

COSTS AND COMPENSATION FOR THE INNOCENT ACCUSED

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This article examines the possibility that innocent accused might be compensated for the expense of defending themselves through cost awards or other payments. It reviews traditional and contemporary approaches, and challenges current Canadian thought on the subject on the basis that it does not address adequately the problem, and that it compromises unacceptably the presumption of innocence. Finally the article considers three leading cases which support the argument.

Dans cet article, l'auteur se demande s'il serait possible de compenser les accusés jugés innocents pour les frais qu'ils ont encourus pour leur défense en leur accordant le remboursement de leurs dépenses ou autre paiement. Il passe en revue les règles traditionnelles et contemporaines en la matière et suggère que la pensée actuelle sur ce sujet au Canada ne résout pas le problème de façon adéquate et qu'elle est en désaccord flagrant avec la présomption d'innocence. À l'appui de sa thèse, l'auteur examine trois décisions importantes.

Introduction

The recent and highly publicized cases of Donald Marshall,¹ Susan Nelles,² and Thomas Sophonow³ have in common the fact that the accused have sought financial compensation as a result of criminal proceedings against them. That such claims are becoming more prominent if not more common, and are attracting interest from governments and law reform bodies,⁴

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I would like to acknowledge the assistance of the Law Reform Commissions of Canada and Saskatchewan in my early work on this subject. I should add, however, that the opinions expressed here are my own.

¹ *R. v. Marshall* (1983), 57 N.S.R. (2d) 286 (N.S. App. Div.). See also M. Harris, Justice Denied: The Law versus Donald Marshall (1986). See *infra*, Part VI, for discussion.

² *R. v. Nelles*, unreported. See the Report of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters (1984). See *infra*, Part VI, for discussion.

³ *R. v. Sophonow (No. 2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.). See *infra*, Part VI, for discussion.

⁴ In July of 1986 the Government of Manitoba announced that a compensation policy for wrongful conviction had been set; see Manitoba Information Services, Compensation Policy for Wrongful Conviction (1986). And in 1987 the Law Reform Commission of Saskatchewan produced its Report, The Cost of Innocence—Tentative Proposals for Compensation of Accused on Acquittal (1987). The Law Reform Commission of Canada is also studying the question.

are good reasons for us to consider the principles and practices by which they are now determined and to inquire about alternatives. At issue is the position of an accused for whom, at the end of the day, the presumption of innocence has prevailed. There has been a charge and a prosecution but either no conviction or the reversal of one on appeal. The successful accused is free of the sanctions of penal law but walks away with burden enough in the ordeal through which he has passed and in the financial costs of the defence. Are these the accused's losses to bear? Should they be? It is these questions that will be explored in this article.

I. Traditional Approaches

In contemplating the successful accused's burden our tendency has been to emphasize the discharge or acquittal. At law the accused has been vindicated. As for the costs:⁵

... exposure to the risk of prosecution is one of the inevitable hazards of living in society and... there is no reason to shield the citizen against the financial consequences so long as no malice, incompetence or serious neglect can be attributed to the prosecutor.

In addition, and related to the idea of prosecution as a risk of community life, it is the nature of criminal proceedings that in theory they do not admit of winners and losers in the way that civil litigation does.⁶ And the existence of winners and losers is essential to the historical rationale of cost awards as the indemnification by the unsuccessful litigant of his successful opposite.⁷

It is therefore not surprising that we find narrow eligibility for costs in criminal proceedings or restrictive interpretation of provisions amenable to wider meaning. For summary conviction criminal offences a trial court may in its discretion award costs that are reasonable and that are not inconsistent with a very modest schedule,⁸ and an appeal court may make any order with respect to costs that it considers just and reasonable.⁹ In the prosecution of indictable offences there is no general power to award costs at trial,¹⁰ and they are explicitly precluded at the appellate

⁵ This description of the traditional view is found in the Report of Committee on Costs in Criminal Cases (New Zealand, 1968), par. 28, cited in Law Reform Commission of British Columbia, Report on Civil Rights, Part 2, Costs of Accused on Acquittal (1974), p. 28.

⁶ For a discussion of the idea that "the Crown never wins and the Crown never loses", see P. Stenning, *Appearing for the Crown* (1986), pp. 239-242.

⁷ *Ryan v. McGregor*, [1926] 1 D.L.R. 476 (Ont. App. Div.).

⁸ Criminal Code, ss. 744, 772.

⁹ Criminal Code, s. 758.

¹⁰ Exceptionally they may be awarded when an accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment with the result that an adjournment is ordered for the purpose of amendment. And they also may be awarded

level.¹¹ Until recently there was a provision suggesting that costs might be dealt with by rules of court¹² but it was said not to confer the substantive jurisdiction to award them; rather it was confined to regulating them where a substantive right had been otherwise granted.¹³ Finally, there is authority in support of the proposition that the inherent power of superior courts to supervise and control their proceedings includes the power to award costs, but only in exceptional cases "analogous to contempt of court situations" where "necessary to censor the negligence or misconduct of a party".¹⁴

In the provinces, legislation typically makes applicable criminal code summary conviction provisions, including those relating to costs, to the trial of provincial offences.¹⁵ Otherwise, provincial laws have been directed to the recovery, through court costs, of part of the expense of the administration of justice from persons who are *convicted*. Only Quebec appears to extend to judges trying provincial offences a discretion to award costs on acquittal,¹⁶ but this discretion has been narrowly interpreted.¹⁷

to the successful party in proceedings by indictment for the obsolete crime of defamatory libel; Criminal Code, ss. 529(5), 656. See also Law Reform Commission of Canada, Working Paper 35, Defamatory Libel (1984).

