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# ***Henry v. British Columbia: Still Seeking a Just Approach to Damages for Wrongful Conviction***

**Dr. Emma Cunliffe\***

## I. INTRODUCTION

*Henry v. British Columbia (Attorney General)* was the first case in which a claimant sought damages under section 24(1) of the *Canadian Charter of Rights and Freedoms* for breaches of rights that led to a wrongful conviction and imprisonment.<sup>1</sup> In its 2015 decision, the Supreme Court of Canada clarified the criteria for the award and quantum of such damages.<sup>2</sup> In June 2016, Hinkson C.J.S.C. awarded \$8,086,691.80 in damages to Ivan Henry in compensation, special damages and “to serve both the vindication and deterrence functions of s. 24(1) of the Charter”.<sup>3</sup> This award reflected Hinkson C.J.S.C.’s findings that: Crown Counsel intentionally withheld relevant information from Henry in breach of his Charter rights; the wrongful non-disclosure seriously infringed Henry’s Charter rights; and if Henry had received the disclosure “the likely result would have been his acquittal at his 1983 trial, and certainly the avoidance of his sentencing as a dangerous offender.”<sup>4</sup>

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>2</sup> *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24 (S.C.C.), revg [2014] B.C.J. No. 71 (B.C.C.A.) [hereinafter “*Henry v. British Columbia*”].

<sup>3</sup> *Henry v. British Columbia (Attorney General)*, [2016] B.C.J. No. 1160, 2016 BCSC 1038, at para. 473 (B.C.S.C.) [hereinafter “*Henry 2016 BCSC*”].

<sup>4</sup> *Id.*, at para. 472.

In this article, I describe the events that led to Ivan Henry's civil case against British Columbia, and explain the interlocutory decisions that shaped the passage of that civil case. I attend particularly to two difficult issues: the role of demonstrable factual innocence in a trial for Charter damages; and the challenges of affording constitutional rights to sexual assault complainants in a civil case that arises from wrongful conviction. Ultimately, I suggest that the *Henry* case illustrates the inadequacies in the Canadian approach to post-conviction review and compensation for wrongful convictions. In lieu of the adversarial process adopted in *Henry*, inquiries such as the one conducted by Justice Peter Cory in the *Sophonow* case offer a model that holds greater potential for doing justice to those whose lives and rights may be affected by a wrongful conviction.

## II. *R. v. HENRY* AND ITS REPERCUSSIONS

Ivan Henry was arrested on July 29, 1982. Initially charged with 17 sexual offences, he was tried and convicted of 10 counts in respect of eight complainants. On November 24, 1983, he was declared a dangerous offender and sentenced to indefinite detention.<sup>5</sup> Henry represented himself at trial, cross-examining the seven complainants who testified, offering his own testimony, and calling witnesses. Prior to trial, he repeatedly sought — and was denied — disclosure of information including complainant statements and forensic evidence.<sup>6</sup> The trial judge described Henry's work in court as follows:

Throughout all the proceedings in this Court, Henry refused any legal assistance and defended himself. No one suggested he was unfit to stand trial before the jury. Nonetheless, during that trial and during the dangerous offender proceedings he exhibited peculiar behaviour in the way he conducted his defence. Repeated suggestions by me that he obtain legal advice went unheeded.<sup>7</sup>

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<sup>5</sup> *R. v. Henry*, [1983] B.C.J. No. 375 (B.C.S.C.) [hereinafter "*Henry* 1983"]. Henry remained in prison until June 12, 2009.

<sup>6</sup> *Henry* 2016 BCSC, *supra*, note 3, at paras. 156-180. On two occasions prior to Henry's conviction, judges denied applications by Henry for further disclosure. Chief Justice Hinkson held that these judicial decisions did not provide Crown Counsel with judicial imprimatur for his decisions to withhold disclosure. *Id.*, at paras. 238-244. In *Henry v. British Columbia*, Moldaver J. held that no liability for Charter damages would arise if a court rules that information sought by the defence need not be disclosed. *Supra*, note 2, at para. 91.

<sup>7</sup> *Henry* 1983, *supra*, note 5, at para. 3.

Although Henry was treated by the Canadian legal system as fit to stand trial, the psychiatric evidence presented on sentencing suggested that Henry suffered from psychosis and thought disorders, and that he was paranoid.<sup>8</sup> In 2009, granting an application to re-open Henry's appeal from conviction, Saunders J.A. observed that "Mr. Henry's fitness at trial ... may bear upon the fairness of the trial."<sup>9</sup> In 2016, Hinkson C.J.S.C. held on the basis of expert evidence that "Mr. Henry was mentally destabilized at the time he was making important decisions about trial matters, including legal representation."<sup>10</sup> Characterizing Henry as "falling within the thin skull category" of plaintiffs, Hinkson C.J.S.C. held that he "should not be made to bear the consequences of his conduct once it is established that he was wrongfully injured".<sup>11</sup>

Henry maintained his innocence from the time he was first interviewed by police<sup>12</sup> and throughout his trial. While Henry's case is now understood as having turned on the reliability of identification evidence, the trial judge characterized Henry's "main defence" as the proposition that the charged offences had not occurred.<sup>13</sup> Henry also testified that he had never participated in a police line-up viewed by six of the complainants.<sup>14</sup> He tendered into evidence the notorious photograph of himself handcuffed among a group of smiling foils, in which he was being restrained in a headlock by one uniformed officer and was flanked by two others. Henry suggested that the photograph had been doctored. In his instructions to the jury, Bouck J. stated: "Henry wanted you to draw the inference that any identification of him is a farce,

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<sup>8</sup> *Id.*, at para. 16.

<sup>9</sup> *R. v. Henry*, [2009] B.C.J. No. 46, 2009 BCCA 12, at para. 19 (B.C.C.A.) [hereinafter "*Henry* 2009 BCCA"]. See also *R. v. Henry*, [2010] B.C.J. No. 2072, 2010 BCCA 462, at para. 33 (B.C.C.A.) [hereinafter "*Henry* 2010 BCCA"]; *Henry v. British Columbia (Attorney General)*, [2015] B.C.J. No. 3087, 2015 BCSC 2319, at paras. 69, 83 (B.C.S.C.) [hereinafter "*Henry v. British Columbia*, Fourth Amended Notice of Civil Claim"].

<sup>10</sup> *Henry* 2016 BCSC, *supra*, note 3, at para. 71.

<sup>11</sup> *Id.*, at para. 292. See also para. 69, *id.*, citing *Janiak v. Ippolito*, [1985] S.C.J. No. 5, [1985] 1 S.C.R. 146, at 159, (S.C.C.).

<sup>12</sup> Joan McEwen, *Innocence on Trial: The Framing of Ivan Henry* (Victoria, B.C.: Heritage House Publishing, 2014), at 22-28 [hereinafter "*McEwen*"]. Further information regarding the investigation is supplied in *Henry* 2016 BCSC, *supra*, note 3, at paras. 3-12.

<sup>13</sup> *Id.*, at 108. In 2009, the BC Court of Appeal stated that "[i]dentification was virtually the only issue" at trial: *Henry* 2009 BCCA, *supra*, note 9. By 2010, the Court characterized the case as one in which the "only issue ... was the identity of the offender": *Henry* 2010 BCCA, *supra*, note 9, at para. 1.

