Tab A

Privy Council Appeal No 9 of 2006

David Cullen Bain *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 10th May 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Sir Paul Kennedy

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*[Delivered by **Lord Bingham of Cornhill**]*

1. On 29 May 1995, following a trial before Williamson J and a jury, the appellant David Cullen Bain was convicted on each of five counts of murder. As more fully narrated below, his appeals against those convictions have failed. He now appeals to the Board against the convictions under section 385(1)(c) of the Crimes Act 1961. He contends, in the light of fresh evidence which was not before the trial jury, that if that jury had had the opportunity to consider the case with the benefit of that fresh evidence they might reasonably have reached different conclusions. The convictions should accordingly be quashed and a retrial ordered. The Crown strongly resists that contention.

2. On 20 June 1994, when these five killings occurred, David was a 22-year old student studying music and classics at the University of Otago. Each of the counts related to a member of David's immediate family: his father Robin; his mother Margaret; his sisters Arawa and Laniet; and his younger brother Stephen. Robin, aged 58, was the principal of Taieri Mouth Primary School, a two-teacher school about 50 kilometres down the coast from Dunedin. Margaret, 50, did not work; she had (with Robin) been a missionary in Papua New Guinea, but her beliefs appeared latterly to have inclined towards the occult. Arawa, 19, attended a teachers' training college. Laniet, 18, had lived away from home for a period but had returned to the family home for the weekend. Stephen, 14, was still at school.

3. Robin spent three nights a week at Taieri, initially sleeping in the back of his van but more recently in the schoolhouse. He and Margaret were estranged, and on returning to the family home at the weekend and on Monday nights he lived in a caravan in the garden. Laniet had lived for a time in a flat in Dunedin and then with her father in the Taieri schoolhouse.

4. The family home was at 65 Every Street, Dunedin. It was an old, semi-derelict, wooden house, which was deliberately burned down shortly after the deaths. Internally, as is clear from the evidence at the trial and contemporary photographs, most of the rooms were dirty, squalid and very disorderly. They, and the caravan, contained large quantities of the family's belongings in disordered heaps.

5. The house faced south on to Every Street. It was on two levels, and was well set back from the road. The front door was in the middle of the front of the house at ground level. On entering the house through the front door, the visitor would enter a hallway. To his immediate right was the lounge, which had some chairs and occasional tables. To one side of this room was a curtained alcove. It was in this living room that Robin was shot. Opposite this room, across the hallway, was David's room, to the visitor's left on entering the house. Immediately next to David's room, on the left of the hallway, were steps down to the lower level of the house. Continuing down the hallway past the stairs, the visitor would come, on the right, to Margaret's bedroom, from which Stephen's room led off. On the left the visitor would come to the room where Laniet was sleeping at the time of the deaths, and beyond that to a living room which plays no part in the story. If the visitor were to go down the stairs to the lower level he would find three rooms: Arawa's bedroom; a kitchen; and a bathroom/lavatory in which the washing machine and a dirty

clothes basket were kept. A door on the western side gave access to the house at this level.

The competing cases at trial

6. The Crown case against David, as developed at trial, was in very bare outline to this effect. At about 5.0 am or earlier on the morning of Monday 20 June 1994 David got up and dressed. He took from his wardrobe his .22 calibre Winchester semi-automatic rifle and unlocked the trigger lock with a spare key which he kept in a jar on his desk. He usually used a key tied on a string round his neck, but he had taken this off on Sunday 19 June when he took part in a polar plunge and had left it in the pocket of an anorak in Robin's van. He took ammunition from the wardrobe. He then shot and killed, in an unknown order, his mother, his two sisters and his brother. There was a violent struggle with Stephen, who was part strangled as well as shot, and during the struggle a lens of the glasses which David was wearing fell out in Stephen's room. These killings, particularly those of Laniet and Stephen, were very sanguinary, and as a result David's person and clothing became stained with blood. He therefore washed and changed his clothing, leaving marks in the bathroom/laundryroom, and put his blood-stained clothing in the washing-machine, which he started. Then, as was his normal practice, he set off at about 5.45 am to deliver newspapers. He did this rather more quickly than usual, returning home at about 6.42 am. He then went upstairs to the lounge and switched on the computer at 6.44 am, either then or at some later time typing in a message "SORRY, YOU ARE THE ONLY ONE WHO DESERVED TO STAY". David knew that it was his father's practice, some time before or after 7.0 am, to come in from the caravan and go to the lounge to pray. So he waited with the loaded rifle in the alcove off the lounge and, when his father entered the room and knelt to pray, shot him from very close range in the head. He then arranged the scene to make it look like suicide, and after a pause, rang the emergency services to report the killings, pretending to be in a state of great distress.

7. David's account was that he got up at the usual time, put on running shoes and shorts, took his yellow newspaper bag and set off on his newspaper round with his dog at about 5.45 am. He ran much of the route, as he usually did, and he took an interest in how long he took. He arrived home at about 6.42 — 6.43 am, entered by the front door, noticed that his mother's light was on and went to his own room. There he took off the paper bag and hung it up. He took off his shoes, took off his walkman and put it on the bed. He then went downstairs and into the bathroom. There he washed his hands to get off the black newsprint, sorted out some coloured clothes and jerseys (including a red sweatshirt

he had worn on his paper run for the past week) and started the machine. He then went upstairs to his room, put on the light and noticed bullets and the trigger lock on the floor. He went to his mother's room, and found her dead. He visited the other rooms, heard Laniet gurgling and found his father dead in the lounge. He was devastated, and rang the emergency services in a state of acute distress. His case inevitably involved the proposition that Robin, having killed the other family members, had switched on the computer, typed in the message and committed suicide.

8. It has never been suggested that anyone other than either Robin or David was responsible for these killings or that the culprit, whoever it was, was not responsible for all of them. Thus, leaving the burden of proof aside, the question has always been, as the judge put it in the opening line of his summing-up, "Who did it? David Bain? Robin Bain?".

The trial

9. The trial before Williamson J and the jury lasted from 8-29 May 1995. During the trial over 60 witnesses were called to give oral evidence, some of them the same witnesses giving evidence on different aspects of the case, and over 20 written statements were read by consent. It will be appreciated that both the Crown case and the defence case were very much more complex than the simplified summary given above might suggest.

10. During the trial the judge was called upon to give a number of rulings. Two of these are relevant for present purposes. Both relate to evidence which the defence wished to call from a witness named Dean Cottle. Laniet had a cellphone registered in the name of Mr Cottle, and this led the police to interview him on 23 June 1994, three days after the killings. He made a statement, saying he had met Laniet about ten months earlier in a Dunedin bar, and they had become friends. According to Mr Cottle, Laniet had told him that she had been a prostitute and that her father Robin had been having sex with her for about a year and was still doing so. This was one of her reasons for leaving home. Later she said she was going to make a fresh start, her parents had been questioning her and she was going to tell them everything. In an affidavit dated 26 June 1995 (after the trial), Mr Cottle stated that on Friday 17 June, just before the killings, Laniet had said to him that she was going home that weekend to tell the family about everything that had been occurring, she was going to put a stop to everything, she was sick of "everyone getting up her". The incestuous relationship with her father had, she said, begun when the family were in Papua New Guinea.

11. The judge's first ruling was given on 24 May. In the course of his reasons the judge acknowledged that Mr Cottle's evidence was hearsay, but he did not rule out admission of the evidence on that ground:

> "The present crimes were horrific and the jury, like every other person, will be considering why they occurred. Any evidence that might shed light on this must, in my view, be relevant. A motive for Robin Bain is certainly relevant to the primary issue in the case. If sufficient relevance were the only test then I would be inclined to admit the evidence despite its remoteness in time and questionable probative value."

But the judge regarded the reliability of the evidence as the real stumbling block. He was unable to conclude that it would be reasonably safe to admit the evidence or to conclude that the evidence would have sufficient reliability or probative value. He had already recorded that Mr Cottle, although subpoenaed to appear as a witness, had endeavoured to avoid service, had not appeared and could not be located.

12. The second ruling was given on 26 May, after prosecuting counsel had completed his closing address to the jury, when Mr Cottle voluntarily attended at the court office in answer to a warrant of arrest. On this occasion Mr Cottle was questioned in court about his failure to appear and his recollection of what Laniet had said to him. He was in a state of some confusion. The judge concluded that his evidence would not be reasonably safe or reliable, and said he did not believe him. He therefore again ruled against admission of this evidence, not because it was hearsay but because it was unreliable. Thus the jury never learned of this possible motive attributed to Robin.

13. In his summing-up the judge listed the points particularly relied on by the defence and then, drawing on the closing address of prosecuting counsel, the cardinal points relied on by the Crown. There were 12 such points:

(1) The rifle and ammunition were David's and the key to the trigger lock was in an unusual place where he had hidden it.

(2) David's bloodied fingerprints were found on the murder weapon.

(3) David's bloodstained gloves were found in Stephen's room.

(4) David had fresh injuries to his forehead and knee. There was no explanation for them and the nature of them indicated that it was he who had had the fight with Stephen.

(5) The glasses (with a missing lens) and fitting David's general glass prescription were found on a chair near where he was in his room when the police arrived, and, significantly, the left side of the frame was damaged and the missing lens was found in Stephen's room quite near his body.

(6) Blood-stained clothing, including a green jersey with fibres matching those found under Stephen's finger nails, was washed by David; and his Gondoliers sweatshirt with blood on the shoulder had been sponged.

(7) Blood found on the top of the washing machine powder container, porcelain basin and various light switches must have come from David's touch.

(8) Droplets of blood were found on David's socks as well as blood which had caused the luminol observed part sock prints in other parts of the house.

(9) The computer had been switched on at 6.44 am, and the jury would conclude on all the evidence that this was just after David had returned home from the paper run, if the evidence (including his own) were accepted that he was at the nearby corner at 6.40 am and that it would take 2-3 minutes to reach 65 Every Street.

(10) David's partial recovery of memory might have enabled him to suggest explanations for some of the blood on him but it did not explain other vital items such as the fingerprints, the clothes or the glasses. The Crown said that David confidently denied matters that he could not remember although they had happened.

(11) If David heard Laniet make gurgling noises, then she must then have been alive and consequently he had been by her bed when the last shot was fired. Other comments of his such as that his mother's eyes were open when he went in and his remark, to his aunt, that they were "dying, dying everywhere" tended to confirm that he remembered, in part, being there before the deaths.

(12) Not only did the expert pathologist say it was unlikely that Robin shot himself because of the angle of the gunshot wound, but Robin could not have killed the others because

(a) no one else's blood was found on him;

(b) there was no blood at all of any type on his socks or shoes;

(c) his fingerprints were not on the rifle, although if he had shot himself he would have been the last person to have gripped it firmly;

(d) no gun powder traces were found on his hands; and

(e) if he had been the wearer of blood-stained clothing and was intent on suicide, why would he have bothered to change his clothes and be in completely blood-free clothes when he shot himself?

14. Later in his summing-up the judge gave a standard direction on the proper approach to expert evidence, drawing attention to the evidence of Mr Jones (the senior police fingerprint technician) about the bloodied fingerprints on the rifle, and Dr Dempster who, the judge said, "may have impressed you as a very competent and experienced forensic pathologist". The judge reminded the jury of prosecuting counsel's suggestion that the Crown case had three angles: a mass of evidence implicating David; strong evidence excluding Robin as the killer of his wife and children; and overwhelming evidence establishing that Robin did not commit suicide. He reminded the jury that prosecuting counsel

> "went on and said to you that although the evidence about the luminol sock foot prints in the house was tested at great length, there now can be no doubt that the prints were made by the Accused and so much of the evidence that you heard does not matter any longer in the sense that you need not worry about it; that, indeed, it need not have been called, since all the Accused now says, supports the evidence that those foot prints were his and that he went into those rooms and got wet blood on his socks."

The judge reminded the jury of prosecuting counsel's description of David as "increasingly disturbed", and of David's behaviour as "unusual and almost obsessional about some strange matters". This was indeed an accurate reflection of counsel's closing address, in which he had described David as "unusual in his behaviour" and a "disturbed young man". His behaviour had been described, more than once, as "bizarre". The judge referred again to the Crown submission about the glasses and the falling out of the lens, the switching on of the computer at 6.44 am

after David's return home at 6.42—6.43, the absence of "one piece of evidence that Robin Bain had been into the rooms of the deceased on this particular morning", and the absence of any real evidence of suicide. In summarising the defence case, the judge referred to the statement of Mrs Laney, which had been read. This was evidence relevant to the time of David's return home from his newspaper round and had, the judge said, "assumed a particular significance". The judge referred to the acceptance by defence counsel that the luminol blood prints must have been David's.

15. The jury retired at 11.45 am on 29 May. At 5.23 pm they returned with four questions, which the judge duly discussed with counsel. The first question was: "The glasses found in David's/Stephen's rooms. Whose were they according to the optometrist?" The optometrist was Mr Sanderson, a witness who had given evidence. The judge reminded the jury of Mr Sanderson's evidence and also David's.

16. The second question related to a matter on which there was no evidence. The third question was a request to read Mrs Laney's evidence, bearing on the time of David's return home. The judge re-read her statement and that of another witness which the judge had not ~~re-~~read in his summing-up.

17. The fourth question was a request to re-play the tape of David's telephone call to the emergency services. The tape was re-played.

18. The jury retired again at 5.42 pm. They returned at 9.10 pm and convicted on all five counts.

The first appeal

19. The appellant appealed to the Court of Appeal (Cooke P, Gault and Thomas JJ, "the first Court of Appeal") which, in a reserved judgment delivered by Thomas J, dismissed the appeal on 19 December 1995: [1996] 1 NZLR 129.

20. The principal question on appeal was whether the trial judge had erred in refusing to admit the evidence of Mr Cottle. But before addressing that issue the court observed that the Crown case appeared very strong and the defence theory not at all plausible. The jury obviously disbelieved David, as it was entitled to do. The court was satisfied that there had been no miscarriage of justice in the jury's verdicts. On the evidential issue, the court was unclear why the judge had refused to allow Mr Cottle to be questioned as to the truth of his statement, as counsel agreed that he had. But it held that the judge had been right to exclude the evidence, which it described as "clearly

inadmissible". Certain secondary grounds of appeal were advanced, but it was accepted that none of these was sufficient in itself to justify setting the verdicts aside and the court, having considered the evidence closely, concluded that these grounds were totally lacking in merit. A petition for leave to appeal to this Board, primarily based on the evidential ground, was dismissed on 29 April 1996.

The second Court of Appeal

21. Following wide publicity, expressions of public concern and a joint review of the case by the New Zealand Police and the Police Complaints Authority, the appellant applied to the Governor-General for the exercise of the mercy of the Crown. On such an application the Governor-General in Council may, if he thinks fit, and if he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon. The Court of Appeal must then consider the point so referred and furnish the Governor-General with its opinion thereon accordingly. That is the effect of section 406(b) of the Crimes Act 1961.

22. The Governor-General exercised his power under section 406(b). By an Order in Council made on 18 December 2000 he referred six questions to the Court of Appeal, specifying in relation to the first four questions a number of documents which the Court of Appeal was asked to consider. In the event the Court of Appeal (Keith, Tipping and Anderson JJ, "the second Court of Appeal") received over 50 affidavits from 42 deponents, 13 of those deponents being orally questioned before the court at a hearing which lasted from 14 to 18 October 2002.

23. The first of the six questions referred was:

> "Was the computer turned on at a time earlier than 6.44 am on 20 June 1994 or, at the very least, is there a reasonable possibility that the computer could have been turned on at a time earlier than 6.44 am on that date?"

Reference was made to a number of sources of evidence, including one witness examined orally before the court. The Crown accepted (paragraph 14 of the judgment) that, if this question were answered literally, the evidence demonstrated at least the reasonable possibility that the computer had been turned on earlier than 6.44 am. Had the full evidence been before the jury at the trial (paragraph 15) they would have had to contemplate a switch-on time of 6.42 am, but the court could not say that was the correct time and it was not possible to say whether the

actual switch-on time was earlier than 6.44 am. The court's answer to the first question (paragraph 16) was that

> "there is definitely a reasonable possibility that the turn on time could have been earlier than 6.44 am on 20 June 1994."

24. The second of the questions referred was:

> "Did the lens that was found in Stephen Bain's bedroom get there at a time or in a way that was unrelated to the murders or, at the very least, is there a reasonable possibility that this could have been so?"

Reference was made to four written documentary sources, the authors of three being examined before the court. Having considered all the manifold matters debated in relation to this matter, the court found it impossible to reach a firm conclusion. It considered that the possibility of the lens having got to where it was found, by a method other than planting, but still unrelated to the murders, was remote but could not be dismissed as fanciful. Its answer (paragraph 20) was:

> "We consider the possibility of the presence of the lens being unrelated to the murders cannot be excluded or confirmed as a reasonable possibility without an examination of the whole case in the depth that a full appeal would involve."

25. The third question referred was:

> "Were the applicant's positive fingerprint marks, made in blood, that were found on the rifle used to commit the murders, put there at some time before the murders or, at the very least, is there a reasonable possibility this could have been so?"

Reference was made to six documentary sources, three of the authors being examined before the court. The court said, in paragraph 22 of the judgment:

> "The key question is whether the blood in which David Bain's fingerprint marks were found on the rifle was human blood. There was no suggestion at the trial that the blood was not human. Hence the jury will undoubtedly have proceeded on the basis that it was."

As a result of subsequent inquiries, tests and analyses there was now a suggestion that it was not human but animal blood. David was known to have used the gun some months earlier for shooting rabbits and possums. The court's answer (paragraph 22) was:

> "From the scientific point of view, we consider it has been shown to be a reasonable possibility that the blood which bore David Bain's fingerprint marks could have been other than human blood. That being so, we consider it follows that there is a reasonable possibility that the marks could have been put on the rifle sometime before the murders."

26. The fourth question referred was:

> "Was the submission made by the Crown Solicitor in the Crown's closing address to the jury at the applicant's trial that 'Only one person could have heard Laniet gurgling. That person is the murderer' wrong or misleading?"

Reference was made to five documentary sources. None of those witnesses was examined orally, although the court heard the oral evidence of Professor Ferris, a pathologist called by the Crown. Its conclusion (paragraph 25) was:

> "The Crown Solicitor was in effect telling the jury, understandably as the evidence then stood (albeit the precise point was not addressed in evidence) that dead bodies cannot make gurgling noises. In the light of the evidence before us, we consider there is a reasonable possibility that this submission was wrong or misleading. Our opinion is therefore that the absoluteness of the Crown Solicitor's submission was wrong or misleading."

27. The fifth of the referred questions was:

> "Does the Court of Appeal's opinion on questions 1, 2, 3 and 4 (whether taken individually or collectively) indicate that there is credible and cogent evidence available that might, if it had been placed before the jury, along with the other evidence given at the applicant's trial, have reasonably led the jury to return a different verdict?"

The court gave its answer in paragraph 26:

> "[26] There is credible and cogent evidence which suggests at least the reasonable possibility that the computer could have been switched on earlier than 6.44 am. There is credible and cogent evidence which suggests at least as a reasonable possibility that David Bain's fingerprints on the rifle could have been put there before the murders. There is credible and cogent evidence which suggests, as a reasonable possibility, that gurgling sounds can be emitted spontaneously from dead bodies. The absoluteness of the Crown's closing submission was, in this respect, wrong or misleading. When all this evidence is viewed collectively, we are of the opinion that it might, along with the other evidence given at David Bain's trial, have reasonably led the jury to return a different verdict. While the other evidence called by the Crown at the trial itself constituted credible and cogent evidence from which David Bain's guilt could be inferred, we consider that if the fresh evidence relevant to questions 1, 3 and 4 had been before the jury, it could reasonably have resulted in a different verdict. For these reasons we answer question 5 yes. Our answer does not imply that had the jury been presented with the further evidence it would necessarily, or even probably, have reached different verdicts. What we are saying is that in our opinion on the material before us, necessarily limited as it was, there is a reasonable possibility the jury may have done so."

28. The last referred question was:

> "Having regard to the Court of Appeal's opinion on question 5, is there a possibility that there has been a miscarriage of justice that would warrant the question of the applicant's convictions being referred to the Court of Appeal under section 406(a) of the Crimes Act 1961?"

The court gave its answer in paragraph 27:

> "[27] Having regard to our opinion on question 5, the wording of which constitutes a relatively low threshold, and in the light of our conclusion on question 2 and what we have learned of the case generally in the course of considering the materials and evidence produced to us and counsel's submissions, we are of the opinion that there is a possibility that there has been a miscarriage of justice that

would warrant the question of David Bain's convictions being referred to this Court under s406(a) of the Crimes Act 1961. Our answer to question 6 is therefore yes."

The third Court of Appeal

29. On receiving these answers the Governor-General, by an Order in Council made on 24 February 2003, referred to the Court of Appeal the question of the 5 convictions of murder entered against David Bain. She exercised this power under section 406(a) of the 1961 Act, which empowers the Governor-General, if she thinks fit, to refer the question of a conviction to the Court of Appeal. The question so referred must then be heard and determined by the court as in the case of an appeal by that person against conviction. The applicable procedure was that provided by section 385(1) of the 1961 Act which at the relevant time read:

> "(1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

30. Thus David's appeal against conviction returned to the Court of Appeal (Tipping, Anderson and Glazebrook JJ, "the third Court of Appeal"). This court had before it all the material before the second Court of Appeal, with some additional affidavits, all of which it admitted, and it of course had the benefit of that court's answers to the Governor-General's questions under section 406(b), which two members of the third Court of Appeal had been party to giving. The third Court of Appeal heard submissions over five days between 1 and 9 September, but it heard no oral evidence and no cross-examination. On 15 December 2003 Tipping J delivered the judgment of the court, dismissing the appeal: [2004] 1 NZLR 638.

31. Early in its judgment the third Court of Appeal addressed the appropriate legal approach in a case where fresh evidence not considered by the jury is said to undermine the safety of the jury's verdict. The correct approach in principle is not seriously in issue between the parties and is considered below.

32. In its judgment, beginning at paragraph 31, the court summarised the key points in the Crown case. These included the unlocking of the trigger lock (paragraphs 32-34), the bloodied opera gloves (paragraphs 35-36), bloodstained clothing worn by David (paragraphs 37-40), bloodstained clothing associated with David (paragraphs 41-44), the palm print on the washing machine (paragraph 45), the bathroom/laundry area (paragraphs 46-49), injuries to David (paragraphs 50-52), the glasses and lenses (paragraphs 53-56), the fingerprints on the rifle (paragraphs 57-68), the washing machine cycle (paragraphs 69-77), the scene in the lounge (paragraphs 78-87), Robin's full bladder (paragraphs 88-90) and Laniet's gurgling (paragraphs 91-93). The court also summarised (between paragraphs 94 and 162) the key points relied on by David, to several of which it will be necessary to return.

33. At paragraph 163 of its judgment the court gave its overall assessment of the case. It found (paragraph 164) "three points in the evidence of such cogency that taken together, in the context of all the evidence, any reasonable jury must in our view have seen the case against David as proved beyond reasonable doubt." Those three points concerned the trigger lock, the fingerprints on the rifle and the scene in the lounge. The court succinctly summarised the points. Only David knew of the existence and whereabouts of the key used to unlock the trigger lock. The bloodstained condition of the rifle was such that the uncontaminated area associated with the fingerprints on the forearm led to the "almost inescapable" conclusion that the hand which made the fingerprints was in position contemporaneously with the murders, and that hand was David's. The spare magazine found beside Robin's dead

body was found standing upright on its narrow edge. The magazine must have been deliberately placed there by David. To those three points, "individually powerful and cumulatively overwhelming", must be added a number of supporting points in particular. These were (paragraph 166): the use of David's gloves; the presence of Stephen's blood on David's black shorts; the "unconvincingly explained" injuries to David's head; his having heard Laniet gurgling; Robin's full bladder; and the timing of the washing machine cycle. Cumulatively the case could only be seen by a reasonable jury as cogently establishing David's guilt beyond reasonable doubt. The court had no doubt (paragraph 172) that any reasonable jury considering the new evidence along with the old would find David guilty. The court was not persuaded (paragraph 174) that there had been a miscarriage of justice on the ground of further evidence or any other ground.

