

Tab F

BETWEEN

JUSTICE IAN BINNIE

Interviewer

AND

MILTON WEIR

Interviewee

Date of Interview: 19 July 2012

Place: John Wickliffe House, Dunedin

Attendees Annabel Markham (Crown Law Office)

**INTERVIEW OF MILTON WEIR (IN RESPECT OF CLAIM FOR COMPENSATION
BY DAVID CULLEN BAIN)**

BINNIE J:

Good morning Mr Weir.

MR WEIR:

Good morning.

5 **BINNIE J:**

Thank you for coming, I appreciate it. I have here a bible and if you would swear in answer to the questions. I'm going to ask you to tell the truth, the whole truth, so help you God.

MR WEIR:

10 I do.

BINNIE J:

Thank you very much. I want to start just by locating where we are in this piece because my mandate really falls into two sections. One has to do with factual innocence and then I'm supposed to form an opinion as to whether it was factual innocence, either beyond a reasonable doubt or on the balance of probabilities. So that's the first series of issues, but at the same time I am to report if I were to find factual innocence, are there conditions or circumstances that make it in the interests of justice that compensation be paid, and the mandate is very general but it's essentially related to process. You know, how is this inquiry dealt with at every stage and subsequently at the trial?

And one of the few specifics in the Minister's letter is to enquire as to whether there was a failure to make appropriate enquiries to establish innocence, and as you know from your years of involvement with this case, this is a refrain of the Bain camp that there was an unfair process. And that is why I suggested that we work from this Police/Police Complainants Authority report, which was focused on process.

So I am going to be dealing with some of the specifics that go to factual innocence but what I have on the record were testimony from the 1995 trial and the 2009 trial, and I'm not going to re-hash the whole exercise. So really, I'm looking for new information and it's directed to the second phase of my inquiry because I – my mandate isn't to come up with the answer to the first group of questions, and then come back to New Zealand and look at the second group of questions. I have to deal with it all at once, okay?

And the way that we will proceed is that I will be asking questions. Certainly at any time you want a break, just say so. We are not on any rigid timetable here. When I have finished the questions I want to pose, then we will adjourn, and there should be coffee arriving at some point, tea, and confer in the next room with Mr Bain's representatives to see if there are points they would like me to ask of you.

And when that is done, my view is that I'm doing this interview, so because somebody wants something asked, doesn't mean it will be asked, but I want to hear what they have to say. And when that's done, then Ms Markham will re-examine you on those issues that have been covered during the morning,
5 just to be clear if there are points that were not as clear as she would like them to be, or if she wants to bring up something else.

Now the governing consideration here is what is helpful to me in making my report. I'm not sitting here as a Judge and this isn't a criminal case, and it's
10 not a civil case. It's an informal inquiry that results in a report by me to the Minister, okay?

So those are the general ground rules and in the testimony that you provided in 2009, you referred at a number of points to what I call the PCA report, the
15 Police Complaints Authority report and you said at one point that you hadn't really looked at it for a long time and so on, and I want to start just with a process question about the training of the detectives in Dunedin that take on what was a very complex investigation. Now Ms Markham has a, looks like a well thumbed copy of the 1883 edition of the Detective's Manual. Can you
20 just outline for me what training you had that is relevant to the investigation you undertook in June of 1994?

MR WEIR:

Well firstly, I arrived here in Dunedin on promotion only a year before that, before this investigation commenced, so day-to-day training pretty much
25 nothing. The only real training that I'd had that would appear to be in some way for dealing with the Bain scene was at either my detective pre-qualifying course or qualifying course, which were some years before the investigation.

BINNIE J:

I think you joined the force in 1980?

30 **MR WEIR:**

That's right.

BINNIE J:

And then you came to Dunedin in what year?

MR WEIR:

I joined the police in 1980. I was – I joined the CIB, for want of a better term,
5 in about 1982/83, early '83. I went to Christchurch from Invercargill and I
came to Dunedin on promotion to detective sergeant in 1993.

BINNIE J:

So these qualifying tests that you just referred to for a detective took place in
1993?

10 **MR WEIR:**

No, no they took place – I'm sorry but I don't remember exactly but –

BINNIE J:

No just generally.