<sup>14</sup> *Henry* 2010 BCCA, *supra*, note 9, at para. 61; *McEwen*, *id.*, at 72.

since he's the only one being restrained by three police officers."<sup>15</sup> Crown counsel argued in turn that Henry's refusal to participate in the line-up could be taken as evidence of his consciousness of guilt.<sup>16</sup>

Henry immediately appealed both his conviction and sentence. The British Columbia Court of Appeal dismissed those appeals for want of prosecution in 1984, and an application for leave to appeal to the Supreme Court of Canada was also dismissed.<sup>17</sup> Throughout his time in prison, Henry continued to seek avenues for review of his convictions and/or the exercise of the prerogative of mercy — the Supreme Court of Canada reported that he filed more than 50 applications between 1984 and 2005.<sup>18</sup> He sought, and was denied, leave to apply to the Supreme Court of Canada on at least four further occasions.<sup>19</sup>

In 2002, the Vancouver Police Department began to re-investigate 25 sexual assaults that had been committed between April 1983 and July 1988. Henry was in prison when these assaults were committed.<sup>20</sup> Police eventually relied on DNA evidence to link three of these sexual assaults to a Vancouver man who was subsequently named as Donald McCrae.<sup>21</sup> The degree of similarity between the *modus operandi* used by McCrae and that attributed to Henry has been variously reported by judges. In 2009, Newbury J.A. identified that eight of the sexual assaults committed after Henry's incarceration "involved a similar *modus operandi* [*sic*] to that used by the perpetrator of the assaults for which Mr. Henry was convicted, and took place in the same Vancouver neighbourhoods."<sup>22</sup>

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<sup>15</sup> McEwen, *id.*, at 108-109. The British Columbia Court of Appeal characterized this instruction as "a faint presentation of a strong point for the defence, namely, that the pre-trial identification process was flawed and seriously called into question the reliability of all other identification evidence." *Henry* 2010 BCCA, *id.*, at para. 69.

<sup>16</sup> The British Columbia Court of Appeal held that this argument, and Bouck J.'s instruction regarding consciousness of guilt, were wrong in law. *Henry* 2010 BCCA, *id.*, at paras. 40-69, citing *R. v. Marcoux*, [1976] S.C.J. No. 54, [1976] 1 S.C.R. 763, 60 D.L.R. (3d) 119 (S.C.C.), affg [1973] O.J. No. 2104 (Ont. C.A.).

<sup>17</sup> *R. v. Henry*, [1983] B.C.J. No. 2204 (B.C.C.A.); *R. v. Henry*, [1984] S.C.C.A. No. 262, 55 N.R. 157 (S.C.C.).

<sup>18</sup> *Supra*, note 2, at para. 15. A partial list of these applications is supplied in *Henry* 2016 BCSC, *supra*, note 3, at paras. 26-34.

<sup>19</sup> *R. v. Henry*, [1990] S.C.C.A. No. 334 (S.C.C.); *R. v. Henry*, [1991] S.C.C.A. No. 205 (S.C.C.); *R. v. Henry*, [1998] S.C.C.A. No. 77 (S.C.C.); *Henry v. British Columbia (Attorney General)*, [2003] S.C.C.A. No. 152 (S.C.C.).

<sup>20</sup> *Henry* 2010 BCCA, *supra*, note 9, at para. 25.

<sup>21</sup> *R. v. Henry*, [2009] B.C.J. No. 337, 2009 BCCA 86 (B.C.C.A.); *R. v. Henry*, [2012] B.C.J. No. 1932, 2012 BCCA 374 (B.C.C.A.).

<sup>22</sup> *R. v. Henry*, [2009] B.C.J. No. 337, 2009 BCCA 86, at para. 2 (B.C.C.A.).

In 2010, a three-member panel of the British Columbia Court of Appeal reheard more extensive arguments made by Henry and the Crown in respect of whether the offences attributed to McCrae, or the 25 post-arrest offences as a whole, exhibited such distinctive similarities to those attributed to Henry that they must have been committed by the same person. Justice Low concluded on behalf of the panel:

In addition, in considering similarities it is also necessary to take dissimilarities into account. There is at least one dissimilar circumstance here that would be potentially significant to a trial judge ruling on admissibility or to the trier of fact if the evidence were admitted. Four of the complainants at the appellant's trial testified that the assailant used the term "ripped off" and a fifth said that the intruder told her that a woman named Valerie had taken money from his boss. This specific ruse does not appear in the particulars of the [25 post-Henry arrest] Smallman offences.

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In my opinion, it cannot be said that the Smallman evidence, whether viewed in broad focus or in narrow focus by being confined to the known conduct of D.M., leads one to conclude that the appellant is innocent of the offences for which he was convicted. It does not exonerate him. At best, it is evidence that might be admitted at a new trial under the law relating to other suspects, not on the basis that it disproves the element of identity, but on the basis that it is capable of raising a reasonable doubt on that issue.<sup>23</sup>

While unable to conclude that the evidence exonerated Henry, the British Columbia Court of Appeal reversed his convictions, entered acquittals on each count, and set aside the dangerous offender designation.

The British Columbia Court of Appeal's 2010 decision identifies numerous errors and inadequacies in Henry's trial.<sup>24</sup> The Court held that the verdict on each count was not one that a properly instructed jury acting judicially could have rendered. In particular, the evidence put before the British Columbia Court of Appeal suggested that the "Crown's case on the element of identification rests entirely on the in-court identification made by the complainants at the preliminary hearing and at trial. Pre-court identification was fraught with problems".<sup>25</sup> Expanding on this observation, the Court held:

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<sup>23</sup> *Henry* 2010 BCCA, *supra*, note 9, at paras. 149, 151.

<sup>24</sup> These inadequacies are summarized, *id.*, at para. 154.

<sup>25</sup> *Id.*, at para. 109.

Eyewitness identification of a stranger is inherently frail for the reasons given in the cases. Pre-court identification of the appellant by the complainants in the present case ranged from tentative to non-existent. One complainant did not participate in pre-court identification exercise. The photographic line-up was fatally unfair. The physical line-up should not have been conducted at all because, to use the description given in *Marcoux*, it became a farce.<sup>26</sup>

Accordingly, Henry's convictions were quashed and a verdict of acquittal was entered on each count.

In June 2011, Henry filed a civil suit against British Columbia, the City of Vancouver, several named police officers and the Attorney-General of Canada. This claim sought damages from each defendant in respect of its role in the criminal investigation, trial, or post-conviction. In late 2015, Henry reached confidential settlements with Vancouver (incorporating the named police officers) and the Attorney-General of Canada. These settlement agreements were reached in the middle of Henry's civil trial, after the plaintiff had closed his case and partway through Vancouver's anticipated evidence.<sup>27</sup> Consequently, the only claim that remained before Hinkson C.J.S.C. in the British Columbia Supreme Court was Henry's claim against British Columbia.

Henry's claim against the province focused on the conduct of Crown counsel before, during and after Henry's trial, and particularly on the failure to disclose investigative material including some complainant statements, information about material collected from the crime scenes, and forensic evidence. It raised the novel question of when and according to what criteria Charter damages should be awarded for a breach of the prosecutorial duty to make disclosure to a criminal defendant. Before this claim was heard on its merits, it was the subject of an appeal to the Supreme Court of Canada. In *Henry v. British Columbia*,<sup>28</sup> the Supreme Court of Canada set out the test for Charter damages arising from an alleged failure on the part of the Crown to make disclosure in a criminal proceeding. Having clarified the test, the Supreme Court of Canada remitted the case to the British Columbia Supreme Court for trial.