The law

34. The third Court of Appeal applied well-settled principles in its approach to fresh evidence. Thus it referred to the threshold conditions of sufficient freshness and sufficient credibility, while acknowledging that the overriding requirement is to promote the interests of justice. The court admitted all the fresh evidence submitted, and no complaint is made of its ruling on this point.

35. The court went on, in paragraph 24 of its judgment, to observe that when fresh evidence is admitted, it must move on to the next stage of the enquiry

> "which is whether its existence demonstrates there has been a miscarriage of justice in the sense of there being a real risk that a miscarriage of justice has occurred on account of the new evidence not being before the jury which convicted the appellant. Such a real risk will exist if, as it is put in the cases, the new evidence, when considered alongside the evidence given at the trial, might reasonably have led the jury to return a verdict of not guilty."

The court pointed out (paragraph 25) that its concern is whether the jury, not the court, would nevertheless have convicted had the posited miscarriage of justice not occurred. This was consistent with

> "the fundamental point that the ultimate issue whether an accused person is guilty or not guilty is for a jury, not for Judges. The appellate court acts as a screen through which

> the further evidence must pass. It is not the ultimate arbiter of guilt, save in the practical sense that this is the effect of applying the proviso, or ruling that the new evidence could not reasonably have affected the result."

36. This approach followed the earlier ruling of Keith and Tipping JJ in *R v McI* [1998] 1 NZLR 696, 711, where they said:

> "But it is important to recognise that the Court is not thereby invited to come to its own view about whether the appellant was in fact guilty of the crime or crimes alleged. Rather, the Court is required to assess whether, without the error or deficiencies of process, the jury would still have convicted. It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction. If, in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies."

37. The third Court of Appeal's ruling in the present case has recently been endorsed and followed by the Court of Appeal in *R v Haig* [2006] NZCA 226. The court there pointed out (paragraphs 58-60) that New Zealand authority differs somewhat from English authorities such as *Stafford v Director of Public Prosecutions* [1974] AC 878 and *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 and Australian authority such as *Weiss v The Queen* (2005) 4 CLR 300 in its emphasis on what the actual trial jury might have decided had it had the opportunity to consider the fresh evidence. Attention was also drawn to that court's approach to the fresh evidence it had received. In paragraph 82 it said:

> "While we accept that there are credibility issues associated with some of the deponents that are apparent on the material we have, it is significant that none of the witnesses were called for cross-examination. In that context, we do not see how we could fairly conclude that the new evidence in question is insufficiently credible to be material to the miscarriage of justice issue".

In paragraph 87 it added:

> "Hogan has sworn an affidavit in which he has explained the admissions attributed to him. It may be that a jury would

> accept Hogan's explanations of the alleged admissions attributed to him, or alternatively might conclude that if Hogan had made the admissions alleged, they were simply in the nature of boasts and did not detract from the truthfulness of his evidence. But, on the state of the evidence before us – which has not been the subject of cross examination – it would not be appropriate for us to reach a conclusion to this effect."

38. Counsel representing David made no significant criticism of the third Court of Appeal's formulation of the relevant principles. Their complaint was directed to the court's application of those principles. Thus, they submitted, the court had not given practical recognition to the primacy of the jury as the arbiter of guilt but had taken upon itself the task of deciding where the truth lay; had done so with inadequate regard to what was known of the jury's thinking; had done so in relation to matters which the jury had had no opportunity to consider; had done so despite the admission of contradictory affidavits by witnesses, many of whom had not been cross-examined; and had failed to appreciate the extent to which the case had changed from that on which the jury had based their verdict. All these criticisms the Crown roundly rejected.

The issues raised by the fresh evidence

39. In seeking to establish their case that the appeal should be allowed, the convictions quashed and a retrial ordered, David's counsel relied in argument before the Board on a large number of issues and on a considerable volume of very detailed evidence. It is not, in the Board's opinion, necessary or even desirable to attempt to consider all these issues or to rehearse all this evidence. Instead, the Board will review nine of what appear to be the most salient issues, referring only to such evidence as is necessary to appreciate the significance of each.

(1) Robin's mental state

40. As noted above in paragraph 14, the jury were invited to view David as "disturbed", "obsessional" and "bizarre" in his behaviour. There was an evidential basis for this submission since it appeared that in the days before the killings he had had premonitions of impending calamity, had described déjà vu experiences and had made curious references to "black hands". Defence counsel submitted at the trial that Robin was a proud school teacher who had been rejected by his family and had snapped after months of pressure. But there was no evidence to support this suggestion. Faced with the judge's blunt question – "Who did it? David Bain? Robin Bain?" – the jury might well have inclined to think it

was the disturbed young man (if such indeed he was, and there was evidence suggesting the contrary).

41. Before the third Court of Appeal were three affidavits from deponents well-disposed towards Robin. The first of these is Mr Kevin Mackenzie, at the time principal of a primary school near Taieri and President of the Taieri Principals' Association. He and his colleagues judged in early 1994 that Robin was deeply depressed, to the point of impairing his ability to do his job of teaching children, and to help him Mr Mackenzie organised a seminar directed to work-related stress but chiefly targeted at Robin's depression. On 23 June 1994, after the killings, Mr Mackenzie visited Robin's school: he found the classroom and office dishevelled, disorganised and untidy; piles of unopened mail were on Robin's desk. Mr Mackenzie was particularly disturbed by the writing and publication in the school newsletter of certain brutal and sadistic stories written by pupils at the Taieri School, one of them involving the serial murder of members of a family. He does not regard these as stories normal children would write unless motivated to do so. He regards Robin's decision as principal to publish them as "unbelievable" and sees them as "the clearest possible evidence that Robin Bain had lost touch with reality due to his mental state".

42. A second witness, Mr Cyril Wilden, is a former teacher and a registered psychologist. In the latter capacity he from time to time visited the Taieri School, where he noted Robin's depressed state of mind. Robin appeared to be increasingly disorganised and struggling to cope. Mr Wilden asked Robin whether he was receiving regular medical attention. Robin said that he was. Mr Wilden formed the view that Robin was clinically depressed with a form of reactive depression. When he learned of the killings he immediately assumed that Robin's mental state had deteriorated to the point where he was no longer able to cope and that he had taken the lives of his family and then his own life. Mr Wilden shares Mr Mackenzie's view of the children's stories, observing that "Children write stories in response to stimuli", and Mr Wilden thinks it likely that the stimuli came from Robin's teaching at the school.

43. The third witness, Ms Maryanne Pease, is also a former teacher and a registered psychologist. She never met Robin, but visited his school after the killings. She had never during her short career encountered comparable disorganisation. A pupil reported that Robin had hit him. She regards the publication of the children's stories, selected by the principal, as a matter of grave concern, causing her to believe that he was "quite seriously disturbed".

44. The third Court of Appeal reviewed this new evidence in paragraphs 141-146 of its judgment. It observed of the children's stories (paragraph 142) that

> "There is, however, no evidence that Robin encouraged or otherwise induced the children to write these stories which could well have been prompted by movie watching".

In paragraph 143 the court held:

> "This evidence of Robin's mental state gives some balance against the evidence led at trial which tended to suggest that David himself was not coping well with the family situation. That is an evidentiary advance from David's point of view. But it is important to recognise that this further evidence neither diminishes the force of the individual strands in the Crown's case against David already identified, nor does it of itself provide any evidence that Robin actually did kill the others and then himself..."

The court's conclusion (paragraph 145) was:

> "Although David's new evidence about Robin's mental state represents an advance in that respect from the evidence at trial, a reasonable jury could well still consider that David's own mental state was at least as relevant as that of Robin."

45. In the Crown's written case to the Board it is submitted that the fresh evidence of Robin's mental state adds little or nothing to what was before the jury at trial. The point is made that there is no evidence that Robin selected the children's stories for publication, or that he even taught the children who wrote them. The Solicitor General and Mr Pike did not address this subject in oral argument.

(2) Motive

46. As noted above (paragraphs 11-12), the trial judge ruled against admission of Mr Cottle's evidence not because it was hearsay but because it was judged to be unreliable, a decision upheld by the first Court of Appeal against whose decision the Board refused leave to appeal. The question whether Laniet intended to make or had made sexual allegations against her father at around the time of the killings was accordingly not

canvassed before the trial jury. Nor was it raised in the questions referred to the second Court of Appeal.

47. Before the third Court of Appeal were four affidavits. The first deponent, [...], kept a shop in Dunedin. He says that Laniet lived opposite and was a regular customer. He describes an occasion when Laniet visited his shop distressed and crying. He asked what was the matter. She replied that there had been troubles at home, she was on drugs and she was having an affair with her father. On this occasion, according to him, she "burbled on" in an unspecified way about pregnancy and an abortion. [...] placed this occasion in March or April of 1994.

48. A second affidavit is sworn by a deponent who asks that her identity be treated as confidential. She deposes that in 1993 she ran an escort agency and engaged Laniet as a prostitute. She had many conversations with Laniet, who on one occasion asked how the deponent had become involved in prostitution, to which the deponent replied that she had been raped at the age of 15. This seemed to upset Laniet, who said that the same thing had happened to her and, on further questioning, identified her father as the culprit. It had started, she said, when the family were still in Papua New Guinea.

49. The third affidavit is sworn by Mr Sean Clarke who in early 1994 was a student at Otago University and was a friend of both David and Laniet. He describes an occasion on 27 May 1994 when he was waiting to meet David and Laniet came up to him. She also wanted to meet David and chatted to Mr Clarke while waiting. She said she was living at Taieri Mouth with her father. She was upset because David didn't arrive and, when asked what the problem was, said she wanted to move back to the family house but had had an argument with her mother and did not know whether she would be welcome. She wanted David to intercede. She was agitated and in tears and said: "I want to move back because I can't live with him anymore. I can't stand what he's doing to me any longer." Both she and Mr Clarke left before David arrived. Mr Clarke made a note for himself: "Must talk to [David]. What is going on between Laniet and her dad?"

50. The fourth affidavit is sworn by Mr Brian Murphy, a director of Murphy Corporation in Dunedin. On Friday 17 June 1994 he interviewed Laniet for a job as a tele-marketer. He decided to employ her. She was due to start on Monday 20 June and seemed very happy and excited about getting the job.

51. The third Court of Appeal (paragraph 149) considered this evidence to be clearly of sufficient reliability to be admitted before a jury:

> "It demonstrates at least the reasonable possibility that Laniet did have an incestuous relationship with her father, was proposing to break it off and was going to make disclosure. It thereby arguably provides some evidence that Robin may have been in a state of mind consistent with doing what David contends he did. This too represents some advance for David on this point from his position at trial, albeit it could perhaps be seen as giving David a motive or reason as well, in wishing to destroy those in his family he considered should not survive. But, as with the evidence of Robin's mental state, this new evidence does not provide any basis for concluding that Robin did actually commit the murders. David has now produced evidence as to why Robin might have had reason to do so, but the evidence does not of itself establish that he might actually have done so. While we must and do certainly bear the new evidence on this and the previous head firmly in mind, its proper compass must be appreciated".

In paragraph 168 the court repeated:

> "There is no evidence positively implicating Robin Bain on any tenable basis. Motive and the state of his mind must be seen in that light. Those matters could not possibly be seen by a reasonable jury as producing a reasonable doubt about David's guilt which is so clearly proved by the combination of affirmative points to which we have drawn attention".

52. The Crown, in its written case to the Board, submit that this fresh evidence does not diminish its case against David or provide a direct motive for Robin to kill members of his family while sparing David. Attention is drawn to the absence of evidence of any disclosure by Laniet over the weekend, and to a statement by the appellant to a relative that the weekend "was a little bit tense but it wasn't anything more than it usually was when Dad was home". The Crown did not elaborate this submission in oral argument.

(3) Luminol sock prints

53. Luminol is a chemical which under certain conditions reacts with blood to produce blue luminescence. It may be used, and is most valuably used, where the blood is not visible to the naked eye. The outline of a print made by a bare foot, or a foot wearing socks or shoes, may be

briefly illuminated and measured. Between 20 and 24 June 1994 Mr Hentschel, a forensic chemist employed by the Institute of Environmental Science and Research Limited ("ESR"), a Crown Research Institute, in Christchurch took part in the examination of the Bain house at 65 Every Street. During that examination he treated the carpet with luminol. A number of sock prints were identified, made by a right foot wearing socks which had become stained with blood. These prints, some of them incomplete, were found in Margaret's room, going into and out of Laniet's room and in the hallway outside Margaret's room, pointing towards the front door. It appeared that all the prints had been made by the same foot. In his evidence given at trial, Mr Hentschel said of that print

> "I said I measured it at 280 mm. That print encompassed both the heel and the toes, that was a complete print from heel to toe."

This evidence he repeated:

> "The other prints that I detected with luminol showed the toes as well, taken from the top of the toes to the heel."

Giving oral evidence to the second Court of Appeal, Mr Hentschel testified to the same effect.

54. The situation of this complete print was a matter of some potential significance, since while David testified in evidence that he had gone from room to room, and there was enough blood in the house for a sock to become impregnated, the print was found in a place where, on the Crown case, Robin would never have been. If, on leaving his caravan in the garden on the morning of 20 June, Robin had entered the house by the front door, he would have turned right into the lounge, the first room on his right. If he had entered by the lower door and gone up the stairs, he would have turned right and then left into the lounge. He would have had no occasion to enter Margaret's or Laniet's rooms, and no occasion to go down the hallway where the complete print was found. In the course of his summing-up to the jury the judge reminded them of the Crown submission that "there was not one piece of evidence that Robin Bain had been into the rooms of the deceased on this particular morning".

55. At trial it was accepted that the prints had been made by David. It is not clear why this should have been accepted, save that evidence was given by Mr Hentschel that socks taken to be Robin's were measured at 240 mm, and socks taken to be David's were measured at 270 mm. Evidence was given of the inside measurements of their respective shoes,

showing Robin's at 275 mm and David's at 304 mm, but this did not displace the assumption and the jury were not told, by the Crown or the defence, that Robin's feet had been measured in the mortuary and found to be 270 mm. Thus in his closing address to the jury the prosecutor submitted (according to his very full note): "There are the [Luminol] footprints – stocking feet – [too] big to be father's". The judge echoed this submission in the passage quoted above in paragraph 14 and reminded the jury that defence counsel accepted the prints were David's while resisting the inference that this identified him as the killer.

56. On a date after the trial Mr Joseph Karam measured David's feet. He found them to be 300mm. This measurement has not been verified. But it is consistent with David's inside shoe size, it is consistent with his height (6' 4"), it is consistent with independent evidence that David has large hands, and it is consistent with the shoe size and foot measurement of Mr Walsh, mentioned below. The measurement is not understood to be challenged.

57. On 29 October 1997 Mr Kevan Walsh, a forensic scientist also employed by ESR, made a report for the Police and Police Complaints Authority inquiry already mentioned. He was asked to determine whether or not David could make bloodied sock prints which were 280mm in length. He noted certain difficulties in the task, including a possible measurement error of +/- 5mm. He described tests he had done on himself, his left foot measurement being 298mm when standing, his height being 6' 3" and his shoe size being 12, the same as David's. From his experiments he concluded

> "that a walking person with a 300mm foot, making sock prints with the sock completely bloodied, would be expected to make a print greater than 280mm. However, it is my opinion that a print of about 280mm could be made."

58. None of the questions referred to the second Court of Appeal referred to the luminol sock prints, and it expressed no opinion on the matter.

59. Before the third Court of Appeal it was argued on David's behalf that given the size of his feet he could not have made a complete footprint measuring 280mm. Robin, it was argued, could, when allowance is made for some extension of the foot when weight is put on it, and for the inherent error in measurement, make a print of almost exactly this length. The court did not accept this. It said (in paragraph 156 of its judgment):

> "In post trial evidence the forensic scientist, Mr Walsh, has said that a 300mm stockinged foot could make a print of about 280mm. He has given quite detailed reasons for that conclusion which we do not need to traverse as Mr Walsh was not called for cross-examination, either on his reasons or on his conclusion. The end result is that on the evidence David could well have made the footprints in question. The matters now raised by him come nowhere near excluding him from responsibility for the footprints. Nor do they establish that the prints must have been made by Robin."

60. This ruling prompted further recourse to Mr Walsh, which in turn resulted in a memorandum presented to the Board jointly by counsel for David and the Crown. To this were annexed a supplementary statement by Mr Walsh dated 1 February 2007 and copies of his working notes made in October 1997. The statement reads :

> "I have been asked to clarify a comment I made in my 'Supplementary report to the review by Kevan Walsh of some aspects of the forensic evidence relating to Operation Bain', dated 29 October 1997.
>
> In particular, on page 3 and in relation to a person with a 300mm foot, I stated 'it is my opinion that a print of about 280mm could be made'. That means if a 280mm print were made by a completely bloodied sole of a 300mm foot, then the print must be incomplete to the extent of 20mm. Therefore a portion from the tip of the toes, or the end of the heel, or both, must be missing from the print."

The working notes showed the results of tests done by Mr Walsh on his own feet.

61. In response to this fresh evidence of Mr Walsh the Crown applied for leave to submit a further affidavit and statement by Mr Hentschel. David's counsel resisted the application, largely because of the manner in which the statement had been obtained. The Board decided to read the statement *de bene esse*. It now formally admits it. In the statement Mr Hentschel explains that by "a complete print from heel to toe at 280 mm" he means that in the print he can see the toe area as well as the heel area, to differentiate it from other partial prints. He also makes observations on the difficulty of measuring luminol prints.

62. In its written case to the Board, perhaps settled before the date of the draft memorandum, the Crown relied on Mr Walsh's opinion that a 300mm foot could make a 280mm print. It was pointed out in oral argument, quite correctly, that at trial the sock prints had been accepted as David's.

(4) The computer switch-on time

63. The time at which the computer was switched on and the time of David's return home from his newspaper round are not facts of significance in themselves, and fine questions of timing are rarely significant in cases such as this. But in the present case these facts were relied on by David as significant in relation to each other. It was common ground at trial that whoever switched the computer on was the killer of Robin, and these timing points were important pegs of David's defence that he could not have switched the computer on since he did not return home until later and had not on any showing gone straight to the lounge on returning home. Although related, these points must be considered separately, since the facts relating to each are quite different.

64. On the afternoon of 21 June 1994, the day after the killings, the computer at 65 Every Street was inspected by Mr Martin Cox, a computer adviser employed by the University of Otago. The computer was still on, and still showing the message typed in the day before. Mr Cox was accompanied by Detective Constable Anderson, who recorded what he did. The evidence given by Mr Cox at trial was :

> "I ascertained that 31 hours and 32 minutes had passed since the computer had been turned on. We saved the file 31 hours and 32 minutes after the computer had been switched on. I had saved the message at 16 minutes past 2 on the afternoon of 21 June. This was noted and taking 31 hours and 32 minutes back from that I ascertained the computer and the word processor had been turned on at 6.44 am, that is on the morning of 20 June 1994."

The message, he said, could have been typed in at any later stage. At trial both sides conducted their cases and the judge directed the jury on the basis that the computer had been switched on at 6.44 am, not earlier or later. The judge reminded the jury that it was one of the Crown's key points that the computer had been switched on at 6.44, just after David had returned home.

65. When the examination was made, Mr Cox was not wearing a watch. He therefore relied on the timings provided by DC Anderson's watch. The constable's watch, having no second hand and no divisions marked between the five minute intervals, was not a very suitable one for making exact measurements. It moreover appeared that it had at the relevant time been 2 minutes fast. Thus it would appear, making the retrospective calculation, that the switch-on time was 6.42 am. But it was suggested that the message had not been saved at 2.16 but at some time, perhaps 2 minutes or more later. This was not accepted by the defence. Hence, as recorded in paragraph 23 above, one of the Governor-General's questions referred to the second Court of Appeal related to the switch-on time. That court heard oral evidence from two witnesses, and received additional affidavit evidence not the subject of cross-examination. The court's conclusion has been quoted above. It held (paragraph 15 of the judgment) that had the inaccuracy of the constable's watch been brought out at trial the jury would have been bound to contemplate a switch-on time of 6.42 am, but (paragraph 16) whether 6.42 am was the correct time it was not possible to say.

66. Further evidence of a detailed and technical nature has been filed by both sides since the ruling of the second Court of Appeal. The issue remains highly contentious. The parties are agreed that the computer could have been switched on as early as 6.39.49 am, but there is no agreement on the most likely switch-on time.

67. Before the third Court of Appeal the Crown pointed out that the inaccuracy in the constable's watch had been recorded in a jobsheet disclosed to the defence before trial, and admission of the evidence was resisted on that ground. But the court considered (paragraph 106) that "it can be said that the Crown should have ensured the correct position was brought to the jury's attention". The court went on, however, to rule (paragraph 111) that "we find ourselves unable to conclude, with any confidence or precision, exactly when the computer was switched on" and (paragraph 112) :

> "The most that can be said about the new evidence relating to the computer switch-on time, when viewed in isolation, is that it cannot be regarded as excluding David in the sense of showing that it was physically impossible for him to have committed the murders."

68. In its written case to the Board the Crown rehearses the parties' competing contentions on timing and complains that the stance of David's counsel today differs from that adopted by his counsel at trial. In

oral argument the Crown supported the approach of the third Court of Appeal.

(5) The time of David's return home

69. On the morning of 20 June 1994, within hours of the killings, Detective Sergeant Dunne questioned David about the timing of his newspaper round. David said that he left home at about 5.45 and arrived back at about 6.40. He made a written statement in which he said that at 6.40 exactly he was just past Heath Street on the way up to his house. He said it took 2 or 3 minutes to walk up to the house. In evidence at trial he confirmed that account, but added that the 2 or 3 minutes was an approximation, "I can't tell you how long it takes exactly".

70. The Crown case at trial was that on this morning David had begun earlier or covered the route more quickly than usual, in order to make sure that he could secrete himself in the alcove off the lounge before his father reached the room. To this end the Crown read (by consent) the statements of several witnesses the purport of whose evidence was that on that morning their newspapers had been delivered earlier than usual. The Crown adduced evidence of the time it had taken police officers to walk and run David's route. The Crown also read (by consent) the statement of Mrs Laney who worked at a rest home in Every Street up the hill beyond No 65. In her statement (made on 27 June 1994) she said that she was supposed to start work at the home at 6.45 am but on the morning of 20 June she was a bit late. She drove up Every Street past No 65, and as she did so noticed a person going past the partially opened gate of that house. She thought she must be running late as she normally saw that person down by Heath Street. She looked at the clock in her car and it read 6.50 am. She knew the clock was 4-5 minutes fast as it was about 6.45 am as she drove past him. She described what she thought he was wearing, but saw no dog, which she had seen with him before.

71. In his closing address to the jury, prosecuting counsel submitted, referring to Mrs Laney: "She passed at speed. Did not identify the [accused]. Saw someone at the gate. She thought at [6.45] am". In a summary of the Crown case prepared for the first Court of Appeal this remained the Crown's contention: "Laney observed some person at the gate of the house (whom she was unable to identify) at around 6.45 am".

72. In his summing-up to the jury, the judge re-read most of Mrs Laney's statement, and reminded the jury of the other evidence. When the jury asked him to re-read Mrs Laney's statement, he did so. No question relating to this point was referred to the second Court of Appeal, which accordingly did not address it.

