed' convictions that were included by the CCRC that resulted in an altered charge or sentence. Nor does it include those 'quashed' convictions that the CACD referred for retrial. ** Figures for the year 1997 are from 31 March when the CCRC started handling casework. *** Figures for the year 2001 are up to and including to October.

This is not to suggest that the trend to focus upon exceptional cases is entirely misguided. To be sure, accompanying this trend is an important 'tradition of CJS reform' (Naughton, 2001, pp. 50-52) whereby the Government has introduced corrective legislation in an attempt to resolve the public crises of confidence that were induced by the high profile that these cases attain. For example, the Court of Appeal (Criminal Division) (CACD) has its roots in the Government's legislative response to the public pressures that were exerted by the *Beck* case, which exemplified the urgent need for a court of criminal appeal (Report of the Committee of Inquiry into the Beck Case, 1904; Pattenden, 1996); capital punishment was abolished in the Government's legislative response to the public crisis of confidence in criminal justice that was engendered by the cases of *Bentley*, *Evans-Christie* and *Ellis*, which together exemplified the question of the justness and/or appropriateness of the continuance of capital punishment (see Block & Hostettler, 1997; Christoph, 1962); the Police and Criminal Evidence Act (1984) (PACE) (see Fisher, 1977; Police and Criminal Evidence Act, 1985) which imposed guidelines on police conduct were a consequence of the pressures brought about by the *Confait Affair* which exemplified the consequences of procedural disregard (see Price & Caplan 1976; Price, 1985); and, the establishment of the Criminal Cases Review Commission (CCRC) was a direct consequence of the cases of the *Guildford Four* and the *Birmingham Six* which exemplified the need for an independent body for the investigation of suspected or alleged miscarriages once existing domestic appeal processes had been exhausted (Royal Commission on Criminal Justice, 1993).

In this context, analyses of exceptional miscarriages are important as they often exemplify problems in the CJS's legislative framework in need of corrective reform. But, they represent only a minute part of England and Wales' miscarriage phenomenon. And, they, therefore, capture only a minute part of the harmful consequences that miscarriages of justice engender.

Routine miscarriages

A major limitation of concentrating on exceptional miscarriage cases that are brought to light via the extra-judicial procedures of the CCRC, is that all manner of *routine* miscarriages have been neglected. For, in addition to the *exceptional* miscarriages there are also all those criminal convictions that are obtained in the Crown Court that are routinely successful in appeal to the CACD on a daily basis. Indeed, if 'miscarriages' are also considered to be those criminal convictions that are routinely quashed upon appeal by the CACD, then they can, perhaps, be said to be far more widespread than is commonly first thought. Table 2 shows that in the decade 1989-1999, for example, the CACD abated a yearly average of 770 criminal convictions over 8,470 in total.

Click HERE for Table 2: Court of Appeal (Criminal Division): Successful appeals against criminal conviction 1989-99 (inclusive)

Source: Lord Chancellor's Department (1999) *Judicial Statistics Annual Report* London: HMSO Cm 4786; Lord Chancellor's Department (1998) *Judicial Statistics Annual Report* London: HMSO Cm 4371.

To put this figure into context, as well as to give some indication of the split between the *routine* and *exceptional* miscarriages contained in the official miscarriage statistics, it is worth comparing the CCRC's reported case statistics in a little more detail. If the 36 cases that were successfully quashed upon being referred back to the CACD by the CCRC since 1997 are compared against all the official CACD statistics, then in the year 1997 alone, 832 appeals against criminal conviction were successful in being quashed through routine appeal procedures. But, by incorporating routine miscarriages within critical analyses, the official scale of England and Wales' miscarriage phenomenon increases from an annual average of 7 cases to an annual average of around 770 cases, and the miscarriage iceberg as it is conventionally perceived and understood is increased a hundred fold.