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<sup>26</sup> *Id.*, at para. 139.

<sup>27</sup> One trial complainant was scheduled to testify on the morning that Henry's settlement with Vancouver was announced. In light of the settlement, her testimony did not proceed. Ian Mulgrew, "Woman who ID'd Henry to testify; J.F." *Vancouver Sun* (November 16, 2015), at A3; Ian Mulgrew, "City settles with Ivan Henry for wrongful conviction; Ottawa and the province ask for adjournment" *Vancouver Sun* (November 17, 2015), at A1.

<sup>28</sup> *Supra*, note 2.

### III. *HENRY V. BRITISH COLUMBIA (ATTORNEY GENERAL)*

In *Henry v. British Columbia*, the Supreme Court of Canada clarified the circumstances in which Charter damages should be awarded for a Crown prosecutor's failure to make disclosure to a criminal defendant.<sup>29</sup> Justice Moldaver held on behalf of a majority that:

... a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.<sup>30</sup>

Justice Moldaver set out four elements that must be proven by a claimant at trial: that the prosecutor intentionally withheld information,<sup>31</sup> the prosecutor knew or ought reasonably to have known that the information was material and that failure to disclose would likely impinge on full answer and defence; the withholding breached the claimant's Charter rights; and that the claimant suffered harm as a result of the withholding.<sup>32</sup>

In order to recover Charter damages, it is not necessary for the claimant to prove that the failure to disclose caused a wrongful conviction, or that the claimant is factually innocent. However, Moldaver J. also suggested that evidence of factual innocence may go to quantum:

... a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of "but-for" causation. In cases involving wrongful convictions, this "but-for" test avoids the thorny issue of whether or not factual innocence is required — that is, proof that the accused did not in fact commit the crimes alleged. Instead, the focus of the inquiry is on the proceedings that occurred at the time of the intentional failure to disclose. That said, without deciding the issue, I would not foreclose the possibility that evidence of factual innocence or guilt could go to the quantum of damages.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at para. 31.

<sup>31</sup> This element will be satisfied upon proof that the prosecutor was in possession of the information and failed to disclose it, or upon proof that the prosecutor was put on notice of the existence of the information and failed to obtain possession of it, in contravention of disclosure obligations. *Id.*, at para. 86.

<sup>32</sup> *Id.*, at para. 85.

<sup>33</sup> *Id.*, at para. 95.

Chief Justice McLachlin and Karakatsanis J. would have adopted a more lenient standard than that which was set out by Moldaver J. for the majority. They held that a claim for Charter damages for wrongful non-disclosure should be assessed according to the four-part test originally set out in *Vancouver (City) v. Ward*.<sup>34</sup> That is, an applicant must establish a Charter breach by the state and must show that damages would serve at least one of the functions of compensation, vindication or deterrence. Upon proof of these two criteria, the onus shifts to the state to show that Charter damages would be inappropriate or unjust in light of countervailing considerations. Finally, if the state's burden is not discharged, the Court should consider the proper quantum of damages.<sup>35</sup> Chief Justice McLachlin and Karakatsanis J. agreed that a showing of causation was necessary to the recovery of compensatory damages. However, they expressed doubt about whether the "but-for" test set out by Moldaver J. established the appropriate standard.<sup>36</sup>

#### IV. CHARTER DAMAGES AND COMPENSATION FOR WRONGFUL CONVICTIONS: THE "THORNY ISSUE" OF FACTUAL INNOCENCE

The difficulties Henry experienced when seeking review of his conviction — and the course of his civil claim for damages — illustrate the gaps that persist in the Canadian approach to post-conviction review and compensation.<sup>37</sup> Before the Supreme Court of Canada, Henry argued that the Court should recognize a broad and generous entitlement to Charter damages:

... a claim for *Charter* damages for non-disclosure resulting in his wrongful conviction and imprisonment predicated on ... simple *Charter*

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<sup>34</sup> [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.), varg [2009] B.C.J. No. 91 (B.C.C.A.).

<sup>35</sup> *Supra*, note 2, at para. 107.

<sup>36</sup> *Id.*, at para. 118.

<sup>37</sup> See generally, Kathryn M. Campbell, "Policy Responses to Wrongful Convictions in Canada: The Role of Conviction Review, Public Inquiries, and Compensation" (2005) 41 *Crim. L. Bull.* 145; Kent Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?" (2010) 85 *Chicago-Kent L. Rev.* 89; Peter de C. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) [hereinafter "Cory"]; Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 *Windsor Y.B. Access Just.* 96 [hereinafter "Kaiser"]; David Hamer, "Wrongful Convictions, Appeals, and the Finality Principle: The Case for a Criminal Cases Review Commission" (2014) 37 *U.N.S.W.L.J.* 270 [hereinafter "Hamer"].

breach that seriously infringed the right to disclosure, fair trial rights and the ability to make full answer and defence[.]<sup>38</sup>

British Columbia argued that the tort of malicious prosecution provided an adequate remedy and that it was not necessary to recognize an additional cause of action in respect of Charter damages under section 24(1). Somewhat ironically, one of the bases on which British Columbia resisted Henry's argument was the under-inclusiveness of the Charter remedy.<sup>39</sup> British Columbia also relied upon the proposition that most nation states that have adopted compensation schemes for wrongful conviction have adopted qualifying criteria that include demonstrable factual innocence.<sup>40</sup> In holding that policy considerations could prevent the recovery of Charter damages and that factual innocence might be relevant to the quantum of damages, Moldaver J. steered a course between these positions.<sup>41</sup> However, disputes about the proper role of arguments about factual innocence predate *Henry v. British Columbia*, and they have persisted in the wake of the Supreme Court of Canada's decision.

In 1988, the Federal-Provincial Ministers Responsible for Criminal Justice adopted *Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*.<sup>42</sup> These Guidelines provide that "compensation should only be granted to persons who did not commit the crimes of which they were convicted."<sup>43</sup> However, the Guidelines have never been passed into legislation and Hinkson C.J.S.C. concluded that "most contemporary compensation awards have departed in some respects from" them.<sup>44</sup> The *Model Legislation* promulgated by the U.S. Innocence Project to govern claims for wrongful conviction also conditions compensation on a showing of demonstrable innocence. Section 4.A.2 of that Model Legislation provides that:

In order to obtain a judgment in his or her favor, claimant must prove by a preponderance of the evidence that:

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<sup>38</sup> *Henry v. British Columbia (Attorney General)*, Supreme Court of Canada file no. 35745, factum of the appellant, at para. 5. See also para. 8.

<sup>39</sup> *Henry v. British Columbia (Attorney General)*, Supreme Court of Canada file no. 35745, factum of the respondent, Attorney General of British Columbia, at paras. 106-108.

<sup>40</sup> *Id.*, at para. 112.

<sup>41</sup> *Supra*, note 2, at para. 95.

<sup>42</sup> Reproduced as Appendix A to Kaiser, *supra*, note 37, at 152-53.

<sup>43</sup> *Id.*, at 152, 153.

<sup>44</sup> *Henry* 2016 BCSC, *supra*, note 3, at para. 376.