73. After the trial it became evident that the Police Constable who took Mrs Laney's statement on 27 June 1994 checked the clock in Mrs Laney's car and found it to be 5 minutes fast. This was endorsed by the constable on a copy of Mrs Laney's statement, but was not brought to the attention of the defence, the judge or the jury.

74. It also became evident that Mrs Laney was re-interviewed by the police on 28 March 1995, just before the trial. This was to "firm up on the timings of the paper round" and "clarify any ambiguities" in her statement. She explained that the digital clock in the dash of her car was at least 5 minutes fast. When it was 7.0 o'clock her car clock would show 7.05. She made and signed a second statement. In this she said that she saw the paper boy standing in the gateway to No 65. He was a tall person, but she could only see the outline of his body, not his face or head because of the darkness. What she did see was the yellow paper bag over his left shoulder. Because she saw him she thought she was running late. She looked at her digital car clock. It read 6.50. Whenever she had seen the paper boy he was carrying the yellow bag. She usually saw him further away, before Heath Street. She identified him as "a tall thin guy, late teens, early 20s". When she looked at her clock and it read 6.50 she knew it was 5 minutes fast, so she believed the real time was 6.45. When the news came on, the clock was usually 5 past the hour.

75. In paragraph 109 of its judgment the third Court of Appeal said:

> "We mention again here the fact that Ms Denise Laney claimed to have seen David outside the gate to 65 Every Street at 6.45 am. The circumstances in which she came to that view are such that her suggested time cannot be regarded as anywhere near precise. The greater detail in her second statement which was not disclosed to the defence does not, in our view, lead to any materially greater precision".

The court referred to the 59 second imprecision in a digital car clock and Mrs Laney's failure to correlate her calculation with any verifiable time signal but only with the commencement of the news on a station or stations which she did not identify. It noted (paragraph 110) that Mrs Laney thought she was running late, but an alternative explanation was that David was running early. When (paragraph 111) all the relevant evidence was assessed, including the evidence about the various sightings on the paper run, and times and distances from those sightings to 65 Every Street, the court found itself unable to conclude with confidence

and precision when David returned home. Relating the computer switch-on time and the return home time, the court concluded (paragraph 113):

> "The new evidence widens the potential time gap but it cannot be regarded as clinching the matter in David's favour by reason of physical impossibility. The times involved do not have nearly enough precision or reliability to produce that consequence. The timing evidence is such that a reasonable jury could conclude that it was physically possible for David to have committed the murders; whether the Crown had proved he had done so would then be a matter for assessment on all the other evidence".

The court made no reference to the jury's request to hear Mrs Laney's evidence re-read, and did not consider the possible significance of that request.

76. In its written case to the Board, the Crown admits that the non-disclosure of Mrs Laney's second statement to the defence was "an unfortunate error" and the prosecutor's comment that Mrs Laney did not identify David, although strictly accurate, would have been better omitted. But it is submitted that the second statement does not materially assist David's argument that he could not have switched on the computer because he had not returned home in time. The Crown criticises the detail of Mrs Laney's statements, suggesting inconsistencies between the two. In oral argument, the Crown supported the approach of the third Court of Appeal.

(6) The glasses

77. It is common ground that David was short-sighted with a degree of astigmatism in one eye. He ordinarily wore glasses for some activities. A few days before the killings his glasses were damaged and he took them to be repaired. The Crown case was that during part or all of the time that he was killing the members of his family David wore another pair of glasses, the distorted frame and detached right-hand lens of which were found in his room after the killings. The detached left-hand lens of those glasses was found after the killings in Stephen's room. The Crown contended that this lens was dislodged when David was struggling with Stephen. Issues have arisen concerning the glasses and the lens found in Stephen's room ("the left-hand lens"). It is convenient to review these issues separately.

78. At the trial the Crown called Mr Sanderson, a highly qualified optometrist on the staff of Otago University. He examined the glasses and the left-hand lens. He testified that the two lenses were similar, but not identical, to glasses prescribed for David two years earlier.

79. When David gave evidence at trial he said that these were not his glasses. They were an older pair of his mother's which he wore on occasion. He added:

> "I know of the evidence of the optometrist, there is a dispute with my evidence as to whether those glasses were mine or someone else's. I have no doubt they were my mother's glasses, yes. On occasions in the past I have worn my mother's glasses if my ~~own~~ glasses were not available, but only for watching TV programmes, basically that is it, or going to lectures".

He could not say how they came to be in his room. David was cross-examined:

> "Q The pair of glasses which have been produced to the court, a saxon frame?
>
> A Yes.
>
> Q You say they are not yours but they are an older pair of your mother's?
>
> A That's right.
>
> Q The ophthalmologist, Mr Sanderson, from the hospital was of the opinion that they were an earlier prescription of your existing optometry prescription?
>
> A That is incorrect …
>
> Q The ophthalmologist was of the opinion that the prescription of the two lenses that fitted the frame are similar to the prescription prescribed for you in October 1992. Do you recollect him giving that evidence?
>
> A I do, that is only in one lens though, not the other.
>
> Q You say he is wrong?
>
> A Yes".

80. The judge in his summing-up gave no direction to the jury on the ownership of the glasses but, as recorded above (paragraph 15), the jury asked a question about it. The judge reminded the jury of what Mr Sanderson and David had said.

81. The Governor-General referred a question to the second Court of Appeal about the left-hand lens but not about the ownership of the glasses. The second Court of Appeal did, however, hear evidence from Mrs Janice Clark, who said David had admitted to her that he had worn the glasses over the week-end before the killings, and from Mr Wright, the prosecutor at the trial, who understood that fact to have been privately conceded by defence counsel. These facts are contested but are not immediately material. In addition, the court heard evidence from Mr Sanderson. The effect of his evidence was that, shortly before the trial, there became available a photograph of Margaret wearing the glasses in question, and this caused him to change his opinion and conclude that the glasses were Margaret's, not David's. The second Court of Appeal made no finding on the subject.

82. Before the third Court of Appeal was a further affidavit of Mr Sanderson. In it he says that a short time before the trial he was shown a photograph of Margaret wearing what were clearly the frames in question. He realised that his original opinion that the glasses were David's was totally wrong. They were Margaret's, not David's. He communicated his view to Detective Sergeant Weir, who acknowledged that this was probably correct and said Mr Sanderson's statement would be changed accordingly. He gave evidence in the belief that his statement had been changed. He now realises, reading the transcript of his evidence to the jury at trial, that his change of opinion was not conveyed to them.

83. The third Court of Appeal (paragraphs 53-56) drew inferences adverse to David from the finding of the glasses in his room and the fact that they were of some use to him and none to Robin. It acknowledged (paragraph 138) that David was:

> "cross-examined in a way which could have suggested that he was not correct in this evidence. The ownership of the glasses was thus apparently put in issue. The jury seems to have thought so because they asked a question: the glasses found in the accused's/Stephen's rooms, whose were they according to the optometrist?"

In paragraph 140 the court continued:

> "The force of the ownership point is that David now contends that although the Crown knew that the glasses belonged to his mother, his evidence to that effect at trial was nevertheless challenged. The Crown suggests that this

> was not so but we are of the view that the jury could have seen the Crown as challenging David's evidence in this respect and thus as impugning his credibility. This point and the point concerning the evidence about the lens might in other circumstances have given rise to concern from a process point of view. In the particular circumstances of this case, however, we do not consider that these matters raise any risk of a miscarriage of justice. The real point was that the glasses were of no use to Robin but could have been used by David: see the discussion in paras 55 and 56. For reasons which are essentially the same as those pertaining to the further evidence issue as a whole, we do not consider that the Crown's approach to this aspect of the case has caused any miscarriage of justice".

84. In its written case to the Board the Crown contends that ownership of the glasses was not a plank of its case against David. His use of the glasses over the week-end before the killings was understood to be conceded. Mr Sanderson was not briefed to give evidence about ownership at the trial, but in a rather confusing way appeared since the trial to have misgivings about the effect of his testimony. The photograph shown to Mr Sanderson by the police was received from Papua New Guinea shortly before the trial. The Crown did not invite the jury to conclude that David was a liar when he said the glasses were his mother's. In oral argument the Crown stressed that the ownership of the glasses was not an issue at trial.

(7) The left-hand lens

85. The exact location of the left-hand lens in Stephen's room was of obvious significance if it was a place where it could probably have fallen during a struggle between David (wearing the glasses) and Stephen.

86. At the trial Detective Sergeant Weir gave evidence on this point with reference to a blown-up photograph of a portion of the floor in Stephen's room. He told them "You can just make out the edge of the spectacle lens just in front of the ice skating boot". The officer left the witness box to point out the location in the photograph to the jury, counsel and the judge. The photograph was taken, he said, on Monday 20 June when Stephen's body was still there, and the lens was on the underneath side of the skate. Cross-examined, he said that the lens was exactly where he had said. At the invitation of the judge, he again left the witness box and pointed with his pen to the image of the lens in the photograph. Faithfully reflecting this evidence, the judge reminded the

jury of the Crown case that the left-hand lens was found in Stephen's room quite near his body.

87. By the time of the hearing before the second Court of Appeal, Mr Weir's contemporaneous notes and typed-up job sheet had been disclosed. The former recorded "Locate lens from glasses beneath clothing etc in front of bunks" and the latter "Underneath the ice skating boot is a lens from a pair of optical glasses". Mr Weir was called as a witness and was cross-examined. In answer to questions, he accepted that his evidence at trial as to where he had found the lens had been wrong, and that he may have misled the jury, although not intentionally. He had found the lens under a skate boot under a jacket, and it was not the object he had identified in the photograph. He agreed it was unlikely that the skate boot had been pushed to where it was found during a struggle. It was possible that the lens had been in position before the struggle and had not been disturbed. Both lenses had been examined by ESR and no blood, hair, human tissue or finger-prints were found on either. The left-hand lens was dusty.

88. The second Court of Appeal's conclusion on this point is quoted in paragraph 24 above. This conclusion was preceded by two paragraphs which merit quotation:

> "[18] There can be no doubt that a lens was found in Stephen Bain's bedroom. The frame from which it came and the other lens were found in David Bain's bedroom. There has been much controversy as to exactly how and where the lens in question was found, and how Detective Sergeant Weir came to his mistaken belief that he could see the lens in a particular photograph. We do not consider it to be helpful to traverse all the issues covered on these and allied points. The Crown's thesis that David Bain was wearing the glasses when engaged in a struggle with Stephen, before shooting him, is certainly a tenable one on the evidence. Indeed, in the absence of any other explanation for the lens being found in Stephen's bedroom, where he was killed, the Crown's thesis is a strong one. The issue for us, however, is whether it is reasonably possible the lens could have got into the vicinity of Stephen's dead body in a manner or at a time which was unrelated to the murders. That could be so only if the lens was there prior to the time when the murderer entered the room to shoot Stephen. There is no direct evidence suggesting how or why a lens from a pair of glasses Stephen

> never wore, and had no need to wear, was already on the floor in his bedroom, prior to his being shot.
>
> [19] Against that we recognise that the lens had no forensic evidence on it; no blood, no fingerprint, indeed nothing of note. That circumstance could be explained by the fact that although the lens was already in the room, and in the close vicinity of where Stephen's dead body was found, it was covered up by clothing at the time the suggested struggle and the shooting took place. There is support for that possibility in Detective Sergeant Weir's own contemporaneous note that when searching Stephen's bedroom he found the lens 'beneath clothing etc' in front of the bunks".

89. The third Court of Appeal's general approach to this issue in paragraphs 53-56 of its judgment has already been summarised. It returned to the glasses and lenses in paragraph 136, observing: "We do not regard the evidence on this aspect of the case as assisting the Crown's case to any appreciable degree". It acknowledged that the lens the officer pointed out in the photograph was not a lens, and continued (paragraph 137):

> "The jury were led to believe that the lens was discovered out in the open, whereas Detective Sergeant Weir had recorded in contemporaneous notes that he had found it beneath clothing. It was more consistent with the Crown's theory for the lens to be found in the open rather than under clothing, albeit it could have got covered up during the struggle. The jury were undoubtedly misled by the Detective Sergeant's evidence. We will bear that in mind when we come to our overall conclusion. It is fair, however, to record that nothing we have seen, read or heard leads us to the view that the jury were deliberately misled …"

In paragraph 168 it added:

> "The glasses and lens issue has not featured significantly in our analysis of the strength of the case against David. It does not in any way tend to exculpate David".

90. In its written case on appeal to the Board, the Crown reject any allegation of deliberate misconduct. It is suggested that the lens was close to where the officer said he saw it. The precise location of the lens was not regarded by the Crown as relevant at trial. It was submitted in oral argument that the lens was not a critical issue.

(8) David's bloodied fingerprints on the rifle

91. Evidence was given at trial that four bloodied fingerprints, identified as David's, were found on the forearm of the rifle used in all these killings. The evidence was that the prints were "defined in blood or what appeared to be blood. When I say the print was in blood – I mean that the fingers were actually contaminated by blood when going down on the gun as opposed to the fingers going down into blood that was already on the gun".

92. David, when questioned by the police on 21 June 1994, said that he had last used the gun in January or February for shooting possums. Cross-examined at trial, he repeated this. He said he could not remember touching the rifle on the morning of 20 June. He was asked to account for his fingerprints on the rifle and replied:

> "I can't account for that, because I don't remember touching the gun at all that morning. All I can say is that I must have picked it up at some stage but I do not recall touching the gun at all or seeing it".

The trial judge listed David's bloodied fingerprints on the murder weapon as one of the key points in the Crown case. As the second Court of Appeal was later to observe (paragraph 22 of its judgment):

> "There was no suggestion at the trial that the blood was not human. Hence the jury will undoubtedly have proceeded on the basis that it was".

93. Unknown, it would seem, to the judge, the jury and the defence at trial, the blood in which David's fingerprints were impressed had not at that stage been tested although material in the close vicinity had been tested, as had samples taken from elsewhere on the rifle, all of which were human blood. Such a test was performed on the fingerprint material, well after the trial, on 7 August 1997 by Dr Sally Ann Harbison. The reagent blank used as a control on that occasion tested negative, as it must if a valid test is to be carried out. The test was carried out on a number of samples of material taken from the rifle, other than from David's fingerprints, all of which proved positive, indicating the presence of human DNA. The test on the material in which David's fingerprints were made proved negative: it did not indicate the presence of human DNA. Dr Harbison repeated the test on 19 August 1997, but on this occasion the reagent blank tested positive, which indicated that it had been

contaminated; the test was therefore invalid. The second Court of Appeal heard oral evidence from four witnesses on this subject, and found a reasonable possibility that the blood which bore David's fingerprints could have been other than human blood, put there before the killings.

94. In 1998 Dr Geursen, a biochemist with long experience of molecular biology research, obtained samples of the fingerprint material and the reagent blank from Dr Harbison. The reagent blank tested negative. The test performed on the fingerprint material yielded a result which showed, in the judgment of Dr Geursen, that the material was not of human origin. Dr Harbison has not accepted this result: she has said that the fingerprint sample she had supplied was not part of the sample tested in her first test of 7 August but was a sample from the invalid second test of 19 August. This is an explanation which, on scientific grounds, Dr Geursen does not accept. His evidence on affidavit, with much other evidence (including evidence given by him in another trial), was before the third Court of Appeal in written form.

95. The third Court of Appeal (paragraph 62) thought it

> "a powerful inference that the existence of David's fingerprints in the small area on the rifle which was otherwise uncontaminated with blood, establishes that the fingers which deposited the prints were in position at the time when all the other blood came onto and was spread throughout the rifle … This aspect of the evidence, on its own, comes close to being conclusive of David's guilt. It is an almost irresistible inference that his prints must have been placed on the murder weapon contemporaneously with the murders".

The court considered (paragraph 67), on the evidence, that the excellent definition of David's fingerprints, and Mr Jones' opinion of their recent origin, constituted a very powerful case that they were deposited at the time of the killings. Later in its judgment (paragraph 130) the court expressed its inability to accept that the fingerprint blood was of animal rather than human origin. The court referred to the tests by Dr Harbison and Dr Geursen, and concluded (paragraph 135):

> "In these circumstances we are of the view that nothing of moment has been raised to cast doubt on our earlier discussion of this topic which demonstrated, for the reasons there set out, that from a practical rather than a scientific point of view, David's fingerprints were almost certainly

> deposited on the fore-end of the rifle contemporaneously with the murders".

It added (in paragraph 168):

> "The confused and uncertain science concerning the nature of the blood in which the fingerprints on the rifle were deposited does not detract from the force of the physical evidence on this topic".

96. In its written case on appeal to the Board, the Crown submits that recent well-defined fingerprints from David's bloodied left hand were found on the forestock of the rifle. The rest of the rifle was smeared with blood. It had been wiped. The only plausible explanation is that David gripped the forestock of the rifle when he wiped it. Dr Geursen's tests are valueless, since he tested a contaminated sample. It was submitted in oral argument that the third Court of Appeal were unquestionably right on this question.

(9) Laniet's gurgling

97. Laniet suffered three gun shot wounds to her head: one to her cheek, one above her ear and one to the top of her head. The evidence was that the wound to her cheek was unlikely to have killed her at once; either of the other wounds would have been immediately fatal.

98. Dr Dempster gave evidence at trial of his findings at the post mortem examination of Laniet. He found a large amount of liquid in her lungs, which were distended largely as a result of the lungs developing pulmonary oedema. He inferred that Laniet had lived for a time after what he took to be the first of her injuries, that to the cheek. He would have anticipated that Laniet would have been making readily audible gurgling or similar noises as this material accumulated in her airways. During his evidence in chief David testified that he remembered being in Laniet's room and could hear her gurgling, elsewhere described by him as groaning type sounds muffled by what sounded like water. In his closing address to the jury prosecuting counsel submitted that "Only one person could have heard Laniet gurgling – that person could only have been the murderer". The judge reminded the jury of that submission, and of the evidence given by David and Dr Dempster.

99. As noted above (paragraph 26), one of the questions referred to the second Court of Appeal related to this matter. The court heard oral

evidence given by Professor Ferris, who supported the Crown case. It was also aware of expert reports expressing a contrary opinion.

100. The evidence before the third Court of Appeal addressed two aspects of this matter: the order of the shots fired to Laniet's head; and the phenomenon of post mortem gurgling. Professor Ferris and Dr Thomson supported the Crown case that the shot to the cheek was fired first and that post mortem gurgling can only occur if a body is moved. Four deponents relied on by David disagreed on one or both of these points. These were Mr Ross, a forensic scientist who first ascertained that the shot to the top of Laniet's head had been fired through a white cloth, a fact of some potential significance, and who considered that that shot had been fired first; Dr Gwynne, a retired pathologist of long experience; Professor Cordner, Professor of Forensic Medicine at Monash University, Melbourne, who supported Mr Ross' view on the order of shots but had no personal experience of gurgling in unmoved bodies; and Mr Pritchard, who for 15 years had been the laboratory technician in charge of the Pathology Teaching Museum at the Otago Medical School, and deposed that there were many occasions when he had experienced the phenomenon of gurgling noises emanating from dead bodies, most often when a body was moved but sometimes spontaneously.

101. The third Court of Appeal observed (paragraph 93) that subject to the force and effect of the new evidence, the gurgling evidence was another substantial strand in the case against David. The court considered (paragraph 117), on the evidence, that the shot to Laniet's cheek had been the first in time. It observed (paragraph 118) that the white cloth through which the shot to the top of the head had been fired had never been found, despite a thorough search of the premises by the police, and suggested that David could easily have disposed of it on his newspaper round. The court referred to the affidavit evidence of Professor Cordner, Mr Pritchard and Dr Gwynne, but concluded (paragraph 123):

> "Up to this point we do not consider the new evidence provides any sufficient basis for doubting the force of the proposition that, as David heard Laniet gurgling, he must have been the murderer".

The court referred to the evidence of Dr Thomson and Professor Ferris and concluded (paragraph 129):

> "All this simply confirms the view we reached on an appraisal of David's new evidence. Any uncertainty there may have been at that point is substantially dispelled by the

> Crown's further evidence on this issue. Overall we consider that the new evidence does not undermine the way the jury were invited to look at this topic; certainly not to the point of our being concerned that any miscarriage of justice has occurred on this account. This point can indeed properly be viewed as strongly indicative of David's guilt".

102. The Crown submits in its written case to the Board that the veracity of the prosecution's submission to the jury gains weight from later evidence, and that David could only have heard what he described after Laniet had been shot through the cheek and before the fatal shots were fired, indicating that he fired them. In oral argument the Crown submitted that Laniet had first been shot through the cheek, and it supported Professor Ferris' evidence based on that inference.

Substantial miscarriage of justice

103. A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it. Such a miscarriage involves no reflection on the trial judge, and in the present case David's counsel expressly disavowed any criticism of Williamson J. It is, however, the duty of the criminal appellate courts to seek to identify and rectify convictions which may be unjust. That result will occur where a defendant is convicted and further post-trial evidence raises a reasonable doubt whether he would or should have been convicted had that evidence been before the jury.

104. In the opinion of the Board the fresh evidence adduced in relation to the nine points summarised above, taken together, compels the conclusion that a substantial miscarriage of justice has actually occurred in this case. It is the effect of all the fresh evidence taken together, not the evidence on any single point, which compels that conclusion. But it is necessary to identify the source of the Board's concern in relation to each point.

Robin's mental state

105. Many questions were directed at trial to establishing David's mental state. The jury may well have accepted the Crown's characterisation of it. Contrasted with Robin who, despite the irregularity of his domestic and marital life, may well have appeared to be a mature and balanced, devout school principal, David could have appeared much more likely to engage in a frenzy of killing. The third Court of Appeal

acknowledges that the fresh evidence redresses the balance in favour of David, and represents an evidentiary advance for him. But only the jury can assess the extent to which the balance is redressed and the evidence advanced. The jury might accept the evidence of three professionals, as yet uncontradicted, that stories of the kind described above are not written by children and published in a school newsletter without participation by the principal of a two-teacher school, and there is no evidence to support the suggestion that they could have been inspired by movie watching. The jury might, not extravagantly, have felt that this evidence put a new complexion on the case. It is true, of course, that this evidence does not alter the underlying facts of the killings. But many of those facts are highly contentious, and the evidence could well have influenced the jury's assessment of them.

Motive

106. Williamson J held that any evidence which might shed light on the motive for these killings must be relevant. That opinion has not been challenged. At trial no plausible motive was established why either Robin or David should have acted as one or other of them undoubtedly did. Mr Cottle's evidence was rejected as unreliable, and no complaint is now made of that decision. But the question must arise whether his evidence would have been rejected had it been known that three other independent witnesses gave evidence to broadly similar effect. The third Court of Appeal again acknowledged that this fresh evidence represented some advance for David, but discounted it as providing no basis for the conclusion that Robin committed the murders. This, again, is a matter for the assessment of a jury, not an appellate court, and the jury's assessment would depend on what evidence they accepted. If the jury found Robin to be already in a state of deep depression and now, a school principal and ex-missionary, facing the public revelation of very serious sex offences against his teenage daughter, they might reasonably conclude that this could have driven him to commit these acts of horrific and uncharacteristic violence.

Luminol sock prints

107. At trial, it was asserted and accepted that the 280mm complete toe to heel sock print, found outside Margaret's room, seen and measured by Mr Hentschel, was David's because it was too big to be Robin's. The fresh evidence throws real doubt on the correctness of that assumption. The jury could reasonably infer that the print, if a complete print, was about the length of print that Robin would have made and too short to have been made by David. A question now arises whether, as Mr Walsh suggests, his earlier report was misunderstood and misapplied by the third

Court of Appeal. If the jury had concluded that the print had, or might have been, made by Robin, the jury might have thought this significant for three reasons. First, it would indicate that Robin had been to parts of the house on the morning of 20 June which, on the Crown case, he would never have visited. Secondly, it would establish that Robin had changed out of blood-stained socks, since if he made the print he must have been wearing blood-stained socks and the socks he was wearing when he was found dead in the lounge were not blood-stained. Thirdly, if he changed his socks, the jury might not think it fanciful to infer that he changed other garments as well, as (on David's case) he had. The implausibility of Robin changing his clothes if he was about to commit suicide, was a point strongly relied on by the Crown, as something a normal and rational person would not have done. But the jury might conclude that whoever committed these killings was not acting normally or rationally.