¹¹ Criminal Code, s. 610(3).

¹² Section 428(2)(c) of the Criminal Code used to state that the court had the power to regulate the pleading, practice and procedure in criminal matters, including costs. However, the reference to costs was deleted in 1985; S.C. 1985, c. 19, s. 67(3).

¹³ *R. v. Brown Shoe Co. of Canada Ltd. (No. 2)* (1984), 11 C.C.C. (3d) 514 (Ont. H.C.). But see as well *Ruud v. Taylor* (1965), 51 W.W.R. 335 (Sask. Q.B.).

¹⁴ *Attorney-General of Quebec v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.), referred to in *R. v. Brown Shoe Co. of Canada Ltd. (No. 2)*, *supra*, footnote 13, at p. 517.

¹⁵ R.S.A. 1980, c. S-26, s. 4(1); R.S.B.C. 197, c. 305, s. 122; S.M. 1985-86, c. 4, s. 3(1); Stat. Nfld. 1979, c. 35, s. 7(2); S.N.S. 197, c. 18, s. 5; R.S.P.E.I. 1974, s. 4(1); R.S.S. 1978, c. S-63, s. 3(3).

In New Brunswick, although Criminal Code provisions relating to summary conviction offences are incorporated into the Summary Conviction Act, cost provisions are specifically excepted and there are no other provisions as to costs; R.S.N.B. 1973, c. S-15, s. 51(1). Ontario and Quebec have their own summary conviction codes.

¹⁶ Quebec's Summary Convictions Act, R.S.Q. 1977, c. P-15, s. 51, provides as follows:

In every case of a summary conviction, or of an order issued by a justice of the peace, such justice may, in his discretion, order by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable and in conformity with the tariff of fees established by law.

If the justice of the peace, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, order that the prosecutor or complainant shall pay to the accused such costs as to the said justice seem reasonable and consistent with law.

¹⁷ See, for example, *Ministry of Transport of Quebec v. Lavaneur Const. Inc.*, [1969] S.C. 293 (Que. S.C.).

The limited possibilities for the compensation of innocent accused are not exhausted in the law of costs. The prerogative act of making an *ex gratia* payment is one alternative, though because prerogative is "the residue of discretionary or arbitrary authority"¹⁸ which is left to the Crown, it is by nature "uncertain and indefinite"¹⁹ and of little importance in this context. *Ex gratia* payments are usually reserved for the few high publicity cases that threaten embarrassment to government if compensation is not awarded. Another possibility is the tort of malicious prosecution which provides a remedy for wrongful prosecution where the plaintiff can make his case with respect to the very stringent elements of that tort.²⁰ However, the difficulty of doing so, coupled with the doctrine of immunity,²¹ combine to render it "virtually a dead letter"²² in the control of prosecutorial abuse. Finally, there is the potential availability of monetary compensation under section 24(1) of the Charter of Rights and Freedoms.²³ Though it is early to assess the jurisprudential boundaries of this remedy, the threshold requirement that a Charter right be infringed or denied combines with questions about the present jurisdiction of the most important criminal courts to award costs²⁴ to suggest that the Charter will not have significant impact in this area.

This summary illustrates what already is well known—the possibilities of compensating accused for the expenses incurred in successfully defending themselves have been very limited. The explanation, we have seen, is rooted in a concept of criminal proceedings that denies a public concern with defence costs. Indeed, when costs in criminal cases were first made available in England, it was to relieve private *prosecutors* from the expense of seeking justice.²⁵ We in Canada have inherited and perpetuated a legal tradition that has recognized only in recent times that costs might be available to an *accused*, and then only in rare cases.

The persistence of our traditional approach is attributable in part to the advent of legal aid—a development which, we shall see, has some bearing on cost awards, but which must be distinguished from them. "[T]he purpose of legal aid is not to compensate for costs that have

¹⁸ It is so described by A.V. Dicey, *Law of the Constitution* (8th ed., 1915), p. 420, quoted in R. Dawson, *The Government of Canada* (4th ed., 1963), p. 157.

¹⁹ Dawson, *ibid.*, p. 157.

²⁰ They are discussed in J. Fleming, *The Law of Torts* (6th ed., 1983), pp. 576-588.

²¹ See the discussion by Stenning, *op. cit.*, footnote 6, pp. 347-350.

²² *Ibid.*, p. 350.

²³ Constitution Act, 1982, Part I.

²⁴ Over ninety per cent of criminal cases are tried at the provincial court level, and "the jurisdiction of Provincial Courts to award costs is quite limited"; D. Gibson, *The Law of the Charter: General Principles* (1986), p. 215.