2. Claimant did not commit any of the crimes charged in the accusatory instrument ...<sup>45</sup>

A 2012 review of U.S. legislation that provided for compensation for the wrongfully convicted concluded that 89 per cent of such statutes imposed burdens of proving factual innocence (from “a preponderance of the evidence” to “clear and convincing evidence”) on those who sought compensation.<sup>46</sup>

When determining the quantum of Henry’s damages, Hinkson C.J.S.C. held “I do not find foreign legislative schemes to be of assistance.”<sup>47</sup> In describing the proper approach to quantum,<sup>48</sup> Hinkson C.J.S.C. did not analyze whether evidence of factual innocence is relevant. In particular, he did not cite or expressly consider whether to apply Moldaver J.’s comment that evidence of factual guilt or innocence may be relevant to quantum.<sup>49</sup>

Debra Parkes and I have recently supplied a review of the concept and limits of wrongful convictions, with particular attention to the role of demonstrable factual innocence.<sup>50</sup> We argue that the emphasis on factual innocence is partly attributable to the role of DNA exonerations in the work of Innocence Projects. However, we also identify that certain classes of criminal defendants — including women who are improperly denied access to the defence of self-defence and those who are accused of crimes that may never have occurred, such as infant death cases in which causation is contested — may be less able to discharge a burden of proving factual innocence.

The difficulties of proof that arise when factual innocence must be established are also evident in the *Henry* case. I have already noted that the British Columbia Court of Appeal declined to exonerate Henry. Specifically, Low J.A. said that “it cannot be said that the Smallman evidence ... leads one to conclude that the appellant is innocent of the offences for which he was convicted.”<sup>51</sup> Vancouver Police failed to retain physical evidence that had the potential to exonerate or implicate Henry,

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<sup>45</sup> Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, Appendix B, online: <[http://www.innocenceproject.org/wp-content/uploads/2016/06/innocence\\_project\\_compensation\\_report-6.pdf](http://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf)>.

<sup>46</sup> Robert J. Norris, “Assessing Compensation Statutes for the Wrongly Convicted” (2012) 23:3 *Criminal Justice Policy Review* 352, at 364.

<sup>47</sup> *Henry* 2016 BCSC, *supra*, note 3, at para. 412.

<sup>48</sup> *Id.*, at paras. 409-413, 445, 448 and 455.

<sup>49</sup> *Henry v. British Columbia*, *supra*, note 2, at para. 95.

<sup>50</sup> Debra Parkes & Emma Cunliffe, “Women and Wrongful Convictions: Concepts and Challenges” (2015) 11:3 *International Journal of Law in Context* 219.

<sup>51</sup> *Henry* 2010 BCCA, *supra*, note 9, at para. 151.

McCrae or some third person in some or all of the offences with which Henry was charged. The existence of this evidence was not disclosed to Henry before, during or until long after his trial. Henry has emphasized that this non-disclosure and destruction of evidence deprived him of an opportunity to prove his innocence.<sup>52</sup>

*Vancouver Sun* columnist Ian Mulgrew, who believes that Henry is innocent,<sup>53</sup> was the only journalist who covered the civil trial on behalf of the *Vancouver Sun*. Mulgrew argued that it was ignoble of the defendants to assert that Henry may not be factually innocent.<sup>54</sup> Henry's counsel, John Laxton, was reported as having said in court that if Vancouver defended itself on the basis that Henry committed the underlying offences, and failed in that defence, Henry would seek "a very large award of punitive damages".<sup>55</sup> When Vancouver settled with Henry, by the terms of that settlement it "unequivocally" withdrew "each and every allegation made by it in its pleadings and in its opening statement that Henry committed the crimes of which he was acquitted."<sup>56</sup>

Notwithstanding the British Columbia Court of Appeal's conclusion that the Smallman evidence did not exonerate Henry, Henry relied heavily on evidence of McCrae's activities in his notice of claim.<sup>57</sup> The British Columbia Court of Appeal identified the legal consequences of such evidence, had it been led at Henry's trial:

... the Smallman material contains evidence of the propensity of another suspect. If this evidence were admitted, it would open up the possibility of the Crown leading reply evidence as to the circumstances of certain criminal conduct by the appellant in Manitoba in 1976. It would also possibly lead to the admissibility of an affidavit sworn by

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<sup>52</sup> *Henry v. British Columbia*, Fourth Amended Notice of Civil Claim, *supra*, note 9, at paras. 15-17, 51(c), 52, 58, 62-64, 67-68, 88, 94-98, 102-103.

<sup>53</sup> Ian Mulgrew, "26 years in jail for suspect convictions; Add a Vancouver man's name to the sadly growing list of wrongly convicted Canadians" *Vancouver Sun* (January 10, 2009), at A10.

<sup>54</sup> For example: Ian Mulgrew, "Decades of wrongful imprisonment weigh heavily on Ivan Henry: Suing for compensation" *Vancouver Sun* (July 19, 2014), at A8; Ian Mulgrew, "Ivan Henry case shows government cannot be trusted; Call for change" *Vancouver Sun* (August 31, 2015), at A1.

<sup>55</sup> Ian Mulgrew, "Ivan Henry under attack, again; Wrongful conviction" *Vancouver Sun* (October 23, 2015), at A6.

<sup>56</sup> Ian Mulgrew, "City settles with Ivan Henry for wrongful conviction; Ottawa and the province ask for adjournment" *Vancouver Sun* (November 17, 2015), at A1.

<sup>57</sup> *Henry v. British Columbia*, Fourth Amended Notice of Civil Claim, *supra*, note 9, at paras. 18, 19, 20, 31, 34, 59, 64, 68, 97-100. Henry also points to the fact that certain police activities, such as a wiretap, tracking device and fluorescent powder test, did not yield inculpatory evidence, *e.g., id.*, at paras. 32-39. Recognizing that physical evidence in the possession of the Vancouver Police Department was destroyed, I presume that if other evidence of Henry's factual innocence existed or had been found, it would be identified in Henry's notice of claim.

the appellant in 2006 referencing a letter he wrote in 1994 in which he admitted breaking into a house in Vancouver on 14 January 1982, confronting a woman present and telling her that he “was looking for someone who had ripped me off on a drug deal ...” but with no assault ensuing.<sup>58</sup>

The convictions and letter referenced in this paragraph, along with a 1973 conviction for possessing a weapon for a dangerous purpose,<sup>59</sup> suggest that Henry’s criminal history included break, enter and assault against women, carrying a weapon between the hours of 1:00 and 5:00 a.m., and using the “rip off” claim in the course of committing a break and enter. Differences also arise: for example, most of these offences occurred in Winnipeg rather than Vancouver and the weapon Henry carried in 1973 was a rifle rather than a knife. A closer analysis of similarities and differences would, of course, require consideration of the proven facts and underlying records. In a criminal trial, Henry’s claim that McCrae committed the charged offences would likely lead to the admission of this evidence of Henry’s past acts.<sup>60</sup> However, such admission would be accompanied by a judicial warning about the proper use of this evidence.