The computer switch-on time

108. It is now clear that the jury should not have been told as a fact that the computer was switched on at 6.44 am. It may have been switched on nearly 5 minutes earlier; it may perchance have been switched on at 6.44; it may theoretically have been switched on later. A prosecutor alert to the fresh evidence now before the court would have had to approach the switch-on time with a degree of tentativeness. The third Court of Appeal observed that this evidence, viewed in isolation, could not be regarded as excluding David in the sense of showing that it was physically impossible for him to have committed the murders. That is so. But there is no burden on David to prove physical impossibility. The onus is not on him. The jury might reasonably have considered this peg of David's argument on timing to be strengthened had they known the full facts.

The time of David's return home

109. The jury were invited to treat Mrs Laney's identification of David as problematical and her estimate of time as at best approximate. The fresh evidence might lead a reasonable jury to infer that her identification was not in doubt and her estimate of time reliable. The third Court of Appeal concluded (see paragraph 75 above) that her suggested time could not be regarded as anywhere near precise and that the new evidence did not clinch the matter in David's favour by reason of physical impossibility. But the reliability of her time estimate was a matter for the jury, who never heard the full evidence and never heard Mrs Laney cross-examined, because the defence did not know her clock had been checked by the police and did not know she had made a second statement. There is again no burden on David to prove physical impossibility. It is noteworthy that the trial jury asked to be reminded of what Mrs Laney

had said, presumably because they were concerned about either her identification or her estimate of time. It may be that the fresh evidence would have allayed their concern. But the third Court of Appeal do not mention the jury's question. This fresh evidence could reasonably have been regarded as strengthening the second peg of David's argument.

The glasses

110. The Crown is right in its contention that the ownership of the glasses, as opposed to the wearing of them on the morning of 20 June, was not in itself a live issue at the trial. But Mr Sanderson was understood to say that the glasses were David's, David said they were not his but his mother's and David was then cross-examined in a way that (as the third Court of Appeal accepted) impugned his credibility. If ownership of the glasses was in itself an immaterial matter, David's credibility was certainly not: the central question the jury had to resolve was whether they could be sure that David's account of events was untrue. While it cannot be known what motivated the jury to ask the question as to whose the glasses were, according to Mr Sanderson, it may have been because they saw in this a valuable indication of David's credibility or lack of it. If Mr Sanderson's fresh evidence be accepted, the jury were given an answer which did not reflect his revised opinion and could have led the jury, reasonably in the circumstances, to draw an inference unfairly adverse to David.

The left-hand lens

111. Detective Sergeant Weir told the jury that he had found the left-hand lens in a visible and exposed position in which, as is now accepted, he had not seen or found it. His evidence to the jury was more consistent with the Crown's case that the lens had become dislodged during a struggle than the finding of the lens, covered in dust, under other articles on the floor. The third Court of Appeal accepted that the jury had undoubtedly been misled by the officer's evidence. From the jury's point of view it did not matter that, as the court also held, the misleading was not deliberate. Nor, in the Board's view, with respect, is it determinative that the glasses and the lens had not featured significantly in the third Court of Appeal's analysis of the strength of the case against David. What matters is what the trial jury made of the incorrect evidence and, even more importantly, what they would have made of the correct evidence.

David's bloodied fingerprints on the rifle

112. The trial proceeded on the assumption that David's fingerprints on the forearm of the rifle were in human blood. It is now known that although blood from other parts of the rifle had been tested before trial and found to be human blood, the fingerprint material had not been tested. When it was tested after the trial it gave no positive reading for human DNA. Thus the blood analysis evidence was consistent with the blood being mammalian in origin, the possible result of possum or rabbit shooting some months before. If Dr Geursen's evidence is accepted, the blood was positively identified as mammalian in origin. There are a number of highly contentious issues arising from this evidence, including the integrity of the sample on which Dr Geursen performed his test and the reliability of Mr Jones' opinion on the age of the fingerprints and his comments on the similarity in appearance between David's fingerprints on the forearm of the rifle and prints made by Stephen on the silencer. But these were not issues which the trial jury had any opportunity to consider, and they are not, with respect, issues which an appellate court can fairly resolve without hearing cross-examination of witnesses giving credible but contradictory evidence.

Laniet's gurgling

113. The trial jury was encouraged to regard David's evidence of Laniet's gurgling as a clear indication of his guilt. The second Court of Appeal heard oral evidence from Professor Ferris, but concluded that the issue was not so straightforward. The evidence before the third Court of Appeal revealed a sharp conflict of opinion as to the order in which the shots were fired at Laniet's head (arguably relevant to the congestion of the airways and the likelihood of gurgling) and the phenomenon of post mortem gurgling. Without hearing any of these witnesses, and without giving any reason for discounting the evidence of the witnesses relied on by David, the court found it possible to regard the issue as concluded in the Crown's favour by its further evidence. But the evidence of Professor Ferris is the subject of sharp expert criticism. The Board feels bound to rule that the court assumed a decision-making role well outside its function as a reviewing body concerned to assess the impact which the fresh evidence might reasonably have made on the mind of the trial jury.

114. It appears that counsel for both parties agreed that there should be no oral evidence and no cross-examination before the third Court of Appeal. But that is not an agreement which the court was bound to accept, and such an agreement, if made, could not empower the court to choose between the evidence of deponents, accepted as credible, but testifying to contradictory effect.

115. While challenging the detail and the significance of the nine points discussed above, and other points relied on by the defence which the Board has not discussed, the real thrust of the Crown's case on appeal is to emphasise the strength of the many facts pointing clearly towards David's guilt. This, as is evident from the quotations given above of passages in the judgment of the third Court of Appeal, is the essential basis upon which the court dismissed the appeal. The Board does not consider it necessary to review these points in detail, for three reasons. First, the issue of guilt is one for a properly informed and directed jury, not for an appellate court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but whether there is or was evidence on which it might reasonably decline to do so. And, thirdly, a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial. The Board should, however, touch on the three key points which the third Court of Appeal identified as establishing David's guilt all but conclusively: see paragraph 33 above.

116. The first of the court's three key points was that only David knew of the existence and whereabouts of the spare key to the trigger lock. This is a point relied on by the Crown throughout. It is based on assertions by David, in themselves remarkable if he was a murderer seeking to avert suspicion or baffle proof. The force of the point depends on three assumptions. The first is that, as David plainly believed, Robin did not know of the existence or whereabouts of the spare key. This may of course be so. But there was evidence (not mentioned by the Court of Appeal) that twenty spent rounds were found in Robin's caravan, all fired by the murder weapon and some of the same ammunition type as was used in the killings. There was no evidence how these rounds came to be there, but the possibility may be thought to exist that Robin had on some occasion or occasions used the gun without David's knowledge and had for that purpose unlocked the trigger lock. The second assumption is that Robin did not know there were two keys to the lock. This may again be so. But Robin had much greater familiarity with firearms than David, and might reasonably be thought to know or suspect that rifles with trigger locks are sold with two keys. The third assumption is that Robin would not have rummaged about among David's belongings to look for the key. It was in a jar on David's desk across the room from where the rifle and the ammunition were kept. The defence contend that this is a place where a searcher might be expected to look and, if he looked, to find it.

117. The court's second key point was based on the blood-stained condition of the rifle generally coupled with the uncontaminated area

associated with David's fingerprints, suggesting that his hand had been in position contemporaneously with the murders. The court placed great reliance on this point. But it is not a point on which (as distinct from the fingerprints themselves) prosecuting counsel relied in his closing address to the jury, it was not one of the 12 main points of the Crown case which the trial judge listed at the outset of his summing-up and it is not a point which the judge drew to the jury's attention in the course of his summing-up. There is no reason to think that this point was in the jury's mind at all. The relevant evidence has not changed. Whatever the merits of the point may be, it can hardly be fair to rely on it for the first time on appeal 8½ years after the trial.

118. The court's third key point is that the spare magazine was found standing upright on its narrow edge almost touching Robin's outstretched right hand, a position in which it was unlikely to have fallen accidentally. This is a point which prosecuting counsel made to the jury in his closing address. But the judge did not include it in his list of the Crown's main points. His only reference was to the prosecutor's argument

> "that when you look at the position of the magazine near [Robin's] right hand, the fact that it is standing on its edge, is explainable logically only by it being put there rather than having fallen out of his hand because if it had fallen, it would have fallen on its side".

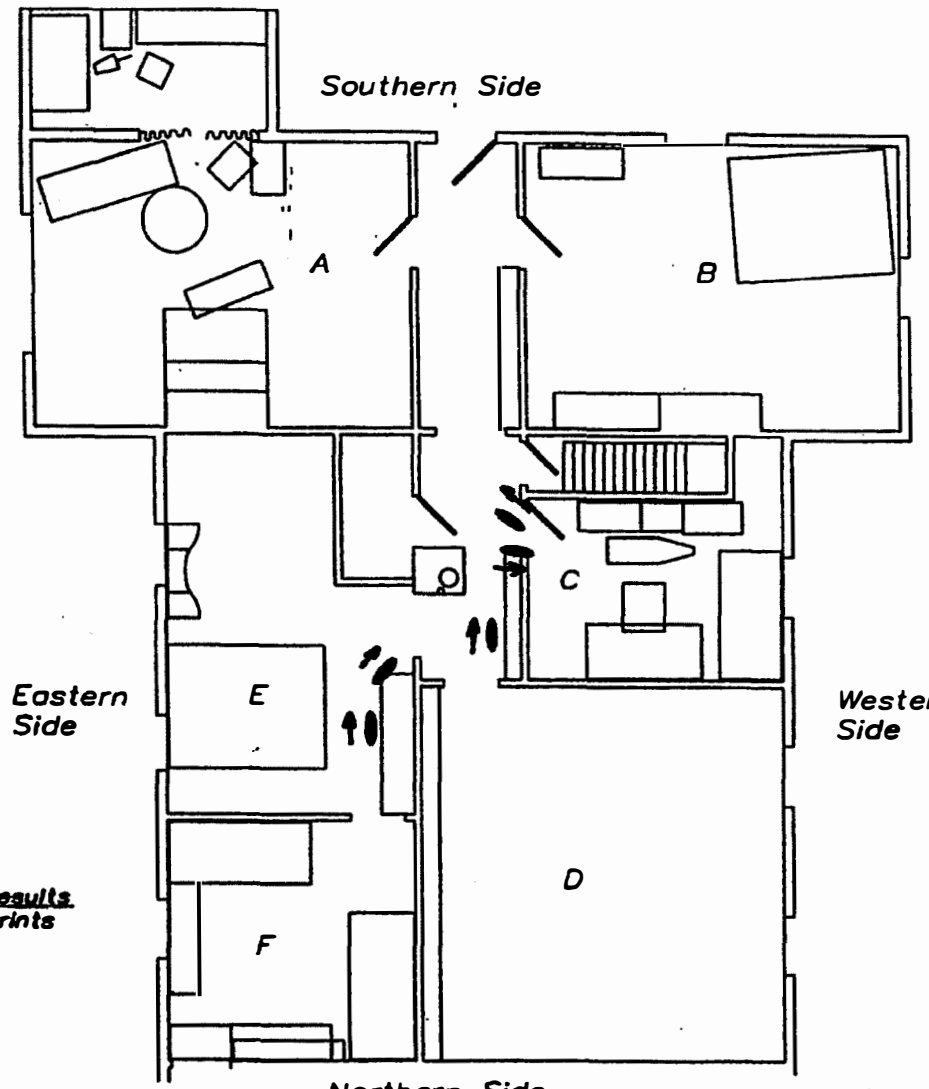
It must be very questionable whether the jury attached significance to this point. The magazine in question was found on examination to be defective. A live round found beside the rifle showed signs of having been misfed. The possibility must exist that, the magazine having caused a misfeed, it was replaced and put on the floor. But even if it be accepted that the magazine was put in the position in which it was found and did not fall into that position, the question remains: who put it there? It could have been David. But there is no compelling reason why it could not have been Robin. This again is a jury question, not a question for decision by an appellate court. Neither singly nor cumulatively can these points fairly bear the weight which the third Court of Appeal gave to them. It is unnecessary to review the six additional points on which the court also relied in particular: all are contentious, and one (the state of Robin's bladder) is a point which, although mentioned by the prosecutor in his closing address, was not mentioned by the judge in his summing up.

119. For all these reasons, the Board concludes that, as asked by the appellant, the appeal should be allowed, the convictions quashed and a retrial ordered. The appellant must remain in custody meanwhile. The

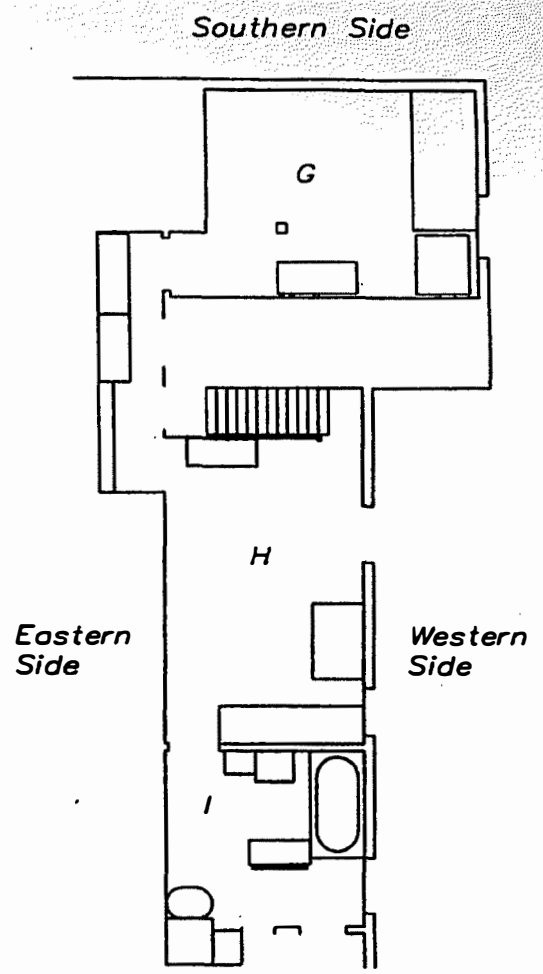
order of the Board for a retrial does not of course restrict the duty of the Crown to decide whether a retrial now would be in the public interest. As to that the Board has heard no submissions and expresses no opinion. The parties are invited to make written submissions on the costs of these proceedings within 21 days. In closing, the Board wishes to emphasise, as it hopes is clear, that its decision imports no view whatever on the proper outcome of a retrial. Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts. The Board has concluded that, in the very unusual circumstances of this case, a substantial miscarriage of justice has actually occurred. Therefore the proviso to section 385(1) cannot be applied, and the appeal must under the subsection be allowed. At any retrial it will be decided whether the appellant is guilty or not, and nothing in this judgment should influence the verdict in any way.

Tab B

GROUND LEVEL



LOWER LEVEL



Luminol Results
Five footprints

SCALE
1 0 1 2 3 4 5 metres

POLICE

WORKS Consultancy Services
DUNEDIN

63 EVERY STREET
ANDERSONS BAY
DUNEDIN

7/468/20 | 2704 | 1

as shown

Overlay No. 2

Tab C

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25 March 2010

The Honourable Simon Power
Minister of Justice
Parliament Office
Private Bag 18888
Parliament Buildings
WELLINGTON 6160

Dear Sir

Compensation Claim - David Cullen Bain

1. In November 2009 we accepted instructions from David Bain to act for him in relation to his claim for compensation for wrongful conviction and imprisonment. Mr Bain was incarcerated between 24 June 1994 and 15 May 2007 and spent a further period of just over two years on bail until his acquittal on 5 June 2009. We have previously acted for Mr Bain in the capacity of solicitors on the record in respect of his re-trial in 2009.

2. Since November 2009 we have carefully considered the basis for a claim for compensation including undertaking a detailed scrutiny of the relevant cabinet guidelines (see attached flowchart), Ministry of Justice background papers and documentary evidence. We have reviewed the many judicial decisions and reports produced in respect of Mr Bain's case and we have considered other examples of claims for compensation for wrongful conviction and imprisonment. Having carried out that careful scrutiny, we are strongly of the opinion that compensation for Mr Bain for both pecuniary (inheritance and loss of earnings) and non-pecuniary losses is warranted. It is clear that Mr Bain is entitled to compensation on an "extraordinary circumstances" basis.

3. We therefore now request that you treat this correspondence as formal notification of a claim for compensation by Mr Bain in respect of his wrongful conviction and imprisonment. We enclose an affidavit sworn by Mr Bain detailing his circumstances as at the date of that affidavit. Mr Bain's circumstances have not changed since that time and it is clear that as a result of his wrongful conviction and imprisonment Mr Bain has been left penniless and without any prospects in life for the foreseeable future. By way of example of the detriment caused to Mr Bain by his wrongful conviction and imprisonment we note that, had the miscarriage of justice not occurred, Mr Bain would have received his rightful inheritance from his parents' estate in the sum of approximately $350,000 in 1994. Those funds were distributed to Mr Bain's extended family many years ago on a wrong premise.

4.

5. Preparation of the substance of Mr Bain's compensation claim will be an extremely onerous task due to the complexities that have arisen as a result of the many trials, appeals, inquiries and related litigation over the period of some 15 years. In respect of Mr Bain's claim for compensation we anticipate being assisted by Michael Reed QC, lead counsel for Mr Bain at the trial, with input from other members of Mr Bain's defence team. Due to Mr Bain's financial circumstances he is unable to meet the costs of our representation on his behalf on any normal basis.

6. We have absolutely no doubt that Mr Bain can meet the "extraordinary circumstances" criteria, however to do so would require literally thousands of man hours to analyse the hundreds of thousands of pages of documentation available before such an application could be prepared and submitted. Such a process would come at an enormous personal and financial cost and in the meantime leaves Mr Bain in an invidious position with no income and no prospect of securing his future in a meaningful way.

7. Our best assessment is that the preparation of a claim would take between nine to twelve months and will result in a document likely to be in excess of five thousand pages (including annexures). The processing of such a document by the Ministry and any third party would inevitably take a number of years, all of this at great cost and highly unsatisfactory to all parties. This of course would be exacerbated in the event that other interested parties were invited to make submissions on the matter, which would necessarily require a right of reply.

8. One of the stated criteria to establish "extraordinary circumstances" is "whether it is in the interests of justice that compensation be paid". Such an assessment will necessarily involve consideration of whether the investigation was conducted in good faith and in a proper manner.

9. It has now been established that a key cause of Mr Bain's wrongful conviction was the grave misconduct and gross negligence of members of the initial inquiry (which lead to his prosecution). Further similar issues have arisen since the verdicts in the first trial including the deliberate destruction of vital evidence by the police. Almost without exception these items would have been helpful to Mr Bain. These matters are of similar gravity to the allegations that caused the then Minister of Justice Jim McLay, to direct a Royal Commission of Inquiry headed by an Australian Judge in respect of Arthur Allan Thomas in 1981. As you are no doubt aware, that resulted in Mr Thomas receiving compensation of approximately $1,000,000 at that time for the nine years he had been wrongfully convicted and imprisoned.

10. In addition, in the event that the Minister elects to appoint either an independent inquirer or a Royal Commission of Inquiry, we would have grave concerns about the ability of any New Zealand legal practitioner, Judge or former Judge to approach the matter without any knowledge of the case or preconceived notions relating to the case. In that regard therefore we would strongly urge that any such appointment should be from outside of New Zealand as occurred in the Royal Commission of Inquiry relating to Mr Thomas' case.

11. In terms of our representing Mr Bain in respect of this claim for compensation, if an exhaustive analysis of the basis of that claim is required, it will be necessary for us to consider the hundreds of thousands of documents in our possession entailing thousands of hours of time. In such circumstances an application for assistance from the Legal Services Agency for Mr Bain's claim will be necessary, and substantial.

12. It seems with respect that the cabinet guidelines, which are just that, guidelines, are not appropriate for the resolution of this case. To that end we would like Mr Reed and the writer to meet with you and the appropriate official to see if we can map out a way forward without involving very significant sums of legal expenses and administrative time.

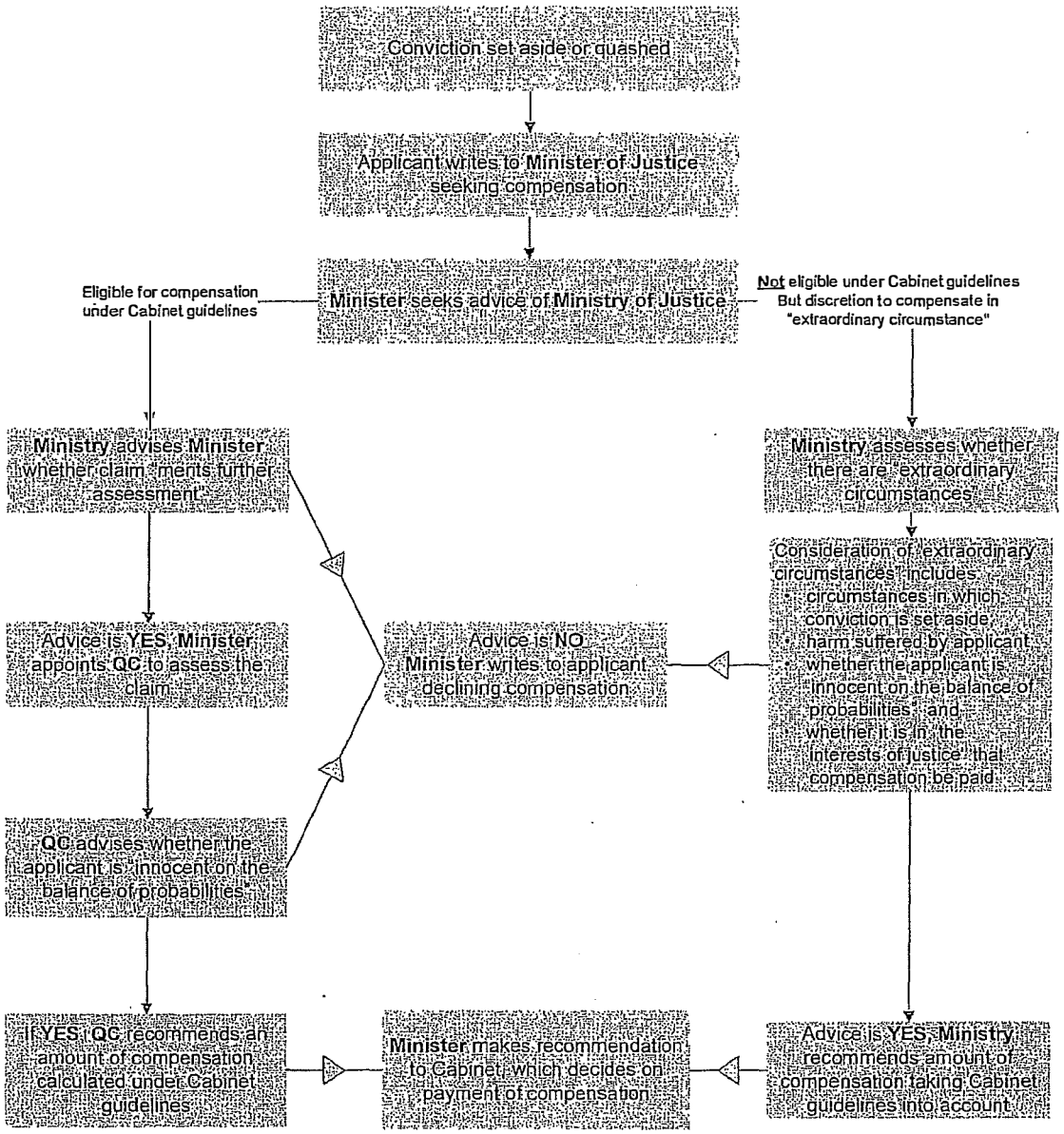
13. We look forward to hearing from you.

