

# DESPISED OUTSIDERS

## COMPENSATION FOR WRONGFUL CONVICTIONS

By Tom Percy QC

Is there any avenue to compensation for wrongful imprisonment following a successful appeal or pardon?

**E**ach year in every Australian state or territory a number of convicted persons have their convictions quashed following successful appeals, or are otherwise exonerated. Very few are compensated in any way for the undeniable losses – social, financial and psychological – incurred by their wrongful imprisonment.

How do you repay someone for these losses, when the justice system has let them down? Over the past two decades, a number of successful appeals or pardons in high-profile cases have raised the question of what compensation the victim of a wrongful conviction should be entitled to.

### EX-GRATIA PAYMENTS

The tort of wrongful imprisonment has long been held not to apply where a wrongful conviction has occurred in the normal course of a judicial conviction.<sup>1</sup>

Aggrieved successful appellants usually seek an *ex-gratia* payment from the state. Such a payment is, by its nature, not one to which such an applicant has a legal right; it depends entirely on the benevolence of the government of the day.

Unlike a case for damages for personal injuries in an accident, there is no statutory or common law entitlement to damages for wrongful conviction. Nor is there any right of appeal where such a payment is declined.

Celebrated cases such as that of Lindy Chamberlain<sup>2</sup> have seen *ex-gratia* payment made by governments, although the size of these payments appears to be somewhat arbitrary. There are so few cases where payments of this nature have been made, that it is not possible to define any tariff or range of damages.

In 1990, Chamberlain was granted an *ex-gratia* payment of approximately \$2 million (\$1.3 million for wrongful imprisonment, \$395,000 for legal costs and \$19,000 for her dismembered Torana) for the two years she spent in prison after being wrongly convicted of murdering her infant child in 1980. The basis of the calculation of the wrongful imprisonment figure was never made public.

The absence of any right of appeal in respect of an *ex-gratia* payment deprives us of any judicial guidelines about the entitlement to and the appropriate levels for such payments, or the criteria that are to be applied. The payments that have been made public (with the notable exception of Chamberlain) appear, however, to be very modest indeed.

### SOME GET LUCKY

In 1978, South Australian man Edward Splatt was charged and convicted of the murder of a 77-year-old Adelaide woman who had been badly beaten, sexually assaulted and strangled in her bedroom. The identification of the accused was based on scientific evidence, with no eye witnesses to the crime. After several appeals and lobbying, the government agreed to a Royal Commission. Mr Splatt's conviction was subsequently overturned in 1984. He was paid \$300,000 *ex-gratia* compensation for his wrongful conviction.

In 1979, Tim Anderson, Ross Dunn and Paul Alister of NSW were convicted of conspiring to murder Robert Cameron, the then leader of the National Front. They were sentenced to 16 years in prison. After serving seven years of their sentence, they were given an unconditional pardon and, two years later in 1987, they were each awarded \$100,000 *ex-gratia* compensation.

Another wrongfully convicted man, Douglas Harry Rendell, also of NSW, was awarded in 1992 an *ex-gratia* payment of \$100,000 to assist in his rehabilitation back into society. He was convicted in 1980 for the murder of his de facto wife, and served eight years in prison before being pardoned in 1989.

In 2003, Perth man John Button was cleared of a 1963 killing on the basis of fresh evidence, after serving five years in prison.<sup>3</sup> He received an *ex-gratia* payment of \$400,000. While the basis of the calculation is not known and will probably remain a cabinet secret, Button did instruct counsel to advise on quantum, and that opinion was given to the government in support of the *ex-gratia* application.

In 2005, Darryl Beamish, another Perth man, who spent 15 years in prison for a murder he did not commit was – like Button – cleared on the basis of fresh evidence.<sup>4</sup> Following on from Button, one might have expected a payment in the area of \$1 million or more. Beamish, however, chose to put the matter behind him and did not seek any compensation.

In 2006, yet another Perth man, Andrew Mallard, was unconditionally cleared of a murder, again on the grounds of fresh evidence. He served 12 years for a crime that the authorities now appear to unreservedly accept he did not commit. Mallard's application for an *ex-gratia* payment is currently under consideration, but in early 2007 the Western Australian government broke new ground in allowing him an interim *ex-gratia* payment of \$200,000. Watch this space.

**SOME ARE UNLUCKY**

While a small number of acquitted persons are successful in obtaining an *ex-gratia* payment, the vast majority are not so lucky.

The appellant in *Ibbs v The Queen*<sup>5</sup> was ultimately acquitted after the complainants subsequently admitted having lied to have him falsely convicted of a 1986 rape. Despite a long fight to be compensated for his imprisonment, the applicant has to date been entirely unsuccessful.

The appellants in *Easterday v The Queen*<sup>6</sup> were cleared in 2004 of a fraud allegation that saw them spend 11 months in jail and lose all their assets. They are still pursuing their claim, so far unsuccessfully.

**AN ALTERNATE ROUTE?**

As an alternative to *ex-gratia* payments, a person might be able to sue for misfeasance in public office or malicious prosecution. If successful, this may result in some form of compensation. Such cases are rare and enormously difficult to bring from an evidentiary point of view. The sinister intent of a public officer is not usually something put on the record in the relevant file. However, recent successful examples do exist. These include *Noye v Robbins*; *Noye v Crimmins*<sup>7</sup> and *A v The State of New South Wales*.<sup>8</sup>

**THE FUTURE**

Who is likely to succeed in obtaining an *ex-gratia* payment? It certainly seems to help if your case has been a high-profile one. It also seems to occur more often in cases where the acquittal was on the merits (usually as a result of fresh

evidence) rather than on technical grounds. Other than that, there appear to be few guidelines.

While the assessment of any *ex-gratia* payment is currently made in secret, there is much to commend an assessment of compensation along the lines of an assessment of damages in a civil court. Factors to be taken into account should include loss of earnings and future earning capacity; psychiatric and psychological damage; special damages; and legal costs.

Perhaps the time has come to introduce a statutory right to compensation for wrongful convictions, as well as a statutory authority to assess such claims. Given, however, that in almost every Australian state persons acquitted at trial or subsequently on appeal are currently not even paid their costs, any such scheme looks to be a very long way off. ■

**Notes:** 1 See *Leake v Sutherland* (1868) 2 SALR 158; *Brown v Chapman* (1848) 6 CB 365. 2 *Chamberlain v The Queen* (No. 2) (1984) 153 CLR 521). 3 *Button v The Queen* (2002) 25 WAR 382. 4 *Beamish v The Queen* [2005] WASCA 62. 5 *Ibbs v The Queen* (2001) 122 A Crim R 377. 6 *Easterday v The Queen* (2003) 143 A Crim R 154. 7 *Noye v Crimmins* [2007] WASC 98. 8 *A v The State of New South Wales* [2007] HCA 10.

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