By observing that Henry’s factual innocence is not manifest, I do not intend to minimize the wrongs perpetuated by State actors in this case. If one cleaves (as I do) to the view that Charter rights have inherent value, one must accept the correlate that any person is entitled to the protection of those rights, regardless of factual innocence. As Susan Bandes has argued:

The notion of fair process, as distinguished from the notion of fair results in particular cases, is always a hard sell. The notion of process is abstract, complex, and not very media friendly. The notion that a process needed to protect the innocent will unavoidably protect the guilty on occasion is a sophisticated notion. An even harder sell is the idea that all suspects ... should receive fair process, not just as a windfall but because our constitutional protections are not meant to protect only the innocent.<sup>61</sup>

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<sup>58</sup> *Henry* 2010 BCCA, *supra*, note 9, at para. 150. For further information about the 1976 charges, see *R. v. Henry*, [1977] M.J. No. 52 (Man. C.A.). A lengthy extract from the 1994 letter written by Henry is reproduced by McEwen, *supra*, note 12, at 159.

<sup>59</sup> *R. v. Henry*, [1973] M.J. No. 173, at para. 7 (Man. Co. Ct.).

<sup>60</sup> See Sidney N. Lederman *et al.*, *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada, 2014), at 10.104-10.109; *R. v. McMillan*, [1977] S.C.J. No. 32, [1977] 2 S.C.R. 824 (S.C.C.), affg [1975] O.J. No. 2247, 7 O.R. (2d) 750 (Ont. C.A.).

<sup>61</sup> Susan Bandes, “Framing Wrongful Convictions” (2008) 1 *Utah L. Rev.* 5, at 16. See also Hamer, *supra*, note 37, at 274: “it would be counterproductive to deny that convictions of the legally innocent are also wrongful”.

On this conception, it is possible to see Henry as ill-treated and the process of investigating and convicting him as deeply flawed, while reserving judgment about the question of underlying factual innocence. Mulgrew's columns in the *Vancouver Sun* and the Henry legal team's reported strategy of responding with indignation whenever the question of guilt or innocence is raised resists the distinction that Bades draws between process rights and underlying criminal responsibility. Justice Moldaver was seemingly seeking to avoid this type of conflation when he held in *Henry v. British Columbia* that proof of causation did not depend on a showing of factual innocence.<sup>62</sup>

As the *Henry* civil trial proceeded in the British Columbia Supreme Court, the question of factual innocence became more complicated. In a ruling issued early in the trial, Hinkson C.J.S.C. held that several paragraphs of the 2010 British Columbia Court of Appeal decision "are findings that were necessarily determined in the proceedings in that Court and are binding on both the plaintiff and the Province as between them".<sup>63</sup> The enumerated paragraphs relate to the adequacy of identification evidence, the admission of the photograph of the line-up, the adequacy of the trial judge's instructions, and the manner in which the pre-trial identification procedure tainted the identification evidence.

In *Toronto (City) v. CUPE, Local 79*, the Supreme Court of Canada held:

Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions.<sup>64</sup>

*Toronto v. CUPE* focused on the question of whether a person convicted of sexual assault and dismissed from his employment as a result could have his employment reinstated by an arbitrator on the basis that the sexual assault did not occur. Justice Arbour held on behalf of the

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<sup>62</sup> *Supra*, note 2, at para. 95. See also *Hill v. Hamilton-Wentworth Police Services Board*, [2007] S.C.J. No. 41, 2007 SCC 41 (S.C.C.), *per* McLachlin C.J.C., at para. 64 and Charron J. (dissenting), at paras. 156-161, *affg* [2005] O.J. No. 4045 (Ont. C.A.) [hereinafter "*Hill v. Hamilton-Wentworth*"].

<sup>63</sup> *Henry v. British Columbia (Attorney General)*, [2015] B.C.J. No. 2141, 2015 BCSC 1798, at para. 16 (B.C.S.C.).

<sup>64</sup> *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79*, [2003] S.C.J. No. 64, 2003 SCC 63, at para. 15 (S.C.C.), *affg* [2001] O.J. No. 3239 (Ont. C.A.) [hereinafter "*Toronto v. CUPE*"].

majority that permitting relitigation of a question that had been conclusively determined by a criminal court would constitute an abuse of process. She concluded that this principle would hold whether the party is a plaintiff or defendant in the subsequent civil proceeding.<sup>65</sup> While recognizing a general rule against relitigation, she held that in certain circumstances relitigation may enhance the credibility and effectiveness of the justice system. These circumstances included “when fairness dictates that the result should not be binding in the new context”.<sup>66</sup> The question therefore arises whether the principles identified by Arbour J. hold when the criminal court has acquitted a defendant.

In her dissenting reasons in *Hill v. Hamilton-Wentworth*, Charron J. identified the challenges that arise when the shift is made from criminal acquittal to civil trial:

It is a principle of fundamental justice that the accused in a criminal trial be given the benefit of any reasonable doubt. Therefore, from a criminal law perspective, there is no question that an acquittal must be regarded as tantamount to a finding of innocence. However, in the context of a tort action, we must come to terms with the reality that the person who committed the offence may well stand to benefit rather than lose from a botched-up investigation. The true victim in such cases is not the suspect but the public at large. Should the successful accused who actually committed the offence be entitled to use the acquittal brought about by the negligent conduct of police investigators as a basis to claim compensation?<sup>67</sup>

Justice Charron proceeds to offer the example of a victim of a brutal sexual assault who offers a firm identification in circumstances in which the police fail to follow the correct identification procedure. The accused is properly acquitted because the frailties inherent to eyewitness evidence mean that there must be a reasonable doubt. Justice Charron then contemplates a civil case in which the accused — now the plaintiff — sues in tort:

How is the civil claim to be adjudicated? Is the acquittal to be considered as the legal equivalent of factual innocence in the civil trial thereby precluding the defendant from [defending itself on the basis that the accused in fact committed the underlying crime]? ... [I]f he is in fact the assailant, many would view it as unthinkable that his loss

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<sup>65</sup> *Id.*, at para. 49.

<sup>66</sup> *Id.*, at para. 52.

<sup>67</sup> *Hill v. Hamilton-Wentworth*, *supra*, note 62, at para. 161.

should be regarded as compensable at law, given that the true victim who was harmed as a result of the police officer's substandard conduct was society, not the plaintiff.<sup>68</sup>

Justice Charron also identifies that placing a burden on an acquitted defendant to prove factual innocence could also be unjust: "Meeting this burden may prove impossible to do. . . . It would also necessitate a retrial of the case which may well lead to conflicting findings and put an aura of suspicion on his acquittal."<sup>69</sup> The majority declined to decide whether an acquittal should be treated as conclusive proof of innocence, but noted that in the United States, a victim may recover damages against an accused who has been acquitted at criminal trial.<sup>70</sup>

Chief Justice Hinkson's reasons regarding issue estoppel do not expressly consider whether principles developed in the context of challenging a criminal conviction apply with equal force to the context in which a criminal defendant has been acquitted after a lengthy period of imprisonment.<sup>71</sup> However, based on the discussion in *Hill v. Hamilton-Wentworth*, it seems at least arguable that the burdens and standards of proof play out differently in this context.

In his decision awarding Charter damages, Hinkson C.J.S.C. did not reach any conclusion regarding Henry's underlying guilt or innocence. Having reviewed the information that was not disclosed by Crown counsel, he identified that the failure to disclose material information was compounded by four disclosure-related "inappropriate acts" committed by Crown counsel at trial.<sup>72</sup> Chief Justice Hinkson concluded:

... if Crown Counsel had provided Mr. Henry with the documents in their control to which he was entitled, and refrained from the four inappropriate acts discussed above, that on the balance of probabilities, Mr. Henry would not have been convicted of the various counts of which he was convicted on March 15, 1983.<sup>73</sup>

It is not clear from Hinkson C.J.S.C.'s reasons whether he considers that evidence of factual innocence or guilt might be relevant to quantum in a different case.