Yours faithfully

Duncan McGill
Partner

Mobile +64 21 226 3530
d.mcgill@duncancotterill.com

Process for determining eligibility and quantum of compensation



AFFIDAVIT OF DAVID CULLEN BAIN

Sworn on 10th December 2009

Duncan Cotterill
Solicitor acting: Duncan McGill
PO Box 5326, Auckland

Phone +64 9 309 1948
Fax +64 9 309 8275
d.mcgill@duncancotterill.com

I, DAVID CULLEN BAIN, of Auckland, unemployed, swear:

1. I was born on 27 March 1972 in Dunedin.

1. On 24 June 1994, I was arrested and charged with the murders of five members of my family. At my trial, the jury found me guilty of five counts of murder on 29 May 1995.

2. On 10 May 2007, the Privy Council quashed the convictions on the grounds of a substantial miscarriage of justice and ordered a retrial.

3. I was in prison from 24 June 1994 (when I was 22 years old) until my release from prison on bail on 15 May 2007 (when I was 35).

4. On 9 March 2009, the retrial commenced. The jury delivered a unanimous verdict of not guilty on 5 June 2009.

5. I make this affidavit in support of my claim for compensation for wrongful conviction and imprisonment.

My Time on Remand (June 1994 – June 1995)

6. Following my arrest and during the remand period, I lost many of my closest friends. My family then all started to drift away. Although I had periodic visits from family members while I was in prison, since my conviction in 1995 I have had no real family support; and I am isolated from them. This is a loss that I feel keenly to this day.

7. When I was first imprisoned, I was put on a suicide watch, which involved the prison officers turning on my cell light to check on me every 15 minutes. This lasted the entire time I was on remand until I was transferred to Christchurch Men's Prison 12 months later. This constant awakening of me resulted in sleep deprivation and effectively became a means of torture.

8. During that initial period on remand, I suffered constant migraines, depression and loneliness as the cell I was in was separate from the main wings. My contact with others was limited as my security classification was higher than the bulk of other prisoners. This meant that I only had contact with the worst offenders or those that caused the most problems within the prison.

9. I was regularly the object of derision and cruel jokes from other prisoners, especially when something new about my case was published in the newspapers or broadcast on television. Not only was I just finding out about the nature of some of the actions of my family, but I also had to deal with the ugly comments of others.

10. I saw in a newspaper (passed through my cell door) the photo of my family home being burned down. I had known about my uncles' decision to do this, but seeing the evidence in such an impersonal way, without even a phone call, robbed me of any remaining strength and I began to spiral into depression. I had seen my family dead, been arrested for their murder, forced to walk into court handcuffed to face the charges in front of the media and public, had not been allowed to go to the funerals of my family members and was locked in a cell two metres by 2.5 metres with no human contact other than criminals and the prison guards.

11. This situation, along with many other traumatic events and discoveries during the 12 months on remand, resulted in me suffering clinical depression for which I received no assistance, other than being examined by forensic psychiatrists to establish whether I was mentally fit enough to stand trial.

12. Professor Paul Mullen examined me to see whether I had blocked any memories of things I may have witnessed on the morning my family died. He intensively scrutinised my memories and used various techniques to try to extract any blocked memories. This was a truly excruciating process that happened over many weeks and left me traumatised. The only support I had during this time was a visit each Wednesday evening by a friend who would hold me as I sobbed uncontrollably; no doubt leaving her quite shaken as to what was happening to me.

13. I suffered further trauma leading up to the 1995 trial when the media published disclosures made by the Police and sordid details about my family. This was done without any regard to the effects it would have, not only on me and my position at the trial but also the effects on my relatives.

My Time in Prison (1995 – 2007)

14. The verdict from the 1995 trial was the turning point in my life. My father and mother became teachers and missionaries here and had left New Zealand in

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1973 to spread the Christian word overseas and increase the knowledge of the world to those less fortunate. I grew up following Christian principles and with the concepts of honour, integrity and compassion a strong part of our daily life. When I was found guilty, I felt complete betrayal by the Police and the justice system.

15. Shortly after being imprisoned in the east wing of Christchurch Men's Prison, I was assaulted by another prisoner and left with two teeth smashed in and a bruised and cut face. Both teeth required surgery and ongoing repair over the years. This was the first, and most severe, assault that I endured and resulted in me suffering severe psychological trauma.

16. During the years that followed, several other prisoners assaulted or confronted me. Although none of those assaults were as bad as the first assault I have mentioned, and most of them I was prepared for.

17. The fact that I had been taken from my normal way of life, where I always avoided confrontation and promoted reconciliation, and had been dumped into such a violent society without warning or any form of preparation caused me great distress.

18. Not only was there the physical affront, I also suffered the alienation of the public and all my friends. The separation from the world is the worst punishment the state can impose on a person. I struggled to hold on to my sanity and underwent over eight years of counselling with Professor Paul Brinded; who diagnosed me with post traumatic stress disorder and severe clinical depression. There were times when I considered giving up the fight and ending the suffering by taking my life. I had no help from the system and only survived because I was willing to ask for help and I knew that I was innocent.

19. Both of my grandmothers, whom I was extremely fond of, died while I was in prison. My maternal grandmother died in 1998 and I did not pursue attending her funeral to avoid embarrassment and family hostility. My paternal grandmother, who lived in Otaki and had been particularly close to me, died in either 2003 or 2004 (to the best of my memory). I wanted to attend her funeral and was initially told by prison authorities that compassionate leave would be available. However, I was then informed by prison authorities that extended family members had made contact with the prison and told them that the family

did not want me to come to the funeral. Again, to avoid hostility, and at much distress to myself, I acceded to that demand.

My Time on Bail (May 2007 – June 2009)

20. From the time of my release from prison on bail in May 2007, I found the hardships of life far greater than I imagined during my isolated existence in prison.

21. I was shocked and confused by the extreme reaction of the media when I was released. The media's reaction caused me to be constantly self conscious, extremely distrustful of strangers and always aware of the impact such attention can have on my friends. Several times in the 18 months before trial, the attention of the media caused my friends distress and thus created difficulties in their relationships with me.

22. My movement around the country was limited to the North Island, and even then I was not allowed to travel anywhere near Hamilton or Wellington. This caused me distress as I have friends in both cities that I would have enjoyed visiting.

23. While I was allowed to live in Auckland, the conditions of my bail meant that I was limited to living at a specific address unless the bail conditions were changed. This hampered any choices I may have had living on my own (despite feeling capable and ready to do so) as no rental or apartment agent would agree to hold a room pending approval for amendments to my bail. Thus I was forced to make accommodations to those I lived with in order to maintain goodwill. When difficulties have arisen, it was at my cost as I was not able to stand up for my rights for fear of being asked to leave – causing more difficulties and unnecessary stress.

24. When making any personal decisions, I have to take into account how those decisions might be perceived by the general public. The constant attention given to my movements and activities by the media has thus restricted my activities, for fear of involving anybody around me. I have found few opportunities to socialise or to make new friends.

25. This has also meant that I have not been able to develop a relationship with a girlfriend as any that 'could have been' were frightened away by the stigma of my case, and with others I have been hamstrung with the consideration such

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attention could have on their relationship with me. The resulting loneliness and depression has thus been the cause of many sleepless nights.

26. Due to the time I spent on bail awaiting the resolution of my case, my life was essentially put on hold. I was unable to pursue the accruement of assets and material belongings of any major worth due to the practicalities of storage during my trial, and the fact that I just couldn't even contemplate searching for a home of my own. This has left me feeling constantly unsettled. I have no real place of refuge, let alone a place that I can make my own.

27. I have not even been able to purchase my own car and have had to rely on the generosity of Joe Karam and his son Richard in order to have some measure of freedom of movement around Auckland and the North Island. I shall always be grateful for this generosity, but it is distressing that even though I have the ability to buy and support my own transport, I could not do so due to the restraints leading up to the retrial in 2009.

28. I did my absolute best to find some place in society here in Auckland and to support myself as much as possible. I had to regularly attend meetings with my lawyers, study statements of evidence, study photographic evidence, give interviews with psychologists and so on. I wanted to work hard for my employer at the time, but the ever present need to focus on the retrial broke into my working day, causing me distress as I was unable to fill my role adequately.

29. Every time there was something new to address, it usually caused me a broken night's sleep and affected me in the form of stress migraines. I had to spend a significant amount of money on medication to combat these migraines and I know that they affected my ability to do my job.

The 2009 Retrial

30. I had to endure two trials for the murder of my family in 1995 and 2009.

31. The 2009 retrial lasted for three months. It is not possible to convey the magnitude of the psychological trauma I suffered during the retrial, let alone the actual cost of having to attend. I was not given any financial assistance by the government, apart from when I applied for an emergency benefit in order to pay for my board. I also had to move myself and my possessions down to

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Christchurch from Auckland at my own personal cost, then pay for clothes, food and transport to and from court, for example, in order to attend court every day.

32. Following my complete and unanimous acquittal, I still find myself in debt to the Legal Services Agency for $30,000. This debt is as a result of my defence team being forced to (successfully) challenge questionable evidence on appeal at both the Court of Appeal and the Supreme Court on an urgent basis prior to the retrial. I have absolutely no means of repaying this debt.

My Life Since the Retrial

33. Following the result of the retrial, I was deeply saddened and disgusted by the reaction of some members of the public and the media. The vitriol with which Joe Karam and I were attacked by the very people that demanded a retrial was extreme. These circumstances make it difficult to make a new life for myself.

34. On a day to day basis, I have found life in Auckland and throughout New Zealand very difficult to deal with. Everywhere I go, and in everything I do, I am always recognised and either comments are made or people question me. This has been common in the places I have been throughout New Zealand, showing that no matter where I choose to go I will always encounter this and have to find some way to deal with it.

35. I was not prepared for this when I left prison. The knowledge that I cannot create a normal life with a normal amount of anonymity has been quite depressing. It is not a comfortable thing being known for something as traumatic as the events I have suffered through. The media coverage has meant that the New Zealand public know a great deal about these events and my personal life.

Loss of Personal Property and Inheritance

36. My personal possessions have not been returned to me. For example, I had a full diving kit (SCUBA tank, gear and wet suit), collection of books, clothes, sporting and camping gear, certificates of my academic and sporting achievements, videos of the shows I had taken part in and recordings of my singing. I have no idea where any of these items are and do not know what happened to them after my relatives took possession of the house and its contents. Nothing has ever been disclosed to me.

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37. The wrongful conviction of me in 1995 took away my inheritance. My Dad had a beautiful collection of string instruments and Mum had her pottery. These items are only a tiny amount of the items they collected during their lives and all have been lost to me. Further examples are Stephen's trumpet and Arawa's flute, a collection of opals from Australia, a collection of Royal Doulton pieces, artwork, books, music, the land and the house itself.

38. On top of all this, Mum and Dad had amassed an impressive library of photos and videos documenting the many years they had been together and our family growing up together. All of these items, while not having great monetary value, all have a far higher sentimental value to me as they were my family's possessions and would have been the things I could have remembered them by. Now all I have are the few photos released by my relatives to the Court for use during the 2009 retrial.

Loss of Earnings and Future Opportunities

39. When I was arrested in June 1994, I was at University studying for a degree in Music and Drama. I had a strong interest in singing. I had found this vocation to be of great interest and hoped to pursue either a performance based career or, with the strong teaching background of my family, a teaching position.

40. I have been told that I had the potential to have a career as successful as the New Zealand opera singer Jonathan Lemalu. Mr Lemalu is now engaged two years in advance and is singing all over the world. In 1992, my singing teacher told me when I started lessons that I had a wonderful voice and that I could one day create a valuable career for myself.

41. Since my arrest in June 1994, I have not taken part in any form of musical expression as the trauma of the events I experienced has taken the joy of music away from me. The wrongful conviction of me and the time I spent in prison meant that the life I was planning has gone out the window. I feel as though I lost the major earning years of my life.

42. From the age of 22, I served almost 13 years in prison, spent almost two years on bail with my life essentially on hold and spent three months at my own expense attending my retrial. Although I am very grateful to be out of prison and to have been exonerated, I feel as though I have had over 15 years as a form of

imprisonment. I have not been able to advance my life. I have only lived through the goodwill of others.

Sworn at Auckland)
this 10th day of December 2009)
before me:)

D C Bain

Solicitor of the High Court of New Zealand

Rowena Marie Boereboom
Solicitor
Auckland

[…]

Tab D

Office of Hon Simon Power

MP for Rangitikei

Minister of Justice
Minister of Commerce
Minister Responsible for the Law Commission
Minister of Consumer Affairs
Associate Minister of Finance
Deputy Leader of the House

10 NOV 2011

Hon Ian Binnie
Binniel@scc-csc.ca

Dear Justice Binnie

CLAIM FOR COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT: DAVID CULLEN BAIN

1. Thank you for agreeing to provide advice on Mr David Cullen Bain's claim for ex gratia compensation for wrongful conviction and imprisonment. This letter is to formally instruct you in this matter.

2. The specific points on which I seek your advice are set out below in paragraphs 45 and 46. I will first provide you with some background to the claim.

Background to claim

3. In brief, the facts of the case are as follows. At 7.09 am on 20 June 1994 an emergency 111 telephone call was made by Mr David Bain ("the claimant"). He reported to the operator that his family were "all dead", and gave the ambulance service operator his address at 65 Every Street, Dunedin. Upon arriving at the house, Police discovered the bodies of the claimant's father (Robin), mother (Margaret), two sisters (Arawa and Laniet) and brother (Stephen). All of the deceased had suffered one or more gunshot wounds to the head, fired from close or point-blank range.

4. With the exception of the claimant's father, Robin Bain, all of the family members had been killed in their beds or near to them. Robin Bain was found in the lounge of the house with a rifle lying next to him. He had suffered a single gunshot wound to the area between his left forehead and left temple. Later that day, a typed note was found displayed on the screen of Robin Bain's computer, in an alcove a few feet from his body. The note read "Sorry, you are the only one who deserved to stay." There was evidence in Stephen Bain's room that there had been a violent struggle before Stephen was killed.

5. The claimant was interviewed three times by the Police following the murders, on 20, 21 and 22 June 1994. He was arrested and charged with the murders on 24 June 1994.

First trial and appeals

6. The claimant's trial commenced on 8 May 1995 and lasted three weeks. The Crown case at trial was that, in the early hours of the morning of 20 June 1994, the claimant shot his mother, younger brother and two sisters with his semi-automatic .22 calibre rifle fitted with a silencer. He then went about his paper round. On his

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return, according to the Crown, he hid behind a set of curtains in an alcove adjacent to the lounge and waited for his father to enter the house and commence his morning prayers. His father had been sleeping in a caravan on the property. It was alleged that the claimant shot his father shortly after he entered the lounge and then placed the rifle beside his body. The Crown also contended that, either before or after this final murder, the claimant typed the note that was found on the computer.

7. In his closing address to the jury, the Crown Solicitor submitted that there were "ten points of hard factual evidence" that indicated that the claimant was guilty. These points included:

   i. The rifle and the ammunition that were used to commit the crimes were owned by the claimant and the spare key to the trigger lock was kept in a location known only to the claimaint;

   ii. The claimant's positive fingerprints, made in blood, were found on the murder weapon;

   iii. The claimant's bloodied gloves were found in Stephen Bain's bedroom, blood droplets were found on the claimant's sock and a diluted bloodstain was found on the shoulder of the claimant's long-sleeved t-shirt;

   iv. A set of spectacles with only a right lens were found in the claimant's room. The left side of the frame was damaged and the left lens was found in Stephen Bain's bedroom; and

   v. The computer in the Bain house was switched on at 6.44 am.

8. The defence case, in contrast, was a murder/suicide theory. The defence claimed that the claimant's father (Robin Bain) may have killed his wife and children, typed a suicide note, and then shot himself prior to his son returning to the house. In conjunction with this, the defence advanced an alibi for the claimant. The Crown had presented evidence as to the time that Robin Bain's computer had been turned on on the morning of the murders. The defence, however, pointed to an eye witness statement that placed the claimant on his paper round at this time. The defence alleged on the basis of this eye witness account that the claimant could not have typed the note that was found on the computer. Accordingly, it was open to the jury to conclude that the claimant had not committed the murders.

9. On 29 May 1995, the claimant was convicted of five counts of murder. Following this conviction, the claimant was sentenced on 21 June 1995 to life imprisonment on each of the five counts. A minimum non-parole period of sixteen years was set by the sentencing Judge, to reflect the "horrendous nature and exceptionality" of the case.

10. Subsequent to trial, the claimant appealed against his conviction and sentence to the Court of Appeal. The principal question at issue was whether certain statements made by Mr Dean Cottle, an associate of Laniet Bain's, were correctly ruled inadmissible by the trial Judge. In its judgment delivered on 19 December 1995, the Court upheld the rulings of the trial Judge in relation to Mr Cottle's evidence, and otherwise dismissed the appeal.

11. The claimant subsequently applied for leave to appeal to the Privy Council. The sole point on appeal related to the rulings made by the trial Judge in relation to Mr Cottle's evidence. Leave to appeal was declined.

Police Complaints Authority review

12. In April 1997, Mr Joseph Karam published a book titled *David and Goliath*. Amongst other things, Mr Karam contended in this book that the Police investigation into the claimant's case was deficient in a number of respects, at least in part because of misconduct or inept practice by Police officers involved in the case.

13. In response to the allegations made in Mr Karam's book, the New Zealand Commissioner of Police and the New Zealand Police Complaints Authority established a joint review of the case. The terms of reference for this investigation were explicitly limited to the conduct of the Police in the investigation of the claimant's case. The inquiry and its report did not purport to reach a conclusion on whether the claimant was correctly convicted of the murders.

14. The final report of the joint review was published on 26 November 1997. The report found that there was no misconduct or inept practice by the Police in the investigation of the claimant's case.

15. An action in defamation brought against Mr Karam by two Police officers mentioned in the book was unsuccessful.

Application for the exercise of the Royal prerogative of mercy

16. On 15 June 1998, the claimant applied to the Governor-General for the exercise of the Royal prerogative of mercy in respect of his convictions.

17. In his application, the claimant submitted that, taken together, the contents of his application established that a grave miscarriage of justice had occurred in relation to his case. He contended that the only way that the miscarriage could be remedied was by the grant of a free pardon in his favour. The claimant based his application on various grounds including that:

    i. a series of errors and omissions occurred in the course of the investigations conducted by the Police and in the course of scientific and forensic testing and analyses undertaken by the ESR, and that these errors led to incorrect and misleading evidence being presented to the jury;

    ii. a range of fresh or otherwise undisclosed evidence was now available that bore on the alibi defence advanced by the claimant at trial;

    iii. a range of fresh or otherwise undisclosed evidence was now available that tended to establish that Robin Bain murdered four members of his family then committed suicide; and

    iv. there were errors by the Crown and defence in the conduct of the trial.

18. In New Zealand, the Royal prerogative of mercy is exercised by the Governor-General on the advice of the Minister of Justice. The Minister of Justice is in turn advised by legal counsel at the Ministry of Justice (the Ministry).

19. Section 406 of the Crimes Act 1961 provides a statutory adjunct to the prerogative powers, enabling a case to be referred back to the courts. Section 406(a) allows the Governor-General to refer a person's conviction(s) to the Court of Appeal. Where a conviction is referred to the Court under this section, the Court is required to reconsider the case as if it were a full appeal. Under section 406(b), however, the Governor-General can ask the Court for its opinion on a discrete point or points relating to a person's case.

> **406 Prerogative of mercy**
>
> Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
>
> (a) refer the question of the conviction or sentence to the Court of Appeal or, where the person was convicted or sentenced by a District Court acting in its summary jurisdiction or under section 28F(4) of the District Courts Act 1947, to the High Court, and the question so referred shall then be heard and determined by the court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or
>
> (b) if he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

20. The Ministry provided advice on the basis of which the then Minister of Justice advised the Governor-General to refer the matter to the Court of Appeal under section 406(b) (a copy of this advice is **attached**). The referral to the Court of Appeal was made on 18 December 2000. The Court was asked for its opinion on whether or not, with reference to six specific questions, there was a "possibility" of a miscarriage of justice that would warrant the claimant's convictions being referred back to the Court of Appeal for consideration under section 406(a).

Consideration by the Court of Appeal

21. The matter was heard in the Court of Appeal between 14 and 17 October 2002. Evidence was heard, including alleged fresh evidence put forward by the claimant that he submitted showed he was not guilty of the murders.

22. On 17 December 2002, the Court of Appeal furnished its opinion on the six questions. Having considered various factual aspects of the case, the Court of Appeal concluded that there was a sufficient "possibility" of a miscarriage of justice to warrant a referral of the convictions to the Court of Appeal pursuant to section 406(a) of the Crimes Act. Based on this opinion, the then Minister of Justice advised the Governor-General to refer the whole case to the Court of Appeal under section 406(a).

23. The section 406(a) appeal was heard in September 2003. The Court of Appeal dismissed the appeal on 15 December 2003 (a copy of this decision is **attached**). Having considered the alleged fresh evidence adduced by both the Crown and the claimant, and all other grounds advanced, the Court concluded that it was "not persuaded that there has been a miscarriage of justice on the ground of further evidence or any other ground."

Privy Council

24. An appeal was subsequently lodged by the claimant to the Privy Council.

25. At the Privy Council, the claimant argued that, although the Court of Appeal properly articulated the approach to be taken by that Court in considering fresh evidence, it had failed to properly follow that approach. The claimant raised nine issues for consideration by the Privy Council. He argued that each issue amounted to fresh evidence.

26. The judgment of the Privy Council was delivered on 10 May 2007. The Privy Council considered that the nine points taken together led to the conclusion that a substantial miscarriage of justice had occurred. Accordingly, it quashed the claimant's convictions and ordered a retrial (a copy of the decision is **attached**). The Privy Council made no comment on the proper outcome of a retrial.

Retrial

27. On 5 June 2009, the claimant was acquitted on all charges following a retrial at the High Court in Christchurch. Copies of certain relevant documents from this trial are **attached** (see paragraph 49).

Application for compensation

28. On 25 March 2010, Mr Bain's lawyers wrote to me to notify his claim for compensation for wrongful conviction and imprisonment. Although he was initially represented by lawyers, the claimant is now represented by Mr Karam who, while not legally trained, has been heavily involved in the Bain appeals and retrial.

29. The Ministry has been in regular contact with the claimant's representatives; however no substantive submissions have been received to date.

Compensation for wrongful conviction and imprisonment

30. There is no legal right to compensation for wrongful conviction or imprisonment in New Zealand. However, the Government in its discretion can decide to pay compensation on an ex gratia basis.

31. In New Zealand, the Cabinet functions as the policy and decision-making body of the executive branch within the government system. The Prime Minister and Ministers of the Crown serve as members of the Cabinet. All Cabinet Ministers also serve as members of the Executive Council. In 1998, Cabinet decided to establish guidelines (the Guidelines) for dealing with claims for compensation for wrongful conviction and imprisonment. The current Guidelines, which incorporate modifications made since 1998 are:

- The *Cabinet Criteria (1998)*, which cover eligibility and factors to be considered when determining the size of compensation payments; and

- The *Additional Guidelines (2000)*, which provide additional guidance on how to assess an appropriate quantum for non-monetary loss.