²⁵ J. Atrens, P. Burns and J. Taylor, *Criminal Procedure: Canadian Law and Practice* (1983), chapter XX, pp. 12-14.

been incurred but rather to ensure that no one charged with an offence will be denied legal representation."²⁶ Legal aid is intended for persons whose resources are so limited that they might not otherwise have the benefit of legal representation. Cost awards, on the other hand, would compensate successful accused for at least some of the expenses they incurred in defending themselves. The financial burden of a criminal defence can bring as much or more hardship to persons of middle or high income who are ineligible for legal aid as to anyone else. It was this consideration that, in the early years of the Law Reform Commission's criminal procedure project, moved the researchers to offer this caution against viewing legal aid as a substitute for cost awards:²⁷

Not to provide for cost awards on the basis that legal aid services are generally available would discriminate against all persons who would not be entitled to legal aid. Furthermore, it would fail to provide for compensation of the various other actual costs that are frequently incurred in the defence of a criminal prosecution.

Who is to be compensated, and for what losses? These questions serve to distinguish the matter of cost awards from the subject of legal aid. They also point to issues central to our concern: when, if ever, should one who has been charged with an offence be entitled to costs? For what expenses should there be compensation? And who should pay?

II. *Rethinking Traditional Approaches*

We should not assume that the answer to our first question has changed much over the years. The visceral reaction of many to the idea of costs in criminal cases would lead them to argue that it would be seldom that a successful accused should receive costs. Yet most would agree that in at least some cases—such as those of Marshall and Nelles—recompense should be made. And to concede the possibility that even in rare cases costs might be appropriate is to invite reflection upon the basis for their award—an exercise which, we will see, brings into play fundamental questions about the nature of the criminal justice process.

What, then, is a principle on which a rule of costs might be based? In civil proceedings, we might recall, the party and party costs which a successful litigant is entitled to recover from his opposite "are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them".²⁸ Costs are intended as compensation for the plaintiff who comes to court and is successful in enforcing a legal right or for the defendant who successfully resists a claim to one. If this approach were adapted to criminal proceedings the rule would be

²⁶ Law Reform Commission of Canada, *A Proposal For Costs in Criminal Cases*, Study Paper (1973), p. 5.

²⁷ *Ibid.*

²⁸ *Ryan v. McGregor*, *supra*, footnote 7, at p. 477.

that costs would follow the event and either the prosecution or the defence would be entitled to them according to whether the accused was convicted or acquitted. The idea that a parallel can be drawn between civil and criminal cases in this regard has influenced some of the thinking on this subject, but there are considerations unique to criminal prosecutions which suggest that, in general, convicted persons should not be liable to pay costs. First, there is the very practical consideration that costs would be recoverable from few of them. More important is the argument that prosecutions should be conducted at public expense because they are carried on by the Crown in the public interest. There is also the perceived harshness of imposing costs against a convicted accused. The McRuer Commission²⁹ in Ontario put this with particular force in recommending that "[n]o person convicted of an offence should be required to subsidize the expense of his trial by having costs thereof levied against him".³⁰

And so we must inquire about approaches peculiar to criminal law. No guidance is to be found in the code provisions summarized earlier; even as a minimalist position they are flawed in that they do not rest upon any coherent rationale. While they express the idea that costs in criminal cases should rarely be available, and then only in very modest amounts, they do not identify the kinds of cases in which costs might be appropriate.

Existing schemes of compensation and law reform proposals have offered different approaches to this fundamental question. Legislation in the United Kingdom³¹ and Northern Ireland³² gives the courts wide discretionary authority to award trial and appeal costs to either a successful defendant or the prosecutor. And in the United Kingdom it is said that it should be accepted as "normal practice" to award costs where the power to do so is given.³³ In New Zealand, the discretion is structured by the enumeration of "relevant circumstances" that are to be taken into account in the award of costs to an acquitted or discharged accused.³⁴ In the State of New South Wales,³⁵ costs to an accused are dependent on the award by the court of a certificate attesting that it would not have been reasonable to institute proceedings had the prosecution been in possession of all the relevant facts before the proceeding, and that any conduct of the defendant that might have contributed to the beginning or continuation of the proceedings was reasonable in the circumstances.³⁶

²⁹ Royal Commission Inquiry into Civil Rights (1968).

³⁰ *Ibid.*, Report No. 1, Vol. 2, p. 927.

³¹ The Costs in Criminal Cases Act, 1973 (U.K.), 21 & 22 Eliz. II, c. 14.

³² Costs in Criminal Cases Act (Northern Ireland), 1968, c. 10.

³³ Practice Note, [1982] 3 All E.R. 1152.

³⁴ The Costs in Criminal Cases Act, 1967 (N.Z.), s. 5(2).

³⁵ Costs in Criminal Cases Act, 1967 (N.S.W.).