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<sup>68</sup> *Id.*, at para. 165.

<sup>69</sup> *Id.*, at para. 166.

<sup>70</sup> *Id.*, at para. 64.

<sup>71</sup> *Henry v. British Columbia (Attorney General)*, [2015] B.C.J. No. 2141, 2015 BCSC 1798, at paras. 17-21 (B.C.S.C.).

<sup>72</sup> *Henry* 2016 BCSC, *supra*, note 3, at paras. 266-273.

<sup>73</sup> *Id.*, at para. 274.

In Part VI, I will briefly return to the role of demonstrable innocence in post-conviction review processes. First, however, I wish to consider how the British Columbia Supreme Court engaged with the interests of the trial complainants throughout the course of *Henry v. British Columbia*.

### V. PROTECTING THE COMPLAINANTS

There is no question that eight trial complainants, together with a larger number of complainants who testified at Henry's preliminary hearing, were sexually assaulted in terrifying circumstances. The seven trial complainants who testified at Henry's trial suffered the further ordeal of being cross-examined by an accused who was subsequently diagnosed with serious mental illness, whose behaviour was "peculiar", and who denied that they had been assaulted. When declaring Henry to be a dangerous offender, Bouck J. observed:

... I cannot let this aspect of the case pass by without commenting upon the courage of the complainants when they came forward and related their horrifying experiences. ...

It is devastating enough to be assaulted as they were, but it must be equally repulsive for them to endure cross-examination at trial and on this application by the very individual who committed these deplorable acts. They are to be commended for seeing the matter through to the bitter end notwithstanding their obvious wish to try and forget it all and begin their lives anew.

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... At one point in these proceedings, he taunted one of the complainants with belittling words when he was trying to cross-examine her at the hearing.<sup>74</sup>

In 2010, when he concluded that the procedures used by police undermined the reliability of the trial complainants' identification evidence, Low J.A. did not impugn the trial complainants' honesty.<sup>75</sup>

After Henry had filed his civil claim, two of the complainants asked the British Columbia Supreme Court to take steps to protect their privacy and safety during the anticipated case. They requested anonymity because, in the words of one complainant "I have specific concerns for

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<sup>74</sup> *Supra*, note 5, at paras. 10, 11, 13.

<sup>75</sup> *Henry* 2010 BCCA, *supra*, note 9, at paras. 112-141.

my safety.”<sup>76</sup> The complainants explained that they and several others had been contacted by author and lawyer Joan McEwen (who was writing a book about Henry) and that an investigator had used trap and trace methods<sup>77</sup> to find them. They had not been advised of McEwen’s application for access to the Henry trial record, nor of a hearing called on a motion to relax the express undertaking imposed on Henry as a condition of access to documents that concerned them and their fellow complainants. They also told Goepel J. that one of the complainants had received “what was considered a threatening letter” from Henry, addressed to her at her parents’ house.<sup>78</sup>

The first complainant explained:

We are well aware it is ... not advisable to appear without the benefit of legal counsel, but we find ourselves in a difficult position as the Attorney General who represented our interests in the criminal trial is the defendant in this case, and as such cannot offer us advice or direction in these complex legal matters.<sup>79</sup>

The complainant identified that she and her co-complainants felt they were in need of legal representation, and that a court ruling to relax the undertaking would “affect a great number of women who need and deserve protection.”<sup>80</sup> The second complainant explained that the “proposed publication ban and sealing of documents has not prevented others from accessing our names and using other means to locate us.”<sup>81</sup> An affidavit sworn by a victim services worker identified that all of the complainants were suffering from symptoms of trauma that impacted significantly on their lives and health.<sup>82</sup>

Justice Goepel expressed sympathy for the complainants’ concerns, and identified the extent to which the complainants were necessarily involved in the trial ahead:

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<sup>76</sup> *Henry v. British Columbia (Attorney General)*, Vancouver registry no. S114405, transcript of proceedings in Chambers, November 21, 2012, at 83 (B.C.S.C.).

<sup>77</sup> The trap and trace method of locating a person entails using a pretext to prompt the person of interest to call a given number, then ascertaining that person’s physical location from data associated with the telephone or cell phone used by the person of interest.

<sup>78</sup> *Supra*, note 76, at 85. The complainant also made reference to a quote attributed to Henry in Joan McEwen, “The Innocence Project” *Vancouver Magazine* (October 2012), online: <<http://vanmag.com/city/the-innocence-project/>>.

<sup>79</sup> *Id.*, at 85.

<sup>80</sup> *Id.*, at 86.

<sup>81</sup> *Id.*, at 86-87.

<sup>82</sup> *Id.*, at 58.

I have tremendous sympathy for the position you find yourselves in today, having gone through what you undoubtedly went through such a long time ago[.] ... [I]f a miscarriage of justice took place in this matter, and it took place because of the acts, perhaps, of the police department or the prosecutors, as has been alleged ... you are, by necessity, caught up in this matter, and things and statements that you may have given so long ago may, unfortunately, be matters which are going to ... have to come before me.<sup>83</sup>

Justice Goepel also voiced concerns about whether counsel for the British Columbia Attorney General could or should represent the complainants in its work in the civil trial:

I'm concerned that you're forced to be wearing two hats ... the legal complications of the question of [the complainants'] privacy rights, and the importance of it, I suspect that it would be most difficult for the complainants in their personal capacities to frame the legal issues — I appreciate the personal issues. ... [T]heir legal position, though, is one of extreme complexity. They are caught up in a proceeding ... in which we have their rights, which are very important rights, being dealt with. ... I'm concerned that these very important privacy rights, that you're not in a position to argue. You've got two — you're wearing too many hats at this point in time.<sup>84</sup>

Notwithstanding these observations, the Attorney General declined to fund independent legal counsel for the complainants. Ultimately, Goepel J. relaxed the implicit undertaking as Henry requested. However, he ruled that no counsel could share addresses of the complainants (other than addresses at which the assaults occurred) with his or her client except with the prior consent of the Attorney General. Justice Goepel observed in his reasons that “[f]or the victims of sexual assault to have to relive those events after more than 30 years is an almost unimaginable horror. It cannot, however, in this case, be avoided. It is a necessary by-product of the allegations made in this proceeding.”<sup>85</sup>

While Goepel J. clearly accepted that the complainants' Charter rights were implicated in Henry's civil trial, Hinkson C.J.S.C. issued a decision in late 2015 that denied that proposition without providing analysis:

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<sup>83</sup> *Id.*, at 88.

<sup>84</sup> *Id.*, at 69-70.

<sup>85</sup> *Henry v. British Columbia (Attorney General)*, [2012] B.C.J. No. 2639, 2012 BCSC 1878, at para. 52 (B.C.S.C.).