32. A fundamental element of the Guidelines is that compensation payments are only made to persons who are innocent on the balance of probabilities of the crimes for which they were convicted.

33. To be eligible under the Guidelines to apply for compensation, a person must:

    i. have served all or part of a sentence of imprisonment; and

    ii. either had his or her convictions quashed on appeal without a retrial being ordered or received a free pardon.

34. Mr Bain's application falls outside the Guidelines because the Privy Council ordered a retrial.

"Extraordinary circumstances" discretion

35. Compensation may be paid in non-eligible or 'outside Guidelines' cases, however, if there are extraordinary circumstances. When the Cabinet Criteria were adopted in 1998, Cabinet agreed that the Crown reserve discretion to consider claims that fall outside the Guidelines "in extraordinary circumstances... on their individual merits, where this is in the interests of justice."

36. The question in cases such as Mr Bain's is, therefore, whether there are extraordinary circumstances, where it is in the interests of justice for the claim to be considered. Cabinet did not determine what matters would constitute "extraordinary circumstances". Claims of extraordinary circumstances have to be considered on their merits on a case-by-case basis, as does the assessment of the interests of justice.

37. The following paragraphs outline the current articulation of the principles applying to applications that fall outside the Guidelines.

38. Innocence on the balance of probabilities is a minimum requirement, consistent with the Guidelines for eligible claimants. But the bar is set higher for claims that fall outside the Guidelines – something more is required that demonstrates that the circumstances are extraordinary. This is because the discretion should not be used in a way that would undermine the Guidelines.

39. Although there can never be an exhaustive list of the kind of circumstances that might be regarded as "extraordinary", the mere fact that an appeal has been allowed could never, of itself, suffice. To qualify as extraordinary, the circumstances must include some feature which takes the claimant's case outside the ordinary run of cases in which appeals have been allowed. Examples of such circumstances include, but are not limited to:

- *unequivocal innocence* – i.e. cases in which it was demonstrable that the claimant was innocent beyond reasonable doubt, for example, due to DNA evidence, strong alibi evidence, etc; or

- *no such offence* – i.e. the claimant had been convicted of an offence that did not exist in law; or

- *serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.

40. The test of "extraordinary circumstances" is inherently open-ended and the list above cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid. The onus is on the claimant to show that his or her case has extraordinary circumstances such that it is in the interests of justice that the compensation claim be considered. This includes the requirement to prove innocence on the balance of probabilities.

41. If a claimant wishes to demonstrate that he or she falls within the class of cases described as "unequivocal innocence", the applicant must establish his or her innocence to the higher standard of proof beyond reasonable doubt.

42. Ultimately, the question of whether an application qualifies for the exercise of the residual discretion reserved by Cabinet is a judgement for the Executive branch of government to make.

43. Due to the discretionary nature of the compensation regime, the assessment of compensation claims is not bound by any rules of evidence. Any information can be taken into account so long as it logically bears upon the question of whether a claimant is innocent of the charge he or she faced.

Approach to Mr Bain's claim

44. Assessment of this compensation claim will take place in two stages. Firstly, you will provide advice on the issues set out in paragraph 45. If, based on your advice, Cabinet considers that the "extraordinary circumstances" test has been made out, Cabinet will then determine whether or not to exercise its discretion to pay compensation. If Cabinet determines that compensation will be paid, the second step will be for you to make a recommendation as to the quantum of the payment. Cabinet will then decide whether or not to accept that recommendation.

45. Accordingly, at this time I seek your advice on:

- whether you are satisfied that Mr Bain is innocent on the balance of probabilities and, if so, whether he is also innocent beyond reasonable doubt; and

- any factors particular to Mr Bain's case (apart from your assessment of innocence beyond reasonable doubt) that you consider are relevant to the

Executive's assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider his claim.

46. Because the question of whether "extraordinary circumstances" apply in a particular case is ultimately a judgement for the Executive to make I am seeking advice on factors you consider relevant to this assessment rather than an opinion on whether Mr Bain's application qualifies for the exercise of the residual discretion reserved by Cabinet.

Administrative matters

47. The Ministry has already informed both the claimant and the Crown Law Office that you have been appointed to assess the claim. I have publicly announced your appointment. The press release is **attached**.

48. The Ministry's role, while you are assessing this claim, will be to provide support as required and assist you to liaise with parties and witnesses. The usual approach is to treat both the claimant and the Crown Law Office (a government department headed by the Solicitor-General and responsible for the prosecution process in the criminal justice system) as parties to a claim and both will be expected to provide submissions.

49. The Ministry has provided certain documents that will be of assistance for you to familiarise yourself with the case:

- *R v Bain* [1996] 1 NZLR 129 (CA);
- Commissioner of Police and Police Complaints Authority Joint Review: Report dated 26 November 1997;
- Ministry of Justice report on Bain application for the exercise of the Royal prerogative of mercy;
- Report by Sir Thomas Thorp on Bain application for the exercise of the Royal prerogative of mercy;
- *R v Bain* [2004] 1 NZLR 638 (CA);
- *Bain v R* (2007) 23 CRNZ 71 (PC);
- Documents relating to 2009 retrial:
    - Notes of evidence;
    - List of exhibits;
    - Judge's summing up;
    - Pre-trial rulings; and
- Notification of claim for compensation and affidavit of David Cullen Bain.

50. The Ministry can also arrange for you to access the files relating to the claimant's first trial and 2009 retrial as well as the relevant Court of Appeal files.

51. I understand that you are prepared to undertake this work at an hourly rate of NZ$450.00. I am happy to leave to your discretion the manner in which you undertake this work. I suggest that you may wish to liaise generally with Mr Jeff Orr, Chief Legal Counsel at the Ministry. If you would find it useful, Mr Orr will be able to provide you with information about the approach taken by previous appointees to the assessment of compensation claims.

Next steps

52. Once you have reviewed the enclosed materials, please contact Mr Orr on +64 4 494 9755 or jeff.orr@justice.govt.nz to discuss the next steps. As a first step, you may wish to suggest what further material you need to be provided with and discuss how you would like to proceed.

Yours sincerely

Hon Simon Power
Minister of Justice

Tab E

BETWEEN	**JUSTICE IAN BINNIE**	
	Interviewer	
AND	**JIM DOYLE**	
	Interviewee	

Date of Interview:	19 July 2012
Place:	John Wickliffe House, Dunedin
Attendees	Annabel Markham (Crown Law Office)

INTERVIEW OF JIM DOYLE (IN RESPECT OF CLAIM FOR COMPENSATION IN RESPECT OF DAVID CULLEN BAIN)

BINNIE J:

Yes sir, will you swear you will answer the questions and that you will tell the truth, the whole truth and nothing but the truth?

MR DOYLE:

I do Sir.

BINNIE J:

Please have a seat. First of all I'd like to thank you for coming in, you've been helpful and it's much appreciated.

MR DOYLE:

Thank you Sir.

BINNIE J:

I'm sure this is a series of events that you would like to see recede in the background. I want to explain a little bit about what I'm doing because it may seem odd that I'm approaching questions in the way I'm going to approach them. My mandate really falls into two parts. One is factual innocence. It's also to get an opinion as to whether I think David Bain is or is not factually innocent beyond a reasonable doubt or on a balance of probability. So that's the whole first section and a lot of that goes into the detail of the 25 issues that people have been arguing about since 1994.

But at the same time I am to report on what they call exceptional circumstances – extraordinary circumstances discussion, and the Cabinet has laid down certain situations in which compensation would be paid if there is a recommendation or a finding of factual innocence and that includes a number of things that I am supposed to look at.

One is whether a pardon has been given; it hasn't been. Another is if there is judicial recognition of wrongdoing by the police or the prosecutor; which there isn't. But one of the elements in the letter to me is that wrongdoing, "Serious wrongdoing by authorities may include failing to take proper steps to investigate the possibility of innocence." That is really the crux of the argument being put forward by the Bain camp. That there was an investigation that simply didn't get to the line of the problems, either at the scene or elsewhere in the investigation.

So in asking these questions I'm not presupposing a conclusion or factual innocence but I just have to report everything at the same time so if I'm ever going to have a chance to talk to you it's now.

MR DOYLE:

Sure.

BINNIE J:

Okay?

MR DOYLE:

Thank you.

BINNIE J:

Now the way we proceed is I am going to ask some questions. I will then, when I come to the end, confer with David Bain's team to see if there are any questions they would like me to pose to you.

MR DOYLE:

Yes.

BINNIE J:

And that I make up my own mind as to whether I will put those questions and I can tell you this morning there were fewer than a handful so this was not a long part of the operation, and then when that is done Ms Markham will have a chance to re-examine you if she feels that, for the usual reasons, that something was said and it wasn't clear or should be put in context or whatever.

MR DOYLE:

Sure.

BINNIE J:

And at that point we're done. And what I had indicated and I hope you got the message, is that I will be referring in a large part to this report by the Police Complaints Authority on the police simply because it's a process document.

MR DOYLE:

Sure.

BINNIE J:

And although it refers to the substantive issues it also talks about how the police went about it and what they found was right and what they found was wrong.

Before I start, if you could just indicate a little bit your background with the police, when you joined the police and when you ascended to the high level that you were at in 1994.

MR DOYLE:

Sir, just – the very first thing I would like to point out is that there was no indication given to me by anyone that this report would be subject to some scrutiny by myself with you today so I'll be blind in respect of it basically.

BINNIE J:

I will certainly point to you to precisely what I am asking about.

MR DOYLE:

Thank you. As to my background, I joined the New Zealand Police in 1971. I was posted here to Dunedin. I was in uniform branch in Dunedin after several years. I joined the CIB in 1975, I think, it was when I commenced my training in the CIB. That was a process of two and a half years.

BINNIE J:

To do the qualification?

MR DOYLE:

To do the qualification. That's when I qualified as a detective. I qualified as a detective, I think, probably at the end of 1977. I think it was probably about November '77 or thereabouts.

I then was promoted the, early the following year to detective sergeant. I remained in the Dunedin CIB for several years as a detective sergeant,

rotating through the various squads. In, I think it was about 1984 as a detective sergeant I was appointed as officer in charge of the prosecutions section, police prosecutions section, Dunedin. I held that position for approximately 18 months I would think. I then went back to the CIB for a period of time, a short period of time before being promoted to senior sergeant in uniform branch in Dunedin. I went back to uniform branch as a uniform senior sergeant and then I think it was about 1988 or approximately round about that period, I was promoted to detective senior sergeant in the Dunedin CIB.

I remained in that position right through until my retirement as a sworn officer at the end of 2001.

BINNIE J:

2001?

MR DOYLE:

2001. At the beginning of 2002 I took up another position as a non-sworn person with the New Zealand Police and I remained in that position over recent years as a – it was part-time, when I retired finally from the police at the end of last year. So –

BINNIE J:

You threw in the towel.

MR DOYLE:

I threw in the towel.

BINNIE J:

All right. In the PCA report there's an interesting discussion towards the beginning. If you look at page 3 at the bottom.

MR DOYLE:

Page 3 was that Sir?

BINNIE J:

Page 3, yes.

MR DOYLE:

Yes.

BINNIE J:

A document, investigation of homicide cases.

MR DOYLE:

Correct.

BINNIE J:

And it says that permanent homicide squads do not exist in our structures and so what is put together is an ad hoc team depending on the case.

MR DOYLE:

Yes.

BINNIE J:

And that the basic investigative procedures laid out in the detective manual and is invariably closely followed in every instance.

Now pausing there, is that an accurate statement?

MR DOYLE:

I would agree with that. There's room, of course, for initiative and for various fluctuations depending on the nature of the inquiry and things that may occur but the basic structure is there full stop, yes.

BINNIE J:

And subject to this adaptation which is to be expected. I take it when you were appointed to the David Bain investigation that the structure contemplated in the manual is what you anticipated would occur?

MR DOYLE:

That's correct Sir.

BINNIE J:

Now, for the officer in charge at the scene which is described in the manual at some length, and perhaps it's not a bad idea just to go there. That is, if you look under the green tab at the back of the book, and the officer in charge of the scene, which was Detective Sergeant Weir which you know, is dealt with at page 3274.

MR DOYLE:

Correct.

BINNIE J:

Now my impression, and I would like you to correct me if I'm wrong, my impression reading the manual is that what is contemplated is a pyramid and in this case the Chief Inspector Robinson occupied the lead role and then you were in charge of the overall investigation as the second in command.

MR DOYLE:

Correct.

BINNIE J:

And then below you there were a number of individuals you appointed to different responsibilities.

MR DOYLE:

Correct.

BINNIE J:

And the idea was that information would flow upwards and there would be regular conferences, not only for information to be exchanged but for jobs to be identified and people identified to do those jobs.

MR DOYLE:

Correct.

BINNIE J:

And that the individuals occupying these different positions, and it might be good to refresh your memory. At page 7 of the document here they give a list of the teams that worked, starting with Detective Sergeant McGregor, OC Victims, and so on.

MR DOYLE:

That's correct.

BINNIE J:

Now I notice that Detective Sergeant Weir isn't in that list. He is referred to early on in the paragraph and what I understood reading this is that he, under you, was responsible for the scene but that he had a higher level of more general responsibility than the people on this list. And the reason I'm asking you this question is that Detective Sergeant Weir's evidence is that really he was doing the scene but at the same level was, for example, Detective Sergeant McGregor dealing with the victims and that there was no reporting relationship between McGregor and Weir, even with respect of what was going on at the scene?

MR DOYLE:

Yes, Detective Sergeant Weir and Detective Sergeant McGregor as well as Detective Sergeant Binnie, Detective Sergeant Dunne they were all at the same level, absolutely the same level.

BINNIE J:

In terms of employment?

MR DOYLE:

In terms of the deployment here and Detective Sergeant Weir had no additional responsibilities as such. He was only responsible as officer in charge of the scene.

BINNIE J:

Okay. So he – it would not be right to describe him as the third in the chain of command. You had Robinson, then you've had yourself and then you had a whole series of people within individual mandates reporting directly to you.

MR DOYLE:

Correct.

BINNIE J:

And below you there really wasn't a hierarchy. It was a shoulder rather than pyramid?

MR DOYLE:

It was a shoulder, yeah, and, and Detective Sergeant Weir was part of that shoulder.

BINNIE J:

Yes, all right. Now Detective Sergeant Weir, as he now is, indicated that there were four or five sergeants as shown on the list but were they of another, is it Dunedin CIB who were not assigned to this investigation, is that right or was everybody brought into the picture?

MR DOYLE:

No there were certainly other staff who weren't involved in this investigation, they were involved in whatever –

BINNIE J:

Speaking at the Detective Sergeant level?

MR DOYLE:

I have to think back a bit now. Um…

BINNIE J:

Put it this way, do you recall roughly how many detective sergeants you had in the CIB at the time?

MR DOYLE:

I would have thought there would be about seven or eight.

BINNIE J:

Seven or –

MR DOYLE:

Just off – because this is 18 years ago and in that time we've had a steady progression of detective sergeants. I just can't think off the top of my head who else was available at that particular point in time. For example, Detective Sergeant Roberts was working at that stage. I'm pretty sure there would have been other detective sergeants and they would not have been involved directly with the operation.

BINNIE J:

This seems to have been one of the most major crime investigations undertaken by the Dunedin CIB, at least in modern times.

MR DOYLE:

I think it's been played that way. I don't believe it to be so, no.

BINNIE J:

Have there been other homicide, suicide, whatever, involving an entire family of five people as here?

MR DOYLE:

Yes. In fact the Bain homicide, I think, was my third mass-type homicide that I was involved in at any degree. Um, the, what would you call it, massacre at Aramoana we had 13 victims there plus the offender. That occurred some two years beforehand. The family just slips my name. There was another family out of Mosgiel where we were involved in that investigation and that was certainly murder/suicide. Yeah, I –

BINNIE J:

Are we speaking now at the period up until –

MR DOYLE:

Up until.

BINNIE J:

– the Bain case?

MR DOYLE:

Up until the Bain case.

BINNIE J:

All right. In terms of the investigation is the officer in charge of the scene particularly critical role?

MR DOYLE:

It's a very important role, yeah. I consider it a most critical role.

BINNIE J:

And I understand that Detective Sergeant Weir was one of the more junior detective sergeants at the time?

MR DOYLE:

I don't know when he was appointed but I think that would be a fair summary to say that he certainly wouldn't have been the most experienced of them but a lot of those detective sergeants, just looking here, were appointed within a reasonable, reasonably short period of each other I would have thought.

BINNIE J:

He's indicated that this was his first assignment as officer in charge of a scene in a homicide case. Were you aware of that when you appointed him?

MR DOYLE:

No. If I could just clarify –

BINNIE J:

Absolutely.

MR DOYLE:

– this Sir. The appointment of the people in their various positions was not made by me. It was made by Detective Chief Inspector Robinson. Now I'm not suggesting that I had no input into that but we had a situation that morning where we'd been advised of this incident out in Every Street and basically it was as staff came in that they were appointed to particular positions. So if you had an NCO come in he would be appointed as OC of whatever the position was and we'd look and see how many people he needed. So at the very early stages it was a matter of very basically filling in boxes to get people into position so that the –

BINNIE J:

Was it whoever came in the door first?

MR DOYLE:

More or less, yeah. So if you were lucky enough to be there, as it was with myself. I'd – unfortunately I didn't miss the plane the day before and I nearly

missed a plane from Australia otherwise it would have been another detective senior sergeant, they would have been sitting there. So it was just the luck of the draw. I happened to be the first in the door, pretty much, and, and even though I'd been contacted at home prior to this my name must have come up somewhere. It wasn't as if I was on call to do it.

BINNIE J:

Now that raises the question of the training of the detective sergeants or the detectives in general, I suppose, because in the evidence at trial there seemed to be a certain lack of familiarity with this manual that the police were supposed to be working to.

What training, continuing training was given to the detectives to make sure they were performing their roles properly?

MR DOYLE:

All of the detectives would have undergone pretty similar training given, looking at their experience and their relativity of their promotions and that would have been a standard training throughout the country.

BINNIE J:

Would that be based on the manual?

MR DOYLE:

Pretty much yes, yes it would be based on the manual.

BINNIE J:

And that reference is also made to CIB notes. Do you know what that refers to?

MR DOYLE:

CIB notes? Could be lesson that –

BINNIE J:

At page 4 it talks about CIB training notes?

MR DOYLE:

Yes, over the years there's been an evolution of various training methods for the CIB. The methods that I trained under, the process I trained under in 1975/'77 thereabouts would have been totally different to the training methods that were employed later on. Throughout it there were a series of, I suppose for want of a better word, tutorials that, and – what's another word? Tasks that the detectives had to complete by certain times, or the trainees had to complete by certain times.

Now as time went on these were developed differently. Now the exact training that these people would have received I'm not totally familiar with just at this point in time because things have changed.

BINNIE J:

Would your working assumption have been in June of 1994 that the people you were putting in positions of responsibility, CIB was putting in positions of responsibility, would be familiar with the procedures and requirements of the manual and the CIB training notes?

MR DOYLE:

Oh, absolutely Sir. Every one of those people who was a detective, whether they held rank or they didn't hold rank, should have been able to have stepped in seamlessly into any one of those positions.

BINNIE J:

So that's why you were able to operate on the first in the door –

MR DOYLE:

Absolutely.

BINNIE J:

– process?

MR DOYLE:

Yeah.

BINNIE J:

Right. Now this PCA report seems to have been initiated by the police and I base that, if you look at page 1, paragraph 3. It says, "In May 1997 the Commissioner of Police consulted with the Police Complaints Authority, and Sir John Jeffries on an appropriate format for examining the allegations," this is from the Bain book. "And it was agreed that a joint investigation should proceed."

Now it seems that some clarification would be helpful. I understand that in 1997 when this report was made, the Police Complaints Authority was essentially an individual, and that is Judge Jain –

MR DOYLE:

(inaudible 12:00:58)

BINNIE J:

– and that he did not have a staff of independent inquirers?

MR DOYLE:

No, I think there would have been individual investigators. I'm going back to the years preceding that and there were certainly people who came to mind who were –

BINNIE J:

Staff?

MR DOYLE:

– part of his staff. For example, Aramoana, the massacre I've referred to was reviewed by the Police Complaints Authority and at that stage of it the Police Complaints Authority and at least one, maybe two, investigators from his staff came to Dunedin immediately. There were other investigations that I'm aware of where it was not just the Police Complaints Authority but in addition to that his staff.

BINNIE J:

Mhm.

MR DOYLE:

So I would imagine that Judge Jain would have had other assistants assisting him in an investigative role.

BINNIE J:

Independent of the police?

MR DOYLE:

Totally independent of the police.

BINNIE J:

Because at the top of page 2, it's not inconsistent with what you just said but I just want to clarify what happened in this case. It says, "Regular contact was maintained with Sir John until his retirement, subsequently the police have frequently discussed progress with the new complaints authority, Judge Jain."

So I got the impression from that that the PCA was kept up to date periodically but that the investigation was done by the police. Is that an accurate reading or do you think that there was a parallel inquiry going on, independently of the police, by the PCA staff?

MR DOYLE:

I was one of the subjects being investigated –

BINNIE J:

Yes.

MR DOYLE:

– so I do not know just how that process worked. I was certainly spoken to by both police officers and by Judge Jain himself. So I –

BINNIE J:

Were you spoken to by any member of Judge Jain's staff, assuming he had one?

MR DOYLE:

Not on that occasion but on prior occasions –

BINNIE J:

Yes.

MR DOYLE:

– and post that I have been, yes.

BINNIE J:

Okay. Were you part of the discussion that ensued after publication of Karam's book *David and Goliath* as to how the police should respond to what was a very public attack on their competence?

MR DOYLE:

I think it's probably timely that I point out at this point, Sir, that I don't think that paragraph 3 clearly reflects the attitude of the investigators, particularly myself, Detective Sergeant Weir and there may have been one or two others, over the response that we believe the police should have been making at that point in time.

BINNIE J:

Can you elaborate on –

MR DOYLE:

To those allegations.

BINNIE J:

What you felt would be, have been a more appropriate response?

MR DOYLE:

Well, we had written to the police and asked them to initiate an independent investigation, refer the matter to the Police Complaints Authority because we felt that our names and our reputations were being unfairly sallied at that point in time and we wanted that clarified.

To that end, a meeting was arranged with the then Commissioner Peter Doone who came to Dunedin and following that meeting –

BINNIE J:

He was overall in charge of the New Zealand Police?

MR DOYLE:

He was in charge of New Zealand Police. Now following that meeting there was an initial news release made by the President of the New Zealand Police Association, Mr Greg O'Connor, which actually made the media in the early hours of the morning, I heard it myself, to the effect that Dunedin police officers, individuals, had requested an independent investigation.

BINNIE J:

Mhm.

MR DOYLE:

Within hours of that a statement was made by the Commissioner Mr Doone, saying that the Commissioner had ordered this investigation which was really not the way it was.

BINNIE J:

It says at the top of page 3, "That some members," the second bullet, "Some members involved in the original case had already begun to make their own written response." Were you one of those?

MR DOYLE:

Yes I was.

BINNIE J:

And left to your own devices, how would you have run the response to the book?

MR DOYLE:

I think I would have sought legal advice, which I did seek legal advice, and I would –

BINNIE J:

In respect of defamation?

MR DOYLE:

In respect of defamation, absolutely. I, I took advice and I don't want to go into that advice in this forum.

BINNIE J:

Well I don't want to hear about it.

MR DOYLE:

Absolutely, but I did take legal advice.

BINNIE J:

Yes, right. There is another item I just wanted to touch on while we are looking at page 3. It says, "Counsel at the trial were questioned." You see that's about –

MR DOYLE:

Yes, I see that.