³⁶ *Ibid.*

In Canada, Professor Peter Burns prepared a study for the Law Reform Commission of Canada in 1972 and recommended that there be compensation for acquitted or accused persons "who are wrongly charged or truly innocent".³⁷ This recommendation was not carried forward in the Criminal Procedure Project of the Commission. Instead, in a study paper published in 1973, the project staff proposed that costs be paid "to all acquitted or discharged persons—or at least to those that can show economic need".³⁸ At the provincial level, a report in British Columbia³⁹ followed the New Zealand example in proposing that entitlement to costs arising from the prosecution of provincial offences should depend upon judicial discretion exercised with regard to specified factors.⁴⁰

The only Canadian jurisdiction that claims a compensation policy of any kind is Manitoba⁴¹ but the plan is not intended to provide redress for any successful accused. Rather it is intended to compensate those who were *unsuccessful* but whose convictions were subsequently proved to have been wrongful. Why compensation is available to those wrongly convicted but denied to those rightly acquitted is not clear. Some of the losses for which payment can be made⁴² may be suffered as much by the latter as by the former. In any event the criteria are such that the plan will have little if any impact; in particular the requirement that there be conclusive proof of innocence means payments will be rare, perhaps unheard of. For example, Susan Nelles would be ineligible because she was not convicted. Thomas Sophonow would be ineligible—as indeed he was declared to be by the Manitoba Attorney General⁴³—because "conclusive evidence of innocence" is not within his grasp. Even Donald Marshall who in 1983 was finally acquitted of the murder for which he was convicted in 1971 might not be eligible for compensation under the Manitoba plan.⁴⁴

³⁷ Law Reform Commission of Canada, *op. cit.*, footnote 26, p. V.

³⁸ *Ibid.*

³⁹ Law Reform Commission of British Columbia, *op. cit.*, footnote 5.

⁴⁰ Among the factors to be considered are the prosecutor's good faith and diligence, the reasonableness of the investigation, the reason for acquittal and the conduct of the accused; *ibid.*, p. 37.

⁴¹ The policy is not in the form of legislation and the only written description of its terms is found in a publication of Manitoba Information Services, *op. cit.*, footnote 4.

Subsequent to the completion of this article, a Federal-Provincial agreement on guidelines for compensating wrongfully convicted persons was concluded at a meeting of Attorneys General and Ministers of Justice. The guidelines perpetuate the tradition of narrow eligibility for compensation and are subject to comments similar to those I offer about the Manitoba policy.

⁴² For example, the guidelines contemplate the possibility of a general award for loss of dignity or other less concrete injuries. Such injury may occur notwithstanding an acquittal.

⁴³ *Op. cit.*, footnote 4.

⁴⁴ See *infra*, Part VI for further discussion.

The most recent proposal is advanced by the Law Reform Commission of Saskatchewan. In its "Tentative Proposals for Compensation of Accused on Acquittal"⁴⁵ the Commission proposes that "only the 'truly innocent', that is those who have been drawn into the legal system through no fault of their own"⁴⁶ should be entitled to compensation for "expenses reasonably incurred" in conducting their defences.⁴⁷ Factors relevant to the determination are: (a) whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt; (b) whether the charge was dismissed because the tribunal considered the accused to be innocent in fact; (c) whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did so, it was reasonable in the circumstances; (d) where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.⁴⁸

Subsequent discussion will suggest that the search for the "truly innocent", guided by these considerations, will be a fruitless, cumbersome and, in some respects, dangerous exercise. For the present we can simply observe that the Saskatchewan proposal, like the Manitoba plan, contemplates that few successful accused should be compensated and, if acted upon, its impact would be similar: little or none.

The restrictive eligibility for costs, combined with a judicial reluctance to award them in jurisdictions where eligibility is cast in wider terms,⁴⁹ has meant that compensation of successful accused is very rare. And neither the Manitoba plan nor the Saskatchewan proposal herald a new direction for Canada. The persistence of these approaches, in law and in reform proposals, can be explained by two considerations. One is the assumption that most of those accused who are acquitted are guilty of the offences with which they were charged, or of other offences, or at least were responsible in some way for bringing the prosecutions to which they were subjected upon themselves. Though winners in the trial process, they are owed nothing more than their acquittals. The second consideration is well known but has received little careful attention; it is the anticipated expense of wider eligibility. Both of these require analysis.

III. *The Status of Acquitted Persons*

The temptation to distinguish among different kinds of successful accused is one to which we all succumb from time to time. It may be done

⁴⁵ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4.

⁴⁶ *Ibid.*, p. 24.

⁴⁷ *Ibid.*, p. 33.

⁴⁸ *Ibid.*, pp. 37, 38.

⁴⁹ In England, despite a 1973 Practice Direction of a presumption in favour of costs, it was thought necessary to reaffirm that guidance in 1982; *supra*, footnote 33.

formally, as it is in Scotland where provision is made for separate findings of not proven and not guilty,⁵⁰ or informally in casual explanations of the results of criminal trials. "They couldn't prove it" or "he got off on a technicality" are conversational pronouncements of guilt with which we are all familiar. Cost awards might also serve to make the distinction, if the criteria are such that they are seen to separate acquitted persons into categories of vindicated innocents and the guilty but lucky.