The applicant [Vancouver Rape Relief] contends that because the plaintiff is seeking damages pursuant to the *Charter*, his case is a public law case, involving the *Charter* rights of the 1980's complainants. In my view, the *Charter* rights of the 1980's complainants are not engaged in these proceedings.<sup>86</sup>

Which of these characterizations is correct? Henry's claim against British Columbia included a claim for damages for breach of Henry's *Charter* rights before, during and after his trial for sexual offences. The impugned rights include the right to disclosure, full answer and defence, liberty and security of the person. The Supreme Court of Canada has repeatedly emphasized that the "principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns".<sup>87</sup> In particular, society has legitimate interests in encouraging sexual assault victims to report crime and protecting witnesses' privacy. "[F]ailure to consider the position of the complainant in the trial process may have the opposite effect."<sup>88</sup>

In *R. v. Mills*, the Supreme Court of Canada drew a direct connection between an accused person's *Charter* right to disclosure and the *Charter* rights of sexual assault complainants, emphasizing the relationship between privacy, equality and dignity. The majority held:

In this respect, an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. As we have already discussed, the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process.<sup>89</sup>

In *R. v. Osolin*, Cory J. held on behalf of a majority that "A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system."<sup>90</sup> In *R. v. O'Connor*, a case that also considers the right to production of records, all judges agreed that

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<sup>86</sup> *Henry v. British Columbia (Attorney General)*, 2015 BCSC 2319, at para. 19 (B.C.S.C.).

<sup>87</sup> *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 603 (S.C.C.), affg [1987] O.J. No. 737 (Ont. C.A.) [hereinafter "*Seaboyer*"]. See also *R. v. E. (A.W.)*, [1993] S.C.J. No. 90, [1993] 3 S.C.R. 155, at 198 (S.C.C.), per Cory J., revg [1991] A.J. No. 1031 (Alta. C.A.); *R. v. Harrer*, [1995] S.C.J. No. 81, [1995] 3 S.C.R. 562, at para. 14 (S.C.C.), per La Forest J., affg [1994] B.C.J. No. 908 (B.C.C.A.).

<sup>88</sup> *Seaboyer, id.*, at 606.

<sup>89</sup> *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 90 (S.C.C.), revg [1997] A.J. No. 1036 (Alta. Q.B.).

<sup>90</sup> *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at 669 (S.C.C.), revg [1991] B.C.J. No. 3822 (B.C.C.A.).

complainants have a constitutional right to privacy. Justice L'Heureux-Dubé observed:

Equally relevant, for our purposes, is Lamer J.'s recognition<sup>91</sup> ... that the right to security of the person encompasses the right to be protected against psychological trauma. In the context of his discussion of the effects on an individual of unreasonable delay contrary to s. 11(b) of the Charter, he noted that such trauma could take the form of stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If the word "complainant" were substituted for the word "accused" in the above extract, I think that we would have an excellent description of the psychological traumas potentially faced by sexual assault complainants.<sup>92</sup>

The complainants' submissions to Goepel J. demonstrate the adverse impact of the *Henry* case on the complainants' privacy and security of the person.

When the case came before the Supreme Court of Canada, several complainants sought leave to intervene in order to make submissions about how the Court should have regard to the Charter rights of sexual assault complainants in assessing a claim for Charter damages for non-disclosure in this context.<sup>93</sup> In making this argument, the complainants relied on *R. v. Mills*<sup>94</sup> and on the statement in *Vancouver (City) v. Ward* that the section 24(1) Charter damages remedy must be developed with careful regard to the existing balance of interests and policy considerations.<sup>95</sup> Justice Karakatsanis denied the application to intervene on the basis that "it would not be appropriate to allow these applicants, who are potential participants in the underlying proceedings, to be involved in this appeal."<sup>96</sup> Justice Goepel's concerns about which parties

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<sup>91</sup> In *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863, at 920 (S.C.C.), affg [1983] O.J. No. 3311 (Ont. C.A.).

<sup>92</sup> *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at 483 (S.C.C.), affg [1994] B.C.J. No. 702 (B.C.C.A.).

<sup>93</sup> *Henry v. British Columbia (Attorney General)*, Supreme Court of Canada file no. 35745, factum of the interveners, Jane Doe #1 - #6.

<sup>94</sup> *Supra*, note 89.

<sup>95</sup> *Supra*, note 34, at para. 43.

<sup>96</sup> *Henry v. British Columbia (Attorney General)*, Supreme Court of Canada file 35745, decision of Karakatsanis J. on October 31, 2014, online: <<http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35745>>.

were in a position to protect the Charter rights of the complainants are arguably substantiated by the fact that no other party or intervener made the arguments that had been offered by the complainants.

Over the course of the civil trial, the complainants' concerns about the extent to which the court and the parties will protect their privacy and dignity have been realized. An object lesson is offered by the *Vancouver Sun*'s coverage of the case — and particularly its characterization of the role of trial complainant JF — and the Court's failure to supervise that reporting. Ian Mulgrew describes JF as “the real catalyst behind the miscarriage of justice” and “the only reason Henry was charged”. He has quoted a police description of her as “very attractive” and reproduced in full a letter sent by JF to a police officer, while describing that letter as “veritably tear stained”.<sup>97</sup> He has identified JF's geographic location and named a friend of JF's.

It seems highly likely that Mulgrew supplied enough information for some readers to identify JF. To the best of my knowledge, neither the lawyers nor Hinkson C.J.S.C. has raised the question of whether the *Vancouver Sun*'s reporting was fair and accurate, nor considered the impact of such characterizations (in and out of court) on the Charter rights of the complainants in this case and on the willingness of other women to report sexual assault. JF was scheduled to testify in Henry's trial on the day that Vancouver announced its settlement with Henry. As a result of the fact and timing of that settlement, she was deprived of the opportunity to respond to claims made inside the courtroom and in the media about her role in Henry's wrongful conviction.

It is in this context that Vancouver Rape Relief applied in November 2015 for standing to bring an application for the appointment of *amicus curiae* in the *Henry* trial. Vancouver Rape Relief argued that *amicus curiae* was necessary to make submissions on the proper approach to factual innocence and to protect the Charter rights of the complainants. Recall that the Supreme Court of Canada had denied the complainants standing to intervene because their role in the case disqualified them. In light of this prior decision, it is ironic that Hinkson C.J.S.C. denied Vancouver Rape Relief standing on the basis that notwithstanding its lengthy history of assisting and advocating on behalf of sexual assault complainants, it had “no stake in these proceedings, nor does it purport to

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<sup>97</sup> Ian Mulgrew, “Ivan Henry's accuser to testify, finally” *Vancouver Sun* (November 15, 2015), at A3.

represent any of the 1980's complainants".<sup>98</sup> Furthermore, evidently overlooking the fact that this is the first case in which a plaintiff has sought Charter damages for wrongful conviction, Hinkson C.J.S.C. noted that Vancouver Rape Relief's "work does not normally include intervention in claims for Charter damages by those who assert that they have been wrongfully convicted of a criminal offence".<sup>99</sup>

Justice Karakatsanis's decision to deny the complainants standing and Hinkson C.J.S.C.'s decision to deny standing to Vancouver Rape Relief leads me to think that the courts' approach to hearing from those who would represent the interests of sexual assault complainants is at best like that of Goldilocks to eating porridge — but with only two bowls, neither of which is "just right". Unfortunately, in the result, no party or lawyer was tasked with ensuring that the complainants' Charter rights and interests were considered while assessing the Crown's duty to make disclosure circa 1983 or in crafting a just approach to quantifying Charter damages for wrongful conviction. These rights and interests were not actively safeguarded within the court process and media reporting about the trial.