BINNIE J:

– the middle of the page. Do you know whether that included the defence counsel, Mr Guest?

MR DOYLE:

No I don't. I'm trying to recollect if I've seen something in this document here to that effect but, no. I, I imagine he was approached, in fact I'm sure that he was approached but to what extent he was questioned I don't know.

BINNIE J:

Okay, when you had your interactions with the inquiry as it eventually developed, were these formal to the extent the transcripts were made of the questions and answers?

MR DOYLE:

We were prohibited from getting any record of what we'd said. It wasn't made available to us.

BINNIE J:

But did – was it recorded as you gave the interviews to the inquiry?

MR DOYLE:

Oh, it was, yes.

BINNIE J:

And you request – did you request a copy of these transcripts?

MR DOYLE:

Yes I did.

BINNIE J:

And that was refused by –

MR DOYLE:

That was refused.

BINNIE J:

– the authority?

MR DOYLE:

Because the inquiry was being done under the auspices of the Police Complaints Authority, it wasn't a police inquiry.

BINNIE J:

Had it been a police inquiry would you have been able to access transcripts?

MR DOYLE:

Yes, we would have been able to access it under the Official Information Act and the Privacy Act.

BINNIE J:

Is that one of the reasons to join forces with the police and the Police Complaints Authority to provide for this deliberate, or secrecy or whatever?

MR DOYLE:

I don't imagine so. I think that, in fairness, the administration, they were trying to be as transparent as one could be.

BINNIE J:

Yes. The mandate, again, on page 1 just below where we were reading says that the book alleges or infers the police misconduct/impropriety/ineptitude, do you see where it says that?

MR DOYLE:

Yes I do Sir.

BINNIE J:

As I read the report, and they go through the batch of allegations, and conclude variously that there was no perjury, there was no ulterior motive, there was no misconduct. So that part of their mandate they seem to have taken quite seriously.

Part of my mandate, on the other hand, is to look at the ineptitude part and apart from dealing quite sharply with the police ballistics expert they don't really seem to assess competence. Do you know of any reason why they stayed away from assessing competence?

MR DOYLE:

I don't. Maybe – I don't know. Maybe it speaks for itself, that they felt that we were competent and that's something which I believe personally myself, we were.

BINNIE J:

But can I pursue that just for a few minutes because one of the disturbing, to me, aspects of the competence inquiry is this whole question of correlating kinds and, you know, I'm finding it odd that in paragraph 12 where they are supposed to be discussing generalities about investigations, they suddenly

say, "Where times are recorded there will often be discrepancies because watches are seldom synchronised."

It seems an odd detail to pick out of the whole galaxy of investigation issues, but it is dealt with at some length later in the –

MR DOYLE:
Excuse me Sir, what paragraph was that?

BINNIE J:
At 12, seventh line. "Watches are seldom synchronised."

MR DOYLE:
Oh, yes, thank you.

BINNIE J:
The – and I will just go through the list and I don't ask we debate these points but I just want to make a basis for my questions so that you understand my concern in this.

David Bain says that, "He looked at his watch at the corner of Heath Street and Every Street and it was 6.40," and then at some other point he says, "It was exactly 6.40." And so far as I can determine on the record, I can't find that his watch was ever tested for accuracy.

MR DOYLE:
That's correct.

BINNIE J:
Although it is treated as a fact. Then there's this issue with Denise Laney and as you would remember she is the lady who was, thought she was late for her job at the rest home and her clock said 6.15 and she knew it was five minutes fast. Now that clock was tested but according to the PCA report they didn't bother to look at the accuracy of the watch that was being used to test it?

MR DOYLE:
Sure.

BINNIE J:
Then on this – the computer turn on time and it's very clear and I assume you will agree, early on in the piece once you knew that David Bain said he was out of the house between 5.45 and whenever he returned, 6.45 or plus or minus. The timing was a serious issue here. Did he have an alibi or did he not have an alibi? Wasn't that a fair – is that a fair statement of your thinking at the time?

MR DOYLE:
I think that perhaps our thinking at the time was more towards the washing machine than the computer and we were relying, and I'm not diminishing the importance of the timings, but we were relying pretty much on what David Bain had told us and the timings of the washing machine, as opposed to the timings of that computer.

Now in hindsight that may have been wrong, I don't know, but that was our thinking at that particular stage and, yeah.

BINNIE J:
All right, so I will broaden my question and say, timing generally –

MR DOYLE:
Yes.

BINNIE J:
– was a serious issue in this investigation?

MR DOYLE:
I think that is in any investigation but probably with the benefit of hindsight I'd do, I'd do things differently in respect of that particular matter, I would.

BINNIE J:

So on the computer aspect, leaving aside the washing machine for the moment, we have Detective Anderson who is assigned to deal with Mr Cox and doesn't really seem to have much of an idea of what Cox is up to or why he is doing it –

MR DOYLE:

Sure.

BINNIE J:

– and who assigned Anderson to do this job?

MR DOYLE:

I'm not sure. I think that Anderson, at that stage of it, was operating under Detective Sergeant Weir, I'm not sure, I can't be positive about that. I'm pretty sure that he was one of the senior investigators so that's where he would have been briefed.

I think with these, with the computer business, we've got to take this back to 1994 where computers were a real novelty for all of us and it's against that sort of background that these, these tests were carried out and, to the extent that Cox was being relied upon by the police as an expert and we were taking advice from him, rather than trying to give him advice on how to do his job.

Now, with that has obviously come some difficulties in respect of the timings and the importance of noting the exact starting time of the start of the computer and everything else that goes with it. I don't think it was appreciated by the detective at the time, nor do I think there would have been anyone available, at that point in time, with the particular knowledge of computers to have assisted us directly with it on the inquiry.

BINNIE J:

Within the police force?

MR DOYLE:

Within the police. Now as I recall it there was an inquiry made with, I'm pretty sure it was Maarten Kleintjes at Wellington but I can't be sure about that, as to the process –

BINNIE J:

Yes, ESR.

MR DOYLE:

Yeah, the process that we should use. Nonetheless, we had the university down there with people who we understood could assist us with it and that was the advice that we went with.

BINNIE J:

I'm not making any objection to what Mr Cox did. My concern is if going back, as you say, to 1994 there is not the general familiarity within the population with computers I would have thought one would set out to identify a policeman who had some understanding of what was being examined that, given the object of the exercise was to identify time, that a person would have been picked to have a watch that, if it didn't have a second hand, would at least demarcate itself in minutes –

MR DOYLE:

Oh, I totally agree with you on that and I can't disagree.

BINNIE J:

Yes, and –

MR DOYLE:

It surprised me and it disappointed me that that did not occur. I would have thought that a trained detective would have had enough savvy to have taken that on board.

BINNIE J:

Mmm, and then it seems that with the – that Mr Cox was smart enough to say, to telephone in, as I understand it, to say, "Check the timing of Anderson's watch." The thing drifts for a week and in the meantime there's another synchronisation that nobody can quite reconstruct.

It brings me back to the topic of ineptitude. This may have no relation to ulterior motive – of misconduct or anything else, but you've got a very serious murder investigation, five dead people, and you've got some evidence that is either going to put David Bain in the house at the time, the relevant time, or possibly exclude him and the thing is conducted with what seems, on the surface, to be a pretty amateurish approach.

MR DOYLE:

Oh, I think, looking back in hindsight, that it was amateurish. I can't disagree with that. I, I would like to think that, well I'm sure that would have been done better now if the same thing occurred today, I'd expect it to be.

BINNIE J:

But don't you think by the standards of the day that this was a pretty poor performance?

MR DOYLE:

It would be very easy to say yes but I don't think this is as simple as that because I think that we were dealing with a totally new arena. The fact that the initiative was even used to go and try to determine that what time the computer was turned on and that probably, I certainly know of my own knowledge of computers at that stage, it wouldn't have even crossed my mind. Someone had, had brought that up and said, "Let's try it."

BINNIE J:

But if somebody had the sense to undertake the job why wasn't it done properly in terms of accuracy of timing?

MR DOYLE:

I can't answer that Sir. I, I agree that it should have been done better and that's about all I can say about it.

BINNIE J:

We – the next thing I would like to talk together – talk with you a little bit about is about the responsibility because in the PCA report there are a number of areas where they say this thing just wasn't put together the way it should have been.

One of the examples is the timing we've just discussed on what are pretty easy on the police in that respect. Another was the photos.

MR DOYLE:

The?

BINNIE J:

The photographs.

MR DOYLE:

Yes.

BINNIE J:

They said, you know, there was no sequencing, there was no proper log, it was impossible to reconstruct what was taken when, apart from in one photograph the body is there and the next photograph it isn't.

MR DOYLE:

Correct.

BINNIE J:

And the officer in charge of the scene, Detective Sergeant Weir says, well that's up to the photographer, the photographer comes in and does his thing. It's true that in the manual the photographer has to be accompanied by a

policeman and I was there and I was given a certain amount of direction but I deferred to the police – to the photographer in terms of getting his act together and a proper inventory, dated inventory of the photographs.

Now what – my question is that if the officer in charge of the scene has a responsibility not only for the inquiry part but also of putting that evidence together eventually in a prosecution. How the officer in charge of the scene can say, well the photographer didn't do his job and I never made any inquiry as to what he was doing that – you see, my problem is identifying responsibility. Who – who's running the ship?

MR DOYLE:

At this particular stage, like right over all the whole inquiry, Detective Chief Inspector Robinson.

BINNIE J:

But he's not down dealing with the photographer, as between the photographer and the police officer who, in this case, happens to be Weir.

MR DOYLE:

At the particular point in time whoever the photographer is working under, the OCC or the OC body or whoever it is, he comes under that particular officer's control.

BINNIE J:

And, as I read the manual, it is up to that officer to make sure the evidence produced is produced in a form usable at trial.

MR DOYLE:

Yes.

BINNIE J:

And that would include having the photographer's photographs properly organised, and before you answer, I just refer you to what I'm talking, on

page 40 of the report. Under "sequence of photographs" there's quite a lengthy description of the problems that we're encountering with sorting what was taken when and, for example, the video had a facility for date and time but it wasn't turned on.

Is it not the police responsibility to ensure that what was being done was done in such a way as to be useful and organised for trial?

MR DOYLE:

I'm sorry?

BINNIE J:

I'm trying to identify who's responsible, who's responsible in all – in this? Do you just –

MR DOYLE:

I would think that there's two people responsible. There's one person overall responsible and that's the person who is in charge of the particular situation. In this particular situation it was the OCC. He has that overall responsibility at that point in time, that member is under his control. But that doesn't absolve the photographer himself from not taking due care and documenting properly, in my view.

BINNIE J:

That's fair enough. Another instance where I'm trying to find out who's in charge is in the footprints disclosed by the luminol on the evidence of Mr Hentschell.

MR DOYLE:

Yes.

BINNIE J:

And as you know there is a controversy that certain bits of carpet were taken up with – for blood stain and testing and these prints were not – that the

carpet was left and burned when the house was burned, and I'm trying to find out is the responsibility that of the officer in charge of the scene, the one accompanying Mr Hentschell for his inquiry. Is it up to him to make sure the evidence is there for trial or is it Mr Hentschell's responsibility as the expert?

MR DOYLE:

I think it's a two-edged sword. In this particular instance where you're talking about the luminol I believe it's the officer in charge of the scene. There are other instances where I believe it's up to the expert to say we need to keep that, I'm taking that, then it goes under his control, but I did not take part in the luminol testing so I don't know just what actually transpired in terms of what Mr Hentschell wanted recorded, uplifted or otherwise, but generally in a situation like that there would be a collaborative approach between the person who was responsible – the police officer who was responsible for that particular phase and the scientist or expert, whoever it was, it would be a collaborative approach on what we should do, but ultimately the responsibility still remains with the police officer.

BINNIE J:

They're the ones carry this exercise forward to trial?

MR DOYLE:

Absolutely.

BINNIE J:

And would it follow from that that if the photographer fell down on the job, as this one seems to have done, that the supervisory responsibility again would be with the police?

MR DOYLE:

Yes. Um…

BINNIE J:

This is not to relieve the photographer of his share of the blame but in terms of – there has to be some supervision going on here in the crime scene I am assuming?

MR DOYLE:

Absolutely, but I think that there's also an assumption that when people are doing a job, and the likes of photographers, for example, have been doing this job for some – quite some time, that there is an assumption, it should be a fair assumption on the part of the officer in charge of the particular scene that that person knows what they are doing and that they are doing their job properly otherwise surely there would have been pull-ups made in the past that would have alerted staff to it. I, I wasn't aware of any problems in the past.

BINNIE J:

You see, I accept that there has to be a level of reliance on the people who are supposed to be expert at what they're doing. My concern is that there seemed to have been a lot of assumptions made in this investigation that a lot of incompetence would be displayed by members of the team where it seems with the benefit of hindsight that the competence wasn't there, and that there didn't seem to be either supervision at the time or an articulation how, in this case, the officer of the scene as to what he expected to get out of this exercise, that there was a discussion between the photographer and the police officer saying, here is what we did, here is the product I want out of your work.

I mean is it – was it a feature of the Dunedin police that everybody just sort of assumed, people drifting in and out of the crime scene were all competent and were all doing what they should be doing?

MR DOYLE:

I –

BINNIE J:

Because the assumption wasn't justified in hindsight?

MR DOYLE:

In hindsight, possibly not.

BINNIE J:

You see one of the things again is the blood on Robin Bain at the mortuary, and the - I'll go to another example. This question of the firearms discharge residue and the PCA report says it's fundamental, not only do we wrap the bodies in plastic but that you wrap the hands, and you make that point specifically, and it appears from what I can read that the hands were not – Robin's hands were not wrapped and the wrapping of his body was somehow disposed of without being tested.

MR DOYLE:

Correct.

BINNIE J:

And I gather Detective Sergeant McGregor was in charge of the body, the bodies –

MR DOYLE:

He was overall in charge of the body, yes.

BINNIE J:

– overall in charge. Where is the responsibility within the police for the fact that evidence which could have been very important one way or the other, either as exculpatory or inculpatory, where is that responsibility?

MR DOYLE:

Sir, that responsibility lies over – at the end of the day with the officer in charge of that phase, Detective Sergeant McGregor. Having said that, the officer in charge of Robin Bain's body, I'm trying to think who it was.

It doesn't matter. Whoever, whoever that person was had that responsibility themselves because they are trained detectives –

BINNIE J:

Lodge? Is it Lodge?

MR DOYLE:

Yes, yes, Detective Lodge. Detective Lodge had that responsibility and he's an experienced detective, he should have, he should have done that.

BINNIE J:

Would that same answer apply, for example, in relation to the skin surrounding the bullet wound to Robin Bain? That the manual seems pretty clear that that skin should have been saved.

MR DOYLE:

Once again, in relation to that Sir, I think there's a necessity for a collaborative approach between the pathologist or the expert and the detective.

BINNIE J:

Can I shorten it down in this way, it won't help with what you say earlier, that from the investigative prospective it is the police responsibility, but that doesn't relieve the pathologist's responsibility within his own sphere of expertise to act appropriately.

MR DOYLE:

In my experience the decision over body samples of any shape or form would be the sole decision of the pathologist. Bearing in mind that in an autopsy there a numerous samples taken from a body. In general a police officer would have no idea of the significance of those samples or what could or could not be done with them other than the fact that they were being taken. Some samples would be possibly more obvious when you're getting to the external parts of the body but, nonetheless, at the end of the day I would

expect that the police officer would be - to be guided by the pathologist and not telling the pathologist what to do.

BINNIE J:

So in this particular instance of the gunshot wound and the controversy that emerged as to whether this was a contact wound or near contact wound, an intermediate wound and the other pathologists, deferring to Dempster because he's the only one who actually saw the wound, that you would say from your experience that that was the decision for Dr Dempster to make?

MR DOYLE:

Absolutely, and I think that's the point I'm trying to make. With the pathology, pathological example – samples, I would expect the pathologist to be making that call not the police officers.

I can never recall in, I don't know, several, a hundred post-mortems or deaths that I have attended ever telling pathologists to take a particular sample and give it to me.

BINNIE J:

At page 58 in this book, just at the bottom of paragraph 141 there is a discussion relating to the topic you and I were discussing a moment ago about detective training requires the hands of deceased persons, especially in shooting cases, be enclosed in plastic or paper bags. We've been unable to establish if this was done for all the deceased.

Given your view that something like the skin surrounding the wound would be a call for Dr Dempster, can I take it that when you get off the pathology expertise and you get into such matters as preserving the wrapping of the body –

MR DOYLE:

Yes.

BINNIE J:

– and the hands, that is a police responsibility?

MR DOYLE:

Absolutely, absolutely Sir.

BINNIE J:

So the definition or the distinction really is to what extent does it come within the pathologist's special area of expertise?

MR DOYLE:

Absolutely.

BINNIE J:

Insofar as the police are sufficiently aware of what's going on to determine what is helpful evidence and what is not helpful evidence –

MR DOYLE:

Sure.

BINNIE J:

– they have the responsibility for purposes of putting this in a form useful for trial?

MR DOYLE:

Sure.

BINNIE J:

Can I ask you this, that did Chief Inspector Robinson, as the head of the inquiry and was concurrently running the entire Dunedin CIB, was that correct?

MR DOYLE:

That is correct.

BINNIE J:

So there would have been a lot going on other than the David Bain investigation?

MR DOYLE:

No. I have been inqui – in charge of the CIB subsequent and if there is a major inquiry I'm very active in that inquiry as he was in this particular inquiry.

BINNIE J:

So he was not a figurehead, he was hands-on manager?

MR DOYLE:

Ah, he was a hands-on manager but, having said that, the administrative part of the inquiry fell to me solely. I, I – there was no question about it, I was busier than what he would have been. He had more time to consider what was coming in than I would have had at that particular point in time, but he was, he was certainly the figurehead of the inquiry, no question about that. I took no part in media conferences, or anything of that nature.

BINNIE J:

Can we look at page 9 of the PCA report. Half way down paragraph 24 it seems to be a quote from *Genesis.* It says, "On the evening of the third day of the investigation it was felt there was sufficient evidence to arrest him," meaning David Bain, "Even though at that stage a great deal of work still had to be done." So that, I take it, refers to the Wednesday night?

MR DOYLE:

Yes it would be Sir.

BINNIE J:

And do you recall what discussion there was that gave rise to that conclusion on the Wednesday night?

MR DOYLE:

We obviously, at that point in time, would have had a lot of, more information coming to hand and I think possibly the most important information that would have been available to us at that particular point in time was the confirmation that the fingerprints which were on the rifle were positive fingerprints, because prior to that, if I've got my timings correctly, I think there was just a suggestion that there were fingerprints on the rifle. I think that arose on the Tuesday but the rifle, if I recall correctly, was brought to Dunedin on the Wednesday and it was at that point that these positive fingerprints and blood were locate – were identified of being of that nature which obviously, without explanation, certainly meant that the gun had been handled recently by David Bain with bloody fingerprints.

Now that combined probably with the ability at that stage of it for us to have had a look at various statements including David Bain's own statements. Would have started to create a picture which led the detective chief inspector to make that statement.

BINNIE J:

And you were in agreement with that conclusion as –

MR DOYLE:

Yes.

BINNIE J:

– as to the Wednesday night?

MR DOYLE:

Yes.

BINNIE J:

And who else was party to that decision? I should correct that. I think you're telling me that it was Robinson's decision but that others were part of the discussion.

MR DOYLE:

Throughout the investigation Peter Robinson, myself, the various NCOs, the Crown solicitor here in Dunedin, experts –

BINNIE J:

Is that Mr Wright?

MR DOYLE:

That was Mr Wright. There were several discussions taking place. They were ongoing discussions but I imagine that what is contained in here arose from information which would have been relayed formally to staff at an evening conference.

BINNIE J:

This would be the Wednesday night?

MR DOYLE:

That would be the Wednesday night Sir, yes.

BINNIE J:

Can you just tell me the practice of the CIB at the time because in some jurisdictions when the police have what they regard as sufficient evidence to charge, there are certain legal consequences regarding how the suspect is then treated –

MR DOYLE:

Yes.

BINNIE J:

– under the so called Judges' Rules and so on that I'm sure you're familiar with.

MR DOYLE:

Correct Sir. That –

BINNIE J:

How is it viewed, as of the Wednesday night when you'd decided you had grounds to arrest him?

MR DOYLE:

David Bain was not to be spoken to formally without being cautioned from that point onwards and that was probably the context that this here was referring to and what would have been made quite clear to the likes of Detective Sergeant Dunne at that particular point in time. Detective Sergeant Dunne being the officer who had been having direct contact with David Bain.

It – under no – we would, we would have believed at that point in time that if we'd spoken to him without cautioning him we would have been wrong.

BINNIE J:

Then the discussions were suspended, shall we say, for Thursday and then he was brought in on the Friday –

MR DOYLE:

The Friday.

BINNIE J:

– but you will see that it goes on to describe that in paragraph 25. Was it – this investigation wouldn't remain suspended for any length of time, was it decided on Wednesday night that he would be charged on the Friday or was it left open as to when he may or may not be charged?

MR DOYLE:

I believe the decision to speak to David Bain finally and for him to be charged was made on the Thursday night. Just trying to think, you'll note Sir, that there was a change in personnel dealing with David Bain at that particular stage but that was because of the personal circumstances of Detective Sergeant Dunne at that stage because he, in the whole design of the operation he would have continued with David Bain but his wife was in the maternity hospital at that stage and he was unavailable, it's as simple as that. But the decision to deal with David Bain on the Friday morning was made by Detective Chief Inspector Robinson on the Thursday night.

BINNIE J:

Okay. Now in the manual when they talk about the arrest, and I'll ask you to look under the green tab towards the back of the book, page 3257, and you'll see it says, "On arrest," and then, "Arrangements are to be made with the examination of the suspect by the pathologist or a police surgeon," and so on and I think that, in this case, was Dr Pryde.

MR DOYLE:

I don't think, from memory, that the defence counsel, Mr Guest, authorised any examination of David Bain after his arrest.

BINNIE J:

Will Dr Pryde examined him on Monday.

MR DOYLE:

On the Monday, certainly.

BINNIE J:

On the Monday.

MR DOYLE:

Yes.

BINNIE J:

And, yes, on the Friday Mr Guest advised against further medical examination, but the reason I raise this is that the manual seems to contemplate, what strikes me as a very invasive, physical strip search. In fact, after arrest, and in this case it was conducted on the Monday when David Bain was still considered as potentially the victim of a murder/suicide by Robin, and I'm interested in knowing how did that come about? Who ordered that medical examination of David Bain in the afternoon of the first day?

MR DOYLE:

I don't know who ordered it. Having said that, at that stage, quite clearly David Bain was a witness to this. Those samples that they were – would have been looking for at that particular point in time would have been for elimination purposes.

BINNIE J:

But they were taking genital swabs. I don't know what that had to do with this particular fact –

MR DOYLE:

I don't –

BINNIE J:

– situation?

MR DOYLE:

I wasn't present and I don't know Sir. I can't take that any further. I just don't know.

BINNIE J:

The – one of the issues here was the firearms discharge residue and why was it delayed, and then there is the issue of David Bain washing his hands and so

on. So that, was that done by the police doctor for the purposes of elimination or inculpation?

MR DOYLE:

I think it would be good practice to have done it at that particular point in time.

BINNIE J:

Wouldn't it have been better practice to have done it in the morning?

MR DOYLE:

Ideally it would have been better in the morning but, like I don't know how much experience others have had in terms of dealing with victims. It's not just a simple matter of suddenly having the person there as a victim first thing in the morning. You're trying to build up a rapport with that person and suddenly asking them for various samples and putting them through processes of physical examination which I don't think are appropriate at that time.