This distinction among different kinds of acquitted persons is commonly referred to as the "third verdict problem". How much of a problem it is may be open to debate, for even now most of us make a rough and ready distinction between true innocence and an acquittal or discharge. Further, if it is the case that "a criminal trial is a search for proof, not truth",⁵¹ is there harm in recognizing that as a consequence some, and perhaps most, acquittals mean not proven rather than not guilty? The recognition need not lie, as it does in Scotland, in the language in which verdicts are delivered, but it might be found in cost rules that would compensate only the truly innocent.

There is, however, a powerful argument to the contrary and it is rooted in the presumption of innocence: one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower. Depending on the criteria, a not guilty verdict without costs might be a tainted acquittal, and tainted acquittals would compromise the presumption of innocence. This is the argument from principle and its power is not diminished on the level of application. How are innocent accused who are deserving of costs to be distinguished from the acquitted though undeserving ones? The distinction between "true" innocence on the one hand, and "legal" or "technical" innocence on the other, is not self evident. If it can be made at all, it must lie in the explanation for an acquittal. This presents an immediate problem in jury trials because reasons for verdicts are not given. Nor, at present, can they subsequently be disclosed by any juror.⁵² Should these objections be overcome by changing the law, we might find that the articulation of reasons for jury verdicts might prove to be a difficult matter. Jurors are required to be unanimous only on their verdict.⁵³ In

⁵⁰ Cf., Law Reform Commission of British Columbia, *op. cit.*, footnote 5, p. 30, n.4:

In Scotland there are three verdict alternatives: guilty, not guilty, and not proven. Either of the latter two verdicts will ensure the freedom of the accused. The "not proven" verdict indicates that the state has not established full legal proof that the accused committed the crime, whereas the Scottish verdict of "not guilty" represents a finding that the accused is in fact innocent of the alleged crime.

⁵¹ This description was attributed to Mr. Justice Edson Haines by Madame Justice Bertha Wilson in the Shumiatcher Lecture, University of Saskatchewan, March 13, 1987.

⁵² Criminal Code, s. 576.2.

⁵³ See, for example, *Thatcher v. The Queen*, [1987] 2 S.C.R. 652, (1987), 57 C.R. (3d) 97.

theory there could be as many as twelve different explanations for that result and, we can predict, at least some differences among jurors supporting the same verdict would be common.

While this difficulty of identifying reasons for an acquittal is unique to jury trials, other problems are not. On what basis are we to distinguish between the "legal" or "technical" points which mean that persons who may be guilty must be acquitted or discharged, and the presumably more substantive matters which satisfy us of "true" innocence? Legal or technical argument may be as fatal to the prosecution of one who is really innocent as to one who may be guilty. This means not only that the failure of a prosecution on a technicality should not be a determinative consideration, it means that it should not be seen even as a relevant one.

It is the merits that must be determinative, and here we are faced with alternatives of treating an acquittal—or the lack of a conviction—as the final word on the merits, or of engaging in a collateral assessment of what the Saskatchewan proposal calls "innocence in fact". It is possible, of course, to make inquiry beyond that involved in deciding if an accused should be convicted on the charge against him. That he was not proven guilty beyond a reasonable doubt does not exhaust all possibilities of his involvement or responsibility. Whether such inquiry is desirable or appropriate is another question the answer to which depends on our assessment of the status of the presumption of innocence, and on our judgment about the kind of inquiry that would be necessary.

The purpose of a criminal trial is only the most obvious reason for the presumption of innocence. If it were the *only* reason, it might be said that when the trial is over—that is, when evidence tested against the presumption and the reasonable doubt principle has been heard and a verdict reached—the presumption no longer applies. In other words the presumption exists for the important but limited purpose of indicating that it is the Crown that must establish guilt. It need not have significance in other contexts including, arguably, that in which costs are awarded. Quite simply, one presumed to be innocent for the purposes of his trial does not have to be taken as innocent for other purposes when the trial is over, even though it is concluded by an acquittal.

The presumption of innocence should not, however, be seen as limited only to establishing the burden of proof in criminal trials. It is a statement of an important social policy, one about the civil status of acquitted persons that should not be interfered with lightly. There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted. We may not be able to prevent suspicion that lingers, but there ought not to be *official* pronouncements of probable guilt, whether implicit in assess-

ments of "innocence in fact" for the purpose of cost awards, or anywhere else.

If the purpose of attempting to distinguish the truly innocent among those merely acquitted is suspect, so too is the process by which this would likely be done. The Manitoba scheme to compensate the wrongly convicted and the Saskatchewan proposal to compensate some accused on acquittal assume this would be accomplished easily; indeed the latter contemplates, in the vast majority of cases, an informal process analogous to that involved in speaking to sentence.⁵⁴ We should not be confident that this would be the case. At least some of the legal issues involved in cost awards would be different from those involved in determining liability, and if the legal issues differ, so too does the potential ambit of relevant evidence. We can predict that, most of the time, one or the other of the parties would want to call additional evidence on the matter of compensation. In short there is a risk of protracted proceedings just to try and sort out who should get costs and who should not.