Chief Justice Hinkson's final decision engaged at considerable length with the complainants' statements and their testimony at trial.<sup>100</sup> In his decision, Hinkson C.J.S.C. concluded that there were "many inconsistencies in the undisclosed evidence relating to each of the complainants" that "had the potential to seriously undermine the identifications they made".<sup>101</sup> Because of the Crown's non-disclosure, Henry was deprived of the opportunity to cross-examine the complainants about these matters during his 1983 trial.

Most of the inconsistencies identified by Hinkson C.J.S.C. relate to the complainants' description of their attackers' voice and appearance. Some seem to have substantial probative value.<sup>102</sup> Other matters characterized by Hinkson C.J.S.C. as inconsistencies seem rather semantic.<sup>103</sup> Overall, Hinkson C.J.S.C.'s reasons leave the impression that many or all of the complainants were unreliable, or that their testimony was incautious. Had the complainants been witnesses in the civil trial, the rule in *Browne v. Dunn* would require that these matters be put to them, and that they be

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<sup>98</sup> *Supra*, note 86, at para. 25.

<sup>99</sup> *Id.*, at para. 28.

<sup>100</sup> *Henry*, 2016 BCSC, *supra*, note 3, at paras. 128-151, 196-229.

<sup>101</sup> *Id.*, at para. 200.

<sup>102</sup> *Id.*, at paras. 215, 217.

<sup>103</sup> *Id.*, at para. 211.

invited to explain any apparent contradictions.<sup>104</sup> However, because no party called the complainants to testify, the complainants were not afforded this right to respond to criticisms of them.

Chief Justice Hinkson's reasons do not consider whether the complainants' exclusion from the civil trial left gaps in the factual record before him. Crown counsel Michael Luchenko died before the civil trial commenced, and accordingly did not give evidence regarding his work on the *Henry* prosecution. Within the damages decision, Luchenko shoulders much of the blame.<sup>105</sup> Chief Justice Hinkson's reasoning offers a straightforward narrative of a wrongful conviction being caused by a Crown lawyer acting in a manner that was improper when judged by the standards of the day, aided by a group of untrustworthy sexual assault complainants. When one compares these reasons against those offered by the British Columbia Court of Appeal in 2010 when it acquitted Henry and against the Supreme Court of Canada's 2015 decision, one is left with the impression that the "story" of the *Henry* case and the array of material issues is almost endlessly malleable. One common thread throughout these judicial processes, however, is that the complainants have never been given an opportunity to share their perspectives on the police investigation and trial process.

## VI. CONCLUSION

In conducting the research that forms the basis for this article, I learned that Henry's trial proceeded while Thomas Sophonow was enduring the second of his three trials for the murder of Barbara Stoppel. That case also famously resulted in a wrongful conviction, and a lengthy inquiry conducted by retired Supreme Court of Canada Justice Peter Cory.<sup>106</sup> Justice Cory's report explores, among other salient issues, the role of police tunnel vision, the frailties of eyewitness identification evidence, disclosure obligations, alibi evidence, and the proper basis on

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<sup>104</sup> *Browne v. Dunn* (1893), 6 R. 67.

<sup>105</sup> For example *Henry* 2016 BCSC, *supra*, note 3, at paras. 115-118, 122-184, 191-229, 242-246, 258, 266, 274. Compare *Re Truscott*, [2007] O.J. No. 3221, 2007 ONCA 575 at para. 117 (Ont. C.A.), in which the Ontario Court of Appeal scrupulously noted that "Most of the people who played any significant role in the trial or the first Reference died before the disclosure issues were raised. Those who were available spoke, quite understandably, in generalities and surmises rather than based on actual recollections of relevant events. The court is left to speculate about what people knew or did not know and what they did or did not do almost fifty years ago."

<sup>106</sup> Cory, *supra*, note 37.

which compensation should be awarded to a wrongly convicted person who has spent a lengthy period in prison.

Justice Cory recommended the establishment of an independent post-conviction review entity along the lines of the U.K. Criminal Cases Review Commission. He concluded that his approach to recommending compensation for Sophonow should be informed by Sophonow's demonstrable innocence.<sup>107</sup> Justice Cory's report also considers the harm done to Stoppel's family by Sophonow's wrongful conviction. He recommended that Manitoba compensate the Stoppel family "for the pain and suffering that has been occasioned to the family by the wrongful conviction and imprisonment of Thomas Sophonow".<sup>108</sup>

The *Sophonow* case differs from *Henry*. Sophonow was able to demonstrate his factual innocence, thereby relieving Cory J. of the difficult task of deciding whether and where to place the burden of demonstrating underlying factual guilt or innocence, and with what consequences for quantum. Sophonow's time in prison was much shorter than Henry's. However, perhaps most importantly, Sophonow's entitlement to compensation was adjudicated through an Inquiry process that was sufficiently flexible to attend to the systemic causes of wrongful conviction as well as the particular effects of this wrongful conviction on Sophonow and on the victim's family.

The evolution of *Henry v. British Columbia* as a civil claim for Charter damages both narrowed and distorted the range of interests to which the Court had regard in determining just compensation. Ultimately, Hinkson C.J.S.C. rejected the proposition that *Henry* is a public law case. In his ruling denying standing to Vancouver Rape Relief, he characterized the case as "private litigation between the two remaining parties, albeit one a government actor".<sup>109</sup>

In this article, I have traced the ways in which the narrowing and distortion of issues over the passage of the *Henry* case diverted the Court's attention from some important questions. Before Hinkson C.J.S.C., the question of factual innocence appears to have been transformed from a difficult, but potentially relevant, consideration in assessing quantum to an irrelevant and perhaps assumed fact. This transformation seemingly happened without careful attention to the

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<sup>107</sup> *Id.*, "Compensation: Entitlement Principles Based on Factual Innocence" and "Compensation: Should there be a Cap Placed on the Damages Flowing from Wrongful Conviction and Imprisonment".

<sup>108</sup> *Id.*, "Compensation: Consideration of the Stoppel Family".

<sup>109</sup> *Supra*, note 86, at para. 24.

relationship between criminal responsibility and constitutional rights. Even more concerning, as the *Henry* case evolved, attempts to pay attention to the Charter rights and interests of the complainants were completely sidelined. The fears that the complainants expressed about their safety and dignity and about the adverse effects of public attention largely went unheard. In Hinkson C.J.S.C.'s decision, the complainants are depicted as untrustworthy witnesses, despite the fact that they were not given the usual opportunity to respond to such characterization.

Reconstructed as private litigation, the *Henry* trial ultimately denied the complex and multidimensional approach to Charter rights that is contemplated by cases such as *Mills* and *O'Connor*. The evolution of this trial process demonstrates the extent to which an adversarial trial model predicated on an antagonistic relationship between a self-interested state party (which was conceived by the trial judge as an essentially private actor) and a self-interested individual plaintiff permitted both state and court to abdicate their responsibility to protect sexual assault complainants' privacy and dignity. The course of the *Henry* case also illustrates the inadequacies of Canada's *ad hoc* approach to reviewing and determining compensation for wrongful convictions. The Soponow Inquiry demonstrates that, with good terms of reference and sensitive leadership, it is possible for an inquisitorial process to avoid the either/or choices that the *Henry* Court perceived itself to face. The wrongly convicted, sexual assault complainants and the Canadian public deserve better from the process of reviewing a wrongful conviction.