BINNIE J:

No, well, I know you've been down this road before, 2009 trial, as to how one could be sensitive to David Bain in the morning of June 20th and subject him to Dr Pryde in the afternoon, and I know that the position that you've explained on this point that the – at the scene that it strikes me that whoever ordered this physical examination by Dr Pryde as of the time David was delivered over to the prison or wherever it was, that sensitivity wasn't upper most in your minds.

MR DOYLE:

I'm just getting a wee bit lost here Sir, because on the Monday morning he wasn't delivered over to a prison?

BINNIE J:

Well he was at the – how he was taken from the house in an ambulance –

MR DOYLE:

Yes.

BINNIE J:

– and I think he was accompanied by the police officer in charge of suspects.

MR DOYLE:

Yes.

BINNIE J:

And where was the physical examination done?

MR DOYLE:

I, I understand – I'm just going off the top of my head –

BINNIE J:

Yes.

MR DOYLE:

– that it was done some time later that morning.

BINNIE J:

Do you recall where?

MR DOYLE:

At the police station.

BINNIE J:

At the police station?

MR DOYLE:

Yes. But after that examination he, he went to his aunt's address where he remained for several days. That, that's the point I was wanting to clarify.

BINNIE J:

The issue of a lens. The left eye lens discovered in Steven's room. Now I don't want to go back through that whole story, I just want to get your views on one point.

Dr Sanderson says that he understood from what he says was a conversation with Detective Sergeant Weir that you would just ignore the dust on the lens. The – his understanding is that otherwise it might appear that the lens had been in Steven's room before the deaths, from a – in the early hours of June 20th and that's what he understood this debate was all about.

When the Police Complaints Authority comes to deal with this lens, and it's at page 63. In paragraph 155 you say, "Well there are two possibilities and one of the possibilities that they look at is that it came off in the fight." And then the other is that it was less likely, if you look down to (b) at the bottom of the page, "But still a possibility that it was pushed under the boot when various articles were moved at the time Steven's body was taken out."

So they are looking at two possibilities, and what I'm interested in knowing from you is whether this whole point that Dr Sanderson was making, which was that the – there seemed to him to be an effort to conceal the fact there was dust on it to get away from the possibility that the lens was in the room prior to the struggle and had nothing to do with the struggle, that that whole issue was simply ignored because that is a third option which they don't even consider when they are talking about this dispute between Sanderson and Weir.

Was there any discussion within the police, at least these conferences you were at or whatever, that indeed the lens may have been there prior to the struggle with Steven and on what basis was it eliminated?

MR DOYLE:

I don't recall any discussion relating to the third possibility just – no, Sir, no.

BINNIE J:

So can I put it this way that although the police were aware after Sanderson came forward with this suggestion that Weir had told him just to ignore the dust, that it was not treated as a serious possibility by the police, is that a fair statement?

MR DOYLE:

I, I would, I would say that it wouldn't surprise me that there was dust on the lens. I'd be surprised if there wasn't considering the, the state of the room, the whole kafuffle that had occurred in there. I'd be very surprised if there wasn't some sort of dust, but what, what is meant by dust? Like is it a layered clo – covering of dust, is it just dust that you would expect you'd have on glasses after a commotion in a room, I don't know.

BINNIE J:

You see the question arises because Dr Sanderson's interpretation of what he says he was told by Detective Sergeant Weir is that the sort of dust that was noted on the lens would make it less likely that the lens had been involved in the struggle.

So without going into a description of what kind of dust it was or it wasn't, what Sanderson is saying is, in fact I was shocked that I was being told to ignore what appeared to be a significant issue as to whether the lens was there before the struggle so.

MR DOYLE:

As I understand it that there was some debate between Mr Weir and Mr Sanderson over whether that was in fact said. So I can't take it any further I'm sorry.

BINNIE J:

I appreciate that and I'm not asking you to intervene in their debate, I'm just saying from the police point of view, given your centrality in their decision

making, whether this so called third option ever surfaced as something of interest?

MR DOYLE:

No.

BINNIE J:

After the PCA report was delivered we know there was a defamation action started by Mr Anderson and detective sergeant – I guess Detective Anderson and Detective Sergeant Weir.

MR DOYLE:

Weir.

BINNIE J:

Was there discussion at the Dunedin CIB that you're aware of that this is something that should be undertaken, given the positive report from the Police Complaints Authority?

MR DOYLE:

I heard no discussion to that effect.

BINNIE J:

Well, was it –

MR DOYLE:

I take it that you're meaning –

BINNIE J:

What I'm really saying is, was there a sense on the part of the police that, given the finding news of this report, it was time to go on the offensive against the person who caused all this trouble?

MR DOYLE:

I can't recall the timings Sir so – but I'm, I'm not aware of whether that was this report was the catalyst for the continuation or not –

BINNIE J:

For the defamation?

MR DOYLE:

For the defamation, no, I –

BINNIE J:

The defamation came after.

MR DOYLE:

I'd be surprised if it was.

BINNIE J:

You don't think that –

MR DOYLE:

I don't think there was any connection.

BINNIE J:

You recall another contentious point of evidence to do with Dr Pryde's estimate of 10 hours of the bruise to David Bain's forehead, and he gave a range of, on the low side, seven, on the high side, 13 or 14 hours. But the allegations made that the Bain defence was ambushed by this precise figure of 10 hours which happened to fit the police theory quite neatly. What I want to know is whether the police were aware at the time that the Dr Pryde deposition was prepared, or prior to his giving evidence at trial that he had this 10 hour figure in mind?

MR DOYLE:

Absolutely not.

BINNIE J:

And this would, as well, go to the timing of the piece of skin evidence, the piece of skin found in Steven's room as to the date of that, of the injury to David's knee was for a while attempted to be timed to Steven or David, back and forth?

MR DOYLE:

I, I just – sorry, I just couldn't follow the question there Sir?

BINNIE J:

It wasn't a very elegantly framed question. The 10 hour figure seems to surface in two respects. One had to do with the bruise to the forehead, the other to the bruise to the knee with the skin off the knee. But when you say you weren't aware of the 10 hour figure, it is correct –

MR DOYLE:

I was aware of the 10 hour figure Sir, I'm aware of that. It's the second part with the skin that…

BINNIE J:

But were you aware at the time that he – that Dr Pryde was going to say 10 hours?

MR DOYLE:

No.

BINNIE J:

And that goes, as I understand your answer, to the point about the bruise. My recollection is there was a similar figure put on the skin injury, it's in the

Crown Law Office submission at paragraph 274, that the precise time estimate also surfaced in relation to that injury.

So my supplementary question to your earlier answer is, where you aware of the precision that Dr Pryde would assign that knee injury prior to the time he gave it in Court?

MR DOYLE:

No.

BINNIE J:

I can assure you the whole problem there was my formulation of the question, not your answer.

MR DOYLE:

No criticism.

BINNIE J:

Now I just have a few additional points of leads which may or may not have gone anywhere but there is a complaint either that spurious leads were followed up or that good leads were not followed up, and in the first category was the notion of that David Bain had feinted a fit –

MR DOYLE:

Correct.

BINNIE J:

– in his room when the police arrived. First of all, did you have any personal observation of this event?

MR DOYLE:

Not of the event itself, no.

BINNIE J:

Did this assume importance in the eyes of the police in shifting David Bain from the victim category to the suspect category?

MR DOYLE:

Probably cumulatively at some point, yes, but not in the initial stages. The initial stages, it was taken for what it was and that, you know, it was a terrible position for a young person to find themselves in and it was taken in that light. However, things changed when you started getting the reports coming in from the ambulance officers and from the police officers who were present. That's when the situation changed.

BINNIE J:

Because those would have been available on the Monday?

MR DOYLE:

Not necess –

BINNIE J:

By van Turnhout I think it was and the ambulance man and –

–

MR DOYLE:

Everything that was available on the Monday probably wasn't available for me personally until the Tuesday and perhaps early Wednesday. People were still to be interviewed. Like I think that van Turnhout, for example, wasn't interviewed until that afternoon.

BINNIE J:

Mhm.

MR DOYLE:

I may have heard anecdotally bits and pieces but the actual physical statement from a lot of people was quite some time generally getting to me, yeah.

BINNIE J:

Was there some sort of time deadline put on people, like they should be reporting daily on what they had uncovered and that these reports should get to you?

MR DOYLE:

Oh, absolutely, but that the whole process that we were working under of getting it to typists, to get it recorded, get it into computers, setting up the whole computer system. In every inquiry pretty much there's a problem with just the administration of getting the thing going and invariably the 2ICs role, he's very often right behind the ball game for 24 even 48 hours on occasions. This particular inquiry would have been no different.

BINNIE J:

Another issue that you have discussed on other times with other people is this business of Dean Cottle and the allegation of incest and you responded at the 2009 re-trial that this was a homicide investigation on an incest investigation.

MR DOYLE:

Yes.

BINNIE J:

And I think you made it clear that it wasn't your decision whether that particular line of inquiry would be pursued or not?

MR DOYLE:

Correct.

BINNIE J:

The question I wanted to ask is whether you recall discussion leading up to that decision not to pursue it at that point?

MR DOYLE:

At this point I can't recall any specific discussion. I'm sure there would have been but I can't recall the nature of it Sir.

BINNIE J:

Was the discussion about there being a problem and no ascertained motive as to why David would kill his family? Was that seen as a hole in the prosecution at that point?

MR DOYLE:

Police don't tend to look at the motive if it's not clearly there as an issue. In this particular case, no. I don't think at any stage we looked for a motive for David killing his family. I think that to be very fair, I think the approach that we probably had taken at that point in time was that this was a young man who, for whatever reason, had snapped and I know that myself and probably a lot of other police officers would have dearly hoped that there had been some medical condition become evident that would have explained it but, aside from that, no there was no question of trying to pursue a motive and I, I think in this sort of a situation you'd never, ever be able to ascertain what a motive would be.

BINNIE J:

In short, the question of a motive for David Bain and the question of a motive for Robin Bain were equally remote from your focus of attention?

MR DOYLE:

Absolutely.

BINNIE J:

The – as the preparation went on and it became clear that this was a case really of circumstantial evidence and it was a matter of who you interpret the assembly of all these little strands of the rope, I think, as the prosecutor put it. Did the question of motive loom more largely than it had initially or was it never really much of a factor in the police thinking?

MR DOYLE:

It was never really a factor in the police thinking but I think that having said that, I think in, in any inquiry it always helps if you can establish a motive as an investigator, but there are numerous inquiries where that – you just never, ever know the motive, not even after a person has been convicted.

BINNIE J:

Would you agree that in this case, either for Robin to have killed his wife and three of his children, or for David to have killed his parents and three siblings, was a more difficult case to explain than most?

MR DOYLE:

Absolutely. It goes outside the normal bounds of human behaviour and human rationale and I guess that's where, where we've always been with it. I can't explain it and I wouldn't like to speculate on it either way.

BINNIE J:

Because the perception of the police seems to have changed from the initial concern about this gap of 25 minutes between the time, on David Bain's evidence, you've got a hole then when he called the 111 number, and the idea that there might have been some kind of killing frenzy in that period, and then – which would have envisaged one type of mental disturbance, as you put it earlier, and the more methodical kind of killer who would have done in the four people initially and then set up and murdered Robin after the paper, with the paper route in the middle. They seem to be quite different characteristics of a murderer?

MR DOYLE:
Absolutely.

BINNIE J:
And I put – point in the police switch from the 25 minute frenzy to the premeditated killing?

MR DOYLE:
I'm not sure exactly if there was ever a preference for one or the other. I think there was an open mind in this throughout it. There may have been some people with different views on it and it certainly would have been my view that the killings had taken place prior to the paper run as opposed to being after the paper run. So that perhaps explains it but others possibly had different views on that.

BINNIE J:
And what led you to your particular view on those alternatives?

MR DOYLE:
To the pre-paper run?

BINNIE J:
Yes, "four before and one after" I think it's described.

MR DOYLE:
I, I just think that 25 minutes was too short a time to have carried out all of the functions including the cleaning up, turning on computers and changing clothes but probably, principally, the fact that the washing machine, the cycle of the washing machine, according to David, took between 45 minutes and one hour and according to tests done by the detectives it was something like 59 minutes, so many seconds and one hour, one minute.

If that were the case, and I have always maintained that the washing machine was very, very pivotal because at the time that the police entered the premises, 7.28, into the alcove or the bathroom where the washing machine, or that area, the washing machine wasn't going 7.30, 7.31, and it just would not have, in my view, have been possible for that washing machine cycle to have got through in that limited time. So that's what's preferred me to an earlier time probably more than anything else.

BINNIE J:

Unless it's based on David's own statement that there was a full cycle.

MR DOYLE:

Absolutely.

BINNIE J:

Okay.

MR DOYLE:

And in addition to that the tests carried out by the police.

BINNIE J:

What I meant by my interjection was that it seems to be one of these dial machines –

MR DOYLE:

Yes.

BINNIE J:

Where you can push it in and it will start with an incomplete cycle which will determine how long it would take to run it's course –

MR DOYLE:

Sure.

BINNIE J:

– and I know that David Bain's statement was that he ran a full cycle and I take it that's partly the thinking?

MR DOYLE:

Absolutely, he was very precise about where the, where the machine, where the switch was on the machine, both in his discussions with the police and, as I recall it, in his evidence-in-chief at the first trial, or, no, it may be cross-examination in the first trial.

BINNIE J:

And just one last point. The famous paying David Bain celebration in 2003 that Detective Sergeant Weir acknowledges to be inappropriate but I asked him this morning, following up some questions of the 2009 trial, as to any other police participants, and I just wanted to ask you whether you were present at that?

MR DOYLE:

I was not present and I've never been to a party at Detective Sergeant Weir's house so I can't comment any further than that.

BINNIE J:

Well what I will do now is to go next door and see if there are questions that the Bain side would like me to follow up on or put to you. I will be back shortly and then Ms Markham will re-examine to the extent she sees fit. But from my part I thank you for indulging me –

MR DOYLE:

Thank you, Sir.

BINNIE J:

– and I hope the accent hasn't been too much of a challenge.

MR DOYLE:

No. Sorry about the noise.

INTERVIEW ADJOURNED: 1.19 PM

INTERVIEW RESUMES: 1.29 PM

BINNIE J:

Just two points that I asked you about and you had a discussion with Mr Weir at the 2009 trial about the destruction of the exhibits, and my recollection is that this deadline that was imposed, I think it was January 29, 1996?

MR DOYLE:

Yes.

BINNIE J:

That you couldn't really recall how that date had been arrived at. Have I understood that correctly?

MR DOYLE:

I think that's – I'm just trying to think of the circumstances under which that deadline was imposed. I –

BINNIE J:

Wasn't it Detective Barbara or somebody who did –

MR DOYLE:

Was it – is this a deadline that I had given him possibly.

BINNIE J:

Yes that they – I think in December you issued this letter, "Have it done by January?"

MR DOYLE:

Yes, I, I, I do recall giving him a deadline. I'm not sure of what date that was but if you were saying that it was a date in January, was that correct?

BINNIE J:

I believe it was January 26 but I'm functioning on memory and I should be able to find it very easily because I think it was towards the end of – yes, at page 213. No, you'll have to formally see the transcript. "26 of January these items were destroyed." This is your answer to Mr Reed.

MR DOYLE:

Yes.

BINNIE J:

Is that a little bit – and I think you, I'm sorry. That particular response was to Mr Raftery.

Can we take it, subject to verification, mid-December there was an instruction and on or about January 26 because the deadline –

MR DOYLE:

There was –

BINNIE J:

– and we will confirm the precise dates –

MR DOYLE:

Yes.

BINNIE J:

– from him.

MR DOYLE:

Yes, yes, so what –

BINNIE J:

Or his opponents.

MR DOYLE:

My recall was that there was a date but I don't know what the date was.

BINNIE J:

And am I correct that you don't recall why this particular date was fixed?

MR DOYLE:

Not the specifics of the date but I have no doubt that it was to – at the end of major inquiries it has been part and parcel of wrapping up the inquires to get rid of what is not needed and that would have been part and parcel of that. There was nothing else with it than that.

BINNIE J:

I had the impression when reading your testimony that there was some kind of a refrigerator at the police headquarters that the human specimens were kept in.

MR DOYLE:

At that stage there was a refrigerator in the CIB for the retention of samples that were likely to deteriorate, like blood samples and that type of thing on the short term, not on a long term. It was never an intention for the police to retain deteriorating items long term.

BINNIE J:

You see what concerned me is that the rules for appeal to the Privy Council seem to be quite flexible that you can't look at a calendar and say, right the date for seeking leave from the Privy Council has passed therefore the case is

done, because they like to retain flexibility as to whether they take appeals. So that the only way of determining whether the matter would go to the Privy Council would be by contacting defence counsel.

MR DOYLE:

At that stage, Sir, no indication had been given to us that the matter was going past the New Zealand Court of Appeal. To that end, I had put it in writing to the defence counsel of our intentions of dealing with the exhibits notwith –

BINNIE J:

Well, you put it – I think you put in writing that you were dealing with a container of stuff –

MR DOYLE:

Absolutely.

BINNIE J:

And what I'm talking about is not the container that went back to the (inaudible 13:35:17) but I'm speaking of the samples that were refrigerated?

MR DOYLE:

I appreciate that.

BINNIE J:

And I don't believe that the destruction of those samples was the subject of a letter to defence counsel.

MR DOYLE:

No it wasn't.

BINNIE J:

And therefore you wouldn't – he hadn't been in touch with you about it, by the same token, you hadn't been in touch with him to say, look, we have –

MR DOYLE:

Yes Sir.

BINNIE J:

– a housekeeping issue here and I want to deal with it and are you going or aren't you going.

MR DOYLE:

Absolutely.

BINNIE J:

That never happened?

MR DOYLE:

It never happened, probably because it's not the normal process of the way trials or post-trial in my, my experience post-trial processes. I've never been involved in a trial that, in a case that had gone to Privy Council from recall and so once it had gone to the New Zealand Court of Appeal that seemed to be the end of the matter for us.

BINNIE J:

But you were aware there was a potential for an appeal –

MR DOYLE:

No.

BINNIE J:

– to the Privy Council?

MR DOYLE:

No I was not. Not at that point in time and the moment I found out that there was a potential and in fact it may have been Mr Karam that brought this to the police notice or Mr Guest. It was not until June of that year that counsel came – that's June that we're dealing with '96?

BINNIE J:

'96.

MR DOYLE:

'96, it wasn't until June '96 that was actually brought to the police notice. So six months after, roughly, or five months after, it might be six months after I first had indicated that we were going to get rid of the container at least but there had been no indication whatsoever.

BINNIE J:

Can we divide this between what was the normal course and what you understood was the potential legal recourse. Can I assume that you're aware that there was such a thing as the Privy Council and that appeal could be taken from a New Zealand Court of Appeal to the Privy Council?

MR DOYLE:

Absolutely, but normally defence counsel would have notified us but, as I say, I, I – not being personally in that position of cases going through to the Privy Council but we've – once we've got to the end of the New Zealand process of the Court of Appeal at that point we have done our housekeeping, so to speak, and disposed of the items as soon as possible.

BINNIE J:

It – from a housekeeping point of view I take it, it wouldn't have made much difference whether they were disposed of in January or, as you say, six months later?

MR DOYLE:

I think it depends from which point of view you look at it. I think the sooner we can tidy up our own house the better and that was the approach that was taken, rightly or wrongly.

BINNIE J:

But balanced against tidiness and good housekeeping is the potential that there might have been a new trial ordered and further scientific work done as in fact was the case years down the road –

MR DOYLE:

Oh, but I think we've got to put this into perspective that it was not the normal thing to happen. This was a totally random act. I certainly didn't expect it to go to the Privy Council. If I had I would have ensured that everything was left exactly the way it was and intact and the moment that I did find out that there was a likelihood of it going to the Privy Council I wrote, not only to our staff, I put a stop on it straight away and got those exhibits preserved immediately but I also wrote to all external interests and parties. Like the pathologist, the ESR and any other parties that had been involved and told them to preserve their exhibits.

BINNIE J:

Just tangentially to that question. There was an email from Dr Dempster after the 2007 Privy Council decision before the 2009 trial had been decided on, in which he suggests that the medical evidence led in 1995 be re-examined. Do you recall that email to Mr Wright?

MR DOYLE:

To Mr?

BINNIE J:

I'm sorry, it wasn't to Mr Wright, Mr Bates?

MR DOYLE:

If it was –

BINNIE J:

Ivan Bates I think his name was.

MR DOYLE:

No, I, I would not have been involved as a lead player in this inquiry at that stage.

BINNIE J:

So you – were you involved at all in the decision to go for a new trial?

MR DOYLE:

No.

BINNIE J:

Okay. Two other short points. One is this issue, again canvassed in 2009 about exhibits, two samples going off to Melbourne to be DNA tested as (inaudible 13:40:49 – 13:40:51) My recollection is your evidence is that you were part of that selection that was the Chief Inspector Robinson –

MR DOYLE:

Correct.

BINNIE J:

– and I just want to be sure that although this was not your decision that you were not aware of any discussion surrounding his going to Melbourne and, if so, what he was to take with him for testing?

MR DOYLE:

Obviously there were a lot of discussions took place at that stage but just the whole scope of those discussions I can't recall Sir, but that was an area that Mr Robinson dealt with pretty principally himself for whatever reason. I rather suspect that his personal interest was possibly motivated by the fact there was at trip involved, I don't know. I certainly didn't get a look at it.

BINNIE J:

You would have been happy to go if a first class ticket had been offered?

MR DOYLE:

Are you offering me one now Sir?

BINNIE J:

And lastly, just on this question of motive. There was a directive, I believe you sent out early on in June, about checking bookshops for what David Bain had been reading or viewing in an effort to perhaps identify his interests and whether there was anything peculiar or bizarre or disturbing. Do you recall that?

MR DOYLE:

I don't recall the exact document, no.

BINNIE J:

Do you recall in general making that line of inquiry?

MR DOYLE:

Not particularly. I know that there were, that inquiries were to be made at the library to see if he had had access but I don't recall bookshops –

BINNIE J:

Mhm.

MR DOYLE:

And I'm just trying to think of the context of the library type –

BINNIE J:

Would that not have gone to the issue of motive and explanation and how does this guy think and does he have any bizarre impulses?

MR DOYLE:

Oh, pos – possibly that, that could but –

BINNIE J:

Would there be any other purpose?

MR DOYLE:

I guess to see if there was any pre-planning involved as opposed to a random act. In other words, whether or not he'd, he'd motivated by, to come back to your word, motive, motivated by the activities of others or whether there was scientific stuff that he may have been looking for to see how he could get round it. I'm not sure. But there would be a whole range of issues that could possibly come out of an inquiry like that and until they're done I wouldn't imagine that we'd know exactly what we were looking for.

BINNIE J:

So this might have been a copycat crime based on something he read was one of your ideas?

MR DOYLE:

Well that's one, that is one possibility but as I say, there may have been certain technical expertise. For example, a book on firearms which gave the difference between different velocities, different types of ammunition that sort of thing. I don't know, it would be speculation.

BINNIE J:

Thank you sir, I'm done.

MR DOYLE:

Thank you Sir.

BINNIE J:

And now it is Ms Markham to the rostrum.

MS MARKHAM:

Well I didn't actually have any questions Sir. The only point, and it's really just a matter of clarification with you Sir, with the dates of the letter to

Constable Barbara. The reference is, I was looking at it while you were asking the questions. It's page 118 of the transcript and the letter was dated 22nd December '95 and the destruction order was the date I think Your Honour had, 26 January '96.

BINNIE J:

On page 118?

MS MARKHAM:

Yes.

BINNIE J:

Thank you very much. I have run 15 minutes over my estimate but I appreciate your co-operation very much.

MR DOYLE:

Thank you Sir.

INTERVIEW CONCLUDES