IV. *The Expense of Cost Awards*

The anticipated expense of different cost proposals is another important consideration in the debate about who should be compensated and for what losses. There is no systematic appraisal of this subject. What evidence we have suggests that existing cost schemes based on narrow eligibility, or judicial discretion with or without guidelines, have been a negligible public expense in the jurisdictions which have them.⁵⁵ It begs the question for us at this stage to observe that cases in which costs are awarded are few in number; it is why they are so few in number that is of interest. Undoubtedly the historical reluctance to award costs, and the difficulty of establishing eligibility, are two of the reasons. A third is legal aid. In New Zealand where cost awards in criminal cases have been authorized for twenty years,⁵⁶ justice department officials attribute the almost trivial expense of that program to the fact that most criminal cases are defended with the support of legal aid.⁵⁷ Needless to say successful accused whose expenses are paid by legal aid cannot and should not be permitted double recovery through an award of costs.

⁵⁴ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 32.

⁵⁵ In 1972, the Law Reform Commission of Western Australia observed that the annual cost to the government of the scheme in New South Wales was \$1,255.50 for 1969 and \$758.00 for 1970. In New Zealand the cost was \$1,154.00 for 1969-70 and \$1,306.00 for 1970-71. By 1986 the cost for the New Zealand plan was \$8,695.00. See *Payment of Costs in Criminal Cases*, Western Australia Law Reform Committee, Working Paper (1972), p. 14, and see, Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 19.

⁵⁶ *Supra*, footnote 4.

⁵⁷ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 19.

Critics of the 1973 proposal that costs be paid "to all acquitted or discharged persons—or at least to those that can show economic need"⁵⁸ argued that the authors ignored the financial implications of their proposal, and thereby implied that the expense of such a program would be prohibitive.⁵⁹ Perhaps it would be, but we do not know because the proposal has never been costed. On the most recent Canadian statistics available, fewer than ten per cent of those charged with indictable offences are acquitted.⁶⁰ The percentage is even lower, it seems, for summary conviction offences.⁶¹ Given that a significant number of these cases—perhaps most of them—are supported by legal aid, we must ask if the conventional wisdom on this subject is accurate. There are other variables, of course, such as whether costs were to be based on a tariff or awarded on some other ground. But in general we can assert that until alternative proposals are subjected to cost analysis, we have only speculation on this matter of expense, and at this stage nothing of importance should depend on what is little more than guesswork.

V. *Compensating Innocent Accused: A Principled Approach*

We come now to the point at which the thesis of this article can be stated. It is this: existing provisions and current proposals for compensating innocent accused are at best inadequate. By their terms even those widely thought to deserve compensation probably would not be eligible for it. At worst they are dangerous in that determination of eligibility threatens to compromise the presumption of innocence. If it is thought desirable to compensate the innocent for expenses incurred in defending themselves, the only acceptable criterion of innocence is the absence of a conviction and the special verdict of not guilty by reason of insanity. The guiding principle should be that compensation normally would be available to one charged with an offence who is not found guilty of that offence, or an included offence, or another offence on which he was tried concurrently. Such a scheme should be compensatory in nature; costs or other awards should be based on a tariff and, so far as possible, sufficient to meet expenses reasonably incurred in conducting the defence.

The arguments against this proposal must be acknowledged. Some of them follow from earlier discussion. Perhaps the most important is

⁵⁸ Law Reform Commission of Canada, *op. cit.*, footnote 26.

⁵⁹ Atrens, Burns and Taylor, *op. cit.*, footnote 25, ch. XX, pp. 146-150, say that the authors of the 1973 Study Paper "chose to ignore the financial implications of their proposal", though there is no analysis of what those financial implications might be.

⁶⁰ Unfortunately, the last year is 1973. In that year, of the 53,964 persons charged with indictable offences, there were 4,671 acquittals. See Statistics of Criminal and Other Offences, 1973. (Statscan, 1978), p. 28.

⁶¹ Although before 1973 the same information is not available for summary conviction offences, the lower acquittal rate for this category is based on unpublished research data of the Law Reform Commission of Saskatchewan.

the idea that it would be going too far normally to award costs to all successful accused. There are really two aspects to this position. One is the position that "most of them are guilty anyway" and the other is that, for other reasons, compensation on this basis would not be good public policy.

The argument that most successful accused are guilty is related to, but must be distinguished from, the earlier discussion on the status of acquitted persons. What it is hoped was demonstrated there is that we should not attempt to distinguish between persons who are truly innocent and those who are guilty but lucky. Just because we should not do so on an individual basis, however, does not preclude us from acknowledging that "most of them are guilty anyway" for the purpose of deciding, as a matter of public policy, whether to compensate successful defendants at all, or of attaching a priority to doing so.

Are most acquitted persons really guilty—if not of the offence charged, then of related conduct that should not commend them for compensation? Of course, the question is unanswerable in any definitive sense, but at least the lines of argument are clear. Those who would answer "yes" argue that the high burden of proof on the Crown implies that most of the prosecutions that fail do so not because the accused is innocent but because the burden of proof cannot be met. Those who answer "no" would say that the burden of proof is higher in theory than it is in practice. This, coupled with the vast resources of the state to investigate crimes, means that the odds of acquittal are low—as indeed they are⁶²—and that most acquittals mean innocence in fact as well as in law.