MR WEIR:

15 Yes, some years before 1993, so my – the qualifying for a detective is a
process that goes right back to the early 80s when I was in Invercargill, so I
was admitted to the CIB as a detective co – first of all a constable on trial. So
you basically, you go from being uniform to plain clothes, but you still hold the
designation of a constable and then, after, I think from memory, six months, if
20 you had suitable report in relation to your behaviour in the CIB, then you went
away and you did, I think from memory, either a three week or four week
induction course into the CIB. After completing that I returned to Invercargill.
I did pretty much two years of what's called in-service training units, which
dealt with a lot of the issues, a lot of what you'll see in that, in the old detective
25 manual. So weekly tests and things like that and then at the completion of
those units, I then went and did a qual – a detective qualifying course, and
having completed that course and passed it, I was then able to use the
designation of detective.

BINNIE J:

And you think that would have been about what year?

MR WEIR:

Oh, mid 80s.

5 **BINNIE J:**

Mid 80s, and you mentioned a three or four week course. Was the manual used as part of the instruction materials for the course?

MR WEIR:

10 I don't remember exactly but I would imagine that it certainly would have been, yes.

BINNIE J:

So would you have had occasion during your train up until 1993 to go through the manual in some detail?

MR WEIR:

15 During my training as a detective, yes, but after that very rarely and I don't think they actually had a detective manual personally.

BINNIE J:

Was there one in the Dunedin CIB?

MR WEIR:

20 Oh, absolutely. Yeah, there would have been, yeah.

BINNIE J:

25 Now the volume which we have here and which is in this booklet I've provided is dated 1983. There are some additional pages that seem to have been substituted in 1985, so that would be more or less concurrent with the training you've just described.

MR WEIR:

I would think so, yes.

BINNIE J:

I am interested in the way in which this inquiry was structured and if you just
5 open the book in front of you, the PCA report. On the first page it talks about
how the investigation should proceed, and it carries on generally and in
paragraph 8 it says at the bottom of page 3, "The basic investigative
procedures laid out in the detective manual and is invariably closely followed
in every instance." Does that accord with your experience?

10 **MR WEIR:**

Yes it does. It obviously depends on the type of investigation but, yes.

BINNIE J:

And in paragraph 9 at the end, it talks about the detective's manual and CIB
training notes. Can you just tell me what the CIB training notes are?

15 **MR WEIR:**

Well, I have no idea, sorry. No I don't but I –

BINNIE J:

So these weren't something that you were dealt with in Dunedin?

MR WEIR:

20 Unless, I guess that could be referring to those in service training papers
which I talked about earlier that I had to pass part of my training to become a
detective.

BINNIE J:

Yes.

25 **MR WEIR:**

I assume that that's what that's referring to.

BINNIE J:

Prior to June 1994 had you been assigned as officer in charge of the scene on another homicide – any other homicide case?

MR WEIR:

5 No I hadn't.

BINNIE J:

Mhm. Was this a first assignment as officer in charge of the scene in relation to any crime?

MR WEIR:

10 No, I had obviously been involved in scene examinations, robberies for example and serious burglaries and that sort of thing, but certainly I'd never been – I'd never had the role of officer in charge of the scene in a homicide.

BINNIE J:

Had you been involved in other homicide investigations?

15 **MR WEIR:**

Yes.

BINNIE J:

And when you were assigned in June 1994 to this case, the assignment, I take it did that come through Robinson or Doyle?

20 **MR WEIR:**

I can't remember exactly, but it certainly would've been either of those two, yes.

BINNIE J:

And was this assignment made at the station, the police station –

25 **MR WEIR:**

That's correct, yes.

BINNIE J:

– and the –

MR WEIR:

Yes it was.

5 **BINNIE J:**

And did you have any discretion with whoever it was that made the assignment as to how you were to carry out your duties or were you left just to deal with it as you saw fit?

MR WEIR:

10 I was left to deal with it myself, basically. I remember the only discussion I had in relation to that was from Detective Chief Inspector Robinson, who had been to the scene, who told me that, in his words, he described it as a 'hovel', so, meaning –

BINNIE J:

15 House.

MR WEIR:

– the house was a mess.

BINNIE J:

20 Yes. But in terms of what inquiries to be made, what evidence was to be collected, what things ought to be looked for in the house, this was left up to you?

MR WEIR:

That's correct.

BINNIE J:

25 All right, and then the people who were assigned other tasks, and there are a list of them in the report at page 7, the PCA report, at paragraph 20. Did you have a role in appointing them or were they appointed by somebody else?

MR WEIR:

I had a role in appointing Detective Constable Thomson as the OC exhibits for the scene. Out of this list –

BINNIE J:

5 Yes?

MR WEIR:

– that's the only person that I was responsible for appointing him to that position because he was part of the staff who had been appointed to the scene by either Robinson or Doyle.

