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Despite DNA testing, injustices will continue without proper investigation

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It took 40 years, a huge amount of money, the efforts of crusading author Estelle Blackburn and her book, *Broken Lives*, a newspaper editor, and an American car-crash testing expert to clear Perth man John Button of the 1963 manslaughter of his girlfriend.

Last year the Chief Justice of Western Australia said that if the American's expert evidence of the crash had been available at the time of Button's original trial, a reasonable doubt would have been raised in the minds of the jury.

Button was convicted of driving his car into his girlfriend after an argument as she walked along a road. Though serial killer Eric Cooke later confessed to the crime, both the police and the appeal court that heard Button's case believed that Cooke could not have done it given the car he was driving.

The American expert, whose trip to Australia was financed by the editor of a suburban newspaper in Perth, convinced Chief Justice David Malcolm that it was more than likely that Cooke's car, and not that of Button, had indeed been responsible for the death of Rosemary Anderson, Button's girlfriend.

Button's saga provides a typical example of the huge amount of work, money and effort that is necessary in rectifying a miscarriage of justice. A great deal of effort was also necessary to correct the outcomes of other such cases including those of Lindy Chamberlain, Harry Rendall, Frederick McDermott, Edward Splatt, Alexander McLeod-Lindsay, Kelvin Condren and the Mickelberg brothers.

Yet these examples represent only the tip of the iceberg when it comes to miscarriages of justice. The fact that these miscarriages were reversed, or that at least those wrongly convicted were released from prison, owed more to the doggedness of their supporters than any self-correcting capacity of the criminal justice system itself.

Just how many miscarriages are there? When he recently commuted the sentence of more than 160 prisoners on death row in the American state of Illinois, Governor George Ryan emphasised the systemic failures of the American criminal justice system. He pointed out that over half of the total 300 capital cases in Illinois had been reversed, or sent for retrial or resentencing because of legal or evidentiary errors.

What about Australia? Based on the experience of the British Criminal Cases' Review Commission - the body that assesses applications of those who believe they are innocent of crimes of which they have been found guilty - the false convictions rate is about 0.5 per cent. This figure agrees with American research, and if translated into the Australian situation adds up to a considerable number of cases. It would mean, for example, that in Queensland alone, given the number of people convicted each year for non-traffic offences, somewhere between 850 and 950 people might be victims of miscarriages of justice.

Like the case of John Button, most of the known miscarriages of justice in Australia have involved serious offences like murder and manslaughter. However, they probably occur far more often with minor offences where there are numerous false guilty pleas and a general lack of scrutiny of legal processes, because there is less at stake than in higher courts.

Although no systematic research has been done, the Lindy Chamberlain case suggests that when public and political opinion is strongly aligned against particular defendants or particularly distasteful
categories of crimes - like the abuse of children, for example - then there is even more room for miscarriages to appear.

The case of Frank Button in Queensland exemplifies some of the issues here. A second round of DNA testing cleared Button, 31, whose conviction for raping a 13-year old girl was overturned in 2001, after Brisbane's John Tonge Forensic Centre failed to find male DNA in the initial test. When the police first interviewed the girl and asked who the rapist was she told them that she "would not know this man if I saw him again". However, after she had been interviewed a number of times, her story changed dramatically and she came to express absolute confidence that her attacker had been Frank Button.

Button's miscarriage was overturned only because of his lawyer's perseverance in insisting on thorough DNA testing. But to assume that DNA testing is a panacea for uncovering miscarriages would be foolish.

In the USA, over 120 defendants in capital cases have had their sentences reduced or quashed because of DNA testing. But despite the growing number of university "innocence" courses and projects in Australia (I run one myself at Bond University) only a handful of convicted prisoners have been able to overturn their convictions because of DNA testing. The costs of carrying out prolonged investigations, the difficulties of actually obtaining original bodily samples for analysis and the problems and expense inherent in mounting legal challenges are just some of the reasons for this meagre result.

In any event, the potential that DNA has to reverse miscarriages has to be balanced against the error rate in DNA testing. After the Frank Button case, Queensland's Crime and Misconduct Commission raised serious concerns about how the John Tonge Centre stored and secured samples and other concerns about the labelling and possible cross-contamination of DNA material.

These concerns coincide with British and American reports suggesting that human error occurs in 12 out of every 1000 tests. Yet as in the past with controversial forensic techniques like blood splatter analysis, ballistics evidence and even fingerprinting; judges, juries and the lawyers themselves are often bedazzled by the aura of infallibility that forensic experts project onto their techniques.

If Australian police emulate their American counterparts by abandoning traditional law enforcement investigative techniques and trawling through DNA databases looking for DNA matches without supporting evidence, then the potential for miscarriages is in fact only increased further.

The pressure for them to do so is enormous. A law-and-order mentality prevails in this country, as is shown by the rhetoric of many politicians and an imprisonment rate out of all proportion to the increase in crime. Gripped as we are with a growing fear about crime, coupled with a determination to solve it by processing as many people as possible through the justice system, a belief in the infallibility of new forensic technologies is tempting. Such a belief, however, guarantees an increasing number of miscarriages of justice, most of which will go undetected and uncorrected.