Naturally, treating an acquittal for what it is—a finding of not guilty—does not mean we have no further interest in the accused's conduct. Some who are acquitted were vulnerable to prosecution because of their own behaviour, for example lying or otherwise intentionally misleading investigators or the courts. It is therefore appropriate to assess the accused's contribution to the fact that a prosecution was commenced or continued and to reduce costs accordingly. The idea, however, is not without difficulty. Inquiries of this kind could themselves raise the third verdict problem if they are seen to intrude upon the question of guilt or innocence. And so it is important that the criteria for assessing a defendant's contribution avoid the merits that must be taken to have been determined by acquittal.

Other policy concerns might arise on two accounts—the expected effect of wider eligibility on police and prosecutor, and its impact on the application of the reasonable doubt principle. Fear of adverse effects on police and prosecutor anticipates that cost awards may discourage them from bringing charges or continuing prosecutions in cases where they

⁶² *Supra*, footnotes 60 and 61.

should not be discouraged from doing so. More subtly, they might discourage the prosecution from discharging its duty to assist the court in discovering the truth, even if it means leading or disclosing evidence that might be fatal to the charge. The fear is well founded if costs are seen as real or implied censure of these officials, and the best way of avoiding this is a rule that defence costs normally follow an acquittal. Cost awards based on narrower eligibility are more likely to be taken as suggesting that the investigation or prosecution was misdirected or mishandled. In any event, we can acknowledge that cost awards may have some impact on the laying of charges and the conduct of prosecutions, but this may not be all bad. To the extent that they encourage reasonable caution on the part of police or prosecutor, they should be welcomed rather than feared.

The potential impact of cost awards on the reasonable doubt principle is the most discomfoting of the concerns about this subject. If costs are normally available to acquitted persons, so the argument might go, the benefit of reasonable doubt may not be extended as readily in cases where it should be. In short, costs would be a disincentive to acquittal. The argument envisages judges as unconscious guardians of the public treasury, reasoning that they will not acquit in some cases where otherwise they might if doing so also means that the accused will have his costs.

Empiricists might not credit so speculative an argument, but it should not be discountenanced readily. Reasonable doubt is a delicate concept and the principle requiring acquittal where it exists is rightly placed at the core of our criminal jurisprudence. Considerations that do not bear upon its application are to be avoided, and whether cost awards would be intrusive in this respect is problematic. Perhaps the most plausible response would acknowledge that the prospect of cost awards might occasionally be intrusive on the merits if the public expense of such a program were controversial, and this we do not know. This is, however, another consideration that underlies the need for cost analyses of alternative compensation proposals.

VI. *Three Case Studies: Marshall, Nelles and Sophonow*

The argument in support of the approach outlined here has been stated in general terms but is made clearer by returning to the cases of Donald Marshall, Susan Nelles and Thomas Sophonow.

Doubt about the soundness of Marshall's 1971 murder conviction and ensuing life sentence led the Minister of Justice, in 1982, to refer the matter to the Nova Scotia Court of Appeal for review as if it were an appeal from that conviction.⁶³ His appeal was allowed and a judgment

⁶³ Criminal Code, s. 617(b).

of acquittal was entered in his favour.⁶⁴ But this man, who in the *Globe and Mail's* estimate had "been left waiting too long for justice",⁶⁵ was not entirely vindicated in the Court of Appeal judgment. New evidence had caused the court "to doubt the correctness of the judgment at trial"⁶⁶ and to conclude "that the verdict of guilt is not now supported by the evidence".⁶⁷ The judgment is not, however, a finding of innocence—appellate judgments never are—and it would be of limited assistance in supporting a claim of innocence in a collateral inquiry for the purpose of costs. Donald Marshall was acquitted, that is all. Not only does the Court of Appeal judgment avoid a stronger statement in his favour, it criticizes Marshall on several counts and alleges that "any miscarriage of justice is. . . more apparent than real".⁶⁸ Though he received a modest *ex gratia* payment from the government of Nova Scotia—no doubt on account of the notoriety of his case and the public clamour for compensation⁶⁹—it is submitted that Marshall would not be entitled, under existing or proposed law anywhere in Canada, to compensation for his costs or for the eleven years he spent in jail. In particular, there is not the conclusive evidence of his innocence required by the Manitoba plan. Nor is there "true innocence" under the Saskatchewan proposal. Indeed, under the latter, Marshall might be ineligible for the further reason that he was found to have done something "that contributed or might have contributed to the institution or the continuation of the proceedings" against him.⁷⁰

Susan Nelles' claim for compensation might not have fared better. She was charged in May 1981 with four counts of murder with respect to the deaths of infants at the Hospital for Sick Children in Toronto. Her preliminary inquiry in 1982 ended after forty-five days in her discharge. Judge Vanik's reasons for not committing Nelles on her preliminary⁷¹ are not tantamount to a finding that she did not do it; there simply was no evidence justifying committal. No blame was attached to the police or to the Crown in the subsequent Royal Commission of Inquiry.⁷² In fact the Commissioner, Mr. Justice Grange, summarized the case in lan-

⁶⁴ *R. v. Marshall*, *supra*, footnote 1.