10 **BINNIE J:**

All right, now just in terms of how you proceeded, the manual talks, not the manual, the PCA report talks at paragraph 11 generally how to proceed, where, when, why, how and who, and then in terms of arrest, as you go over onto the top of page 5, they talk about, "An earlier arrest may be appropriate if
15 there is a possibility the suspect could re-offend or flee while at large." I take it that was not an issue in this case?

MR WEIR:

It certainly wasn't an issue for me. I was at the scene, so it's not something that I ever dwelled on, or thought about or considered.

20 **BINNIE J:**

Mhm. In the transcripts of the trial, it is said time and time again that on Monday June 20th, David Bain was seen by the police as a victim –

MR WEIR:

Absolutely.

25 **BINNIE J:**

– and that it was tentatively thought that it was a murder/suicide. And we know that, according to Mr Doyle, that by Wednesday night the view had

crystallised that, in fact, David Bain was the suspect. Does that accord with your recollection?

MR WEIR:

It does, yes.

5 **BINNIE J:**

What happened between Monday and Wednesday night that tilted the balance towards David Bain as the suspect?

MR WEIR:

10 The best person to get that information from will be Jim Doyle, who I understand you are going to be speaking to.

BINNIE J:

Yes.

MR WEIR:

15 And what you to appreciate, and I don't think has been property appreciated over the years, in terms of my role, especially in the early stages, was that my role was at the scene. So I worked long hours at the scene. I went to the scene first thing in the morning, often had a briefing at night time, which was really my only opportunity, along with every other staff, or most of the other staff involved in the inquiry, to find out what was happening outside of the part
20 that I was dealing with, which was the scene.

25 So we'd have a briefing at night time, normally around about meal time, and then I'd go back to the scene. So, really my involvement in the early stages and leading up to that Wednesday, or the Thursday, revolved around the scene. So I can talk about what I recall happening in those early stages at the scene but I wasn't really aware of what was happening outside of the scene in terms of the rest of the investigation.

BINNIE J:

But in these meetings at night, which I take it were down at the police station –

MR WEIR:

Yes they were.

5 **BINNIE J:**

There were reports being made by the various police officers in charge on one aspect or another, so although you may not have had the responsibility you were taking in what others were reporting.

MR WEIR:

10 Yes that's right.

BINNIE J:

And as Wednesday night, what had been reported that tilted the police view against David Bain?

MR WEIR:

15 Well, once again, I think the best person to get that information from would be either Jim Doyle or Robinson because they were the ones that were making the decisions about the tilting of any feeling in relation to David Bain but for my part, I guess, at the scene, there was the amount of blood at the scene, the lack of blood on Robin Bain's clothing was something that springs to mind.

20 I can't remember whether we'd found –

BINNIE J:

But this was known on Monday.

MR WEIR:

Pardon?

25 **BINNIE J:**

This was known on Monday when it was still thought to be a murder/suicide. So what I'm trying to focus on, what is it that changed between what you saw

on Monday and the view taken on Wednesday night that there was sufficient to arrest David?

MR WEIR:

I don't know. I mean I wasn't involved in the decision to arrest David Bain,
5 so –

BINNIE J:

No, but from your point of view –

MR WEIR:

Yeah.

10 **BINNIE J:**

– I appreciate you're not speaking for the police force –

MR WEIR:

Yep.

BINNIE J:

15 – you're speaking for Milton Weir.

MR WEIR:

Well, I'm just trying to – I mean I did the scene examination over, I think, about
nine or 10 days from memory, so on Wednesday night when the decision was
made to arrest David Bain, if it was on the Wednesday night. I can't even
20 remember if it was the Wednesday night.

What had changed? The lack of blood on Robin Bain's clothing and the fact
that we had started the investigation in Stephen's room and saw how much
blood there was in that room and the fact that the offender should have been
25 heavily covered in blood is one that springs to mind.

BINNIE J:

But he being Robin?

MR WEIR:

Pardon?

BINNIE J:

You said that Robin should have been –

5 **MR WEIR:**

Robin.

BINNIE J:

– heavily covered in blood if he had –

MR WEIR:

10 Yes, yeah.

BINNIE J:

– been the killer.

MR WEIR:

15 We, by that stage, had seen the blood on the – the bloody footprints on the floor with the luminol. We did that on the Monday night. I remember that. The swipe, or wipe, marks