Mundane miscarriages

In addition to successful appeals in the CACD from the CCRC and the Crown Court, criminal convictions obtained in the magistrates' court can be appealed in the Crown Court. When the criminal convictions from the magistrates' court that are quashed upon appeal to the

Crown Court are also taken into account conceptions of England and Wales' official miscarriage phenomenon are even further extended.

For example, Table 3 shows an annual average of 3,546 quashed convictions at the Crown Court for criminal convictions that were given by the magistrates' courts between 1998-2000 (inclusive). If this average is added to the CACD annual average then an official picture of England and Wales' miscarriage phenomenon, the official miscarriage iceberg, is multiplied to an annual average of 4,316 cases.

Table 3: Crown Court: Successful appeals against criminal conviction in the magistrates' court 1998-2000 (inclusive)

Year	1998	1999	2000	Total	Average
	3,980	3,575	3,090	10,645	3,546

Source: Lord Chancellor's Department (2000) *Judicial Statistics Annual Report* London: HMSO Cm 5223; Lord Chancellor's Department (1999) *Judicial Statistics Annual Report* London: HMSO Cm 4786; Lord Chancellor's Department (1998) *Judicial Statistics Annual Report* London: HMSO Cm 4371.

Zemiology

But, are these routine and mundane successful appeals against criminal convictions really miscarriages? Or, are they, as advocates and defenders of the system contend, a manifestation of the safeguards that are contained within the CJS, functioning in the interests of the protection of the criminal suspect population (see, for example, Pattenden, 1996, pp. 57-58). Of course, in a sense the criminal convictions that are routinely quashed by the CACD and mundanely quashed by the Crown Court *are* a sign of 'the carriage of justice' and that people who are wrongly convicted in England and Wales *do* have rights of legal redress. But, safeguards are supposed to exist only for use in extreme circumstances and only then are they supposed to be used in the last resort. By concentrating the critical miscarriage agenda only upon exceptional cases, the safeguard argument is sustained. But, by widening the critical miscarriage gaze to incorporate *routine* and *mundane* miscarriages any notion of the right to appeal as a last resort appellate safeguard collapses. By so doing, safeguards can themselves be conceived as merely routine and

mundane legal procedures that do not stand up to critical scrutiny (c.f. McBarnet, 1981, pp. 11-25).

Another angle on miscarriages that comprehensively calls into question the notion of safeguards and points towards the critical necessity of including *routine* and *mundane* miscarriages within the rubric of England and Wales' miscarriage iceberg is the zemiological perspective. In essence, zemiology takes a more holistic approach to the study of the consequential harm(s) of socio-legal phenomena - social, psychological, physical and financial - that have profound impacts and effects. It is then well placed to determine whether the law is in need of review and/or re-constitution (Gordon et al, 1999; Hillyard and Tombs, 2001).

Elsewhere, these ideas have been applied and the harmful social, psychological physical and financial consequences of miscarriages of England and Wales' CJS have been briefly outlined, and the financial consequences of the likely penal costs of containing the wrongfully convicted more fully developed (Naughton, 2001, pp. 56-61). What have previously received less attention are the crucial zemiological questions of the potential scale of England and Wales' miscarriage phenomenon and the forms of harm that both accompany, and are associated with, routine and mundane successful appeals against criminal conviction. Indeed, from a zemiological perspective the distinction between exceptional, routine and/or mundane miscarriages is not so straightforward. Even the most apparently routine and mundane wrongful criminal convictions also involve an extensive range of zemiological harms, and not always to a lesser degree.

For example, in June 1998, 58 motorists won a joint action against Greater Manchester Police after being wrongly convicted of drink-driving offences. It transpired that a kit that was being used to determine blood alcohol levels contained a fault that actually introduced alcohol into the suspect's sample and gave a positive reading even if the suspect had not been drinking. The zemiological costs attached to this case were as substantial as in many exceptional cases. Some of those concerned served prison sentences, some lost their businesses, several suffered mental breakdowns, and some even tried to take their own lives (see Ford, 1998).

Conclusion