⁶⁵ *Globe and Mail* Editorial, Feb. 16, 1984, quoted in Harris, *op. cit.*, footnote 1, p. 389.

⁶⁶ *Supra*, footnote 1, at p. 321.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Harris, *op. cit.*, footnote 1, p. 389.

⁷⁰ The Court of Appeal criticized Marshall on a number of counts for helping to secure his own conviction; Harris, *ibid.*, p. 321.

⁷¹ The reasons are summarized in the Report of the Royal Commission of Inquiry, *op. cit.*, footnote 2, p. 206.

⁷² *Ibid.*

guage attributed to defence counsel Austin Cooper in a discussion with the prosecutor after the discharge: "You did your job; I did mine. The police did theirs. The judge did his. The system worked."⁷³

Nelles would not be entitled to compensation under the "innocence" approach as conceived in the Manitoba plan or the Saskatchewan proposal. Additionally, under the latter she might be ineligible on a wide interpretation of contributing "to the institution or the continuation of the proceedings".⁷⁴ While the Commissioner concluded that she had done "nothing wrong" in her dealings with the police, her refusal to deny the charges or to explain herself when first approached, and her "selective answers" to police questions "may not in the circumstances have been wise".⁷⁵

Thomas Sophonow is our third example. At his first trial in Winnipeg on a charge of murder, the jury was unable to agree upon a verdict. A second trial ended in a conviction that was reversed by the Manitoba Court of Appeal and a new trial was ordered. That trial ended in a conviction which was also reversed, only this time the Court of Appeal entered a verdict of acquittal, in part because the accused by this time has been thrice tried and had spent nearly four years in jail. On the final appeal the court was divided on the question of whether the verdict was unreasonable.⁷⁶

Predictably Sophonow was considered ineligible for compensation under the Manitoba plan, as he would be under the "true innocence" approach proposed for Saskatchewan. While it would be open to him "if he has proof of his innocence to come forth with that proof"⁷⁷ the final result of the legal proceedings would not be taken as establishing his innocence.

These three cases—Marshall, Nelles and Sophonow—demonstrate the weakness of the so-called "innocence" approach to the question of compensation. All three received official or public support for the idea that recompense be made to the defendants,⁷⁸ yet neither in Manitoba

⁷³ *Ibid.*, p. 220.

⁷⁴ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, pp. 37, 38.

⁷⁵ *Op. cit.*, footnote 2, page 217.

⁷⁶ *R. v. Sophonow (No. 2)*, *supra*, footnote 3. O'Sullivan J.A. concluded, at p. 421, that the verdict of guilt "was unreasonable as well as being vitiated by misdirection". Twaddle and Huband J.J.A. were not prepared to go that far; Twaddle J.A., at p. 460, observed that "there are so many instances of misdirection that I find the reasonableness of the jury's verdict to be a somewhat hypothetical question".

⁷⁷ Manitoba Attorney General Roland Penner, quoted in Manitoba Information Services, *op. cit.*, footnote 4.

⁷⁸ See Harris, *op. cit.*, footnote 2. Also Mr. Justice Grange thought that compensation should be made available to Nelles; Report of the Royal Commission of Inquiry, *op. cit.*, footnote 3.

nor in Saskatchewan, if that province's Law Reform Commission proposal were adopted, is it clear that it would be available in even one of the cases. Who, then, is the innocent accused contemplated by this approach? Is he anything more than a hypothetical abstraction who, like the man on the Clapham Omnibus, is interesting to talk about but is not really of this world?

Conclusion

The proposition to which the argument in this article leads is this: any plan to compensate innocent persons who were subject to the criminal process should take innocent to mean that the presumption of innocence has prevailed. If the accused was not convicted of the offence charged, an included offence, or another crime for which he was tried concurrently, he should normally be entitled to compensation for the reasonable legal expenses incurred in defending himself. He would not receive compensation for expenses met from legal aid, and costs could be reduced where he contributed to the fact that the prosecution was begun or continued by lying or otherwise intentionally misleading the police or prosecution. The only exception to the idea that costs be tariff based out-of-pocket expenses should be the provision for a lump sum payment in cases, such as *Marshall*, where the accused served part of a prison term to which he was sentenced pursuant to a conviction which was subsequently reversed.

By this approach, all three of the accused discussed above—*Marshall*, *Nelles* and *Sophonow*—would be eligible for compensation. And so would a good many others, a fact which raises one reservation about this approach: the possible expense of making all who are acquitted eligible for costs. While this concern can only be resolved by cost analysis, there is reason to question what to date has been an assumption that it would be too expensive. But if that assumption proves to be accurate, eligibility should not be circumscribed by more restricted definitions of "innocence" such as we find in the Manitoba plan and the Saskatchewan proposal. If these examples were followed, one of two possible consequences would occur. Either the problem of proving innocence to establish eligibility would be such that compensation would virtually never be available, or the determination of eligibility would compromise the presumption of innocence. It would be preferable to have no plan than one with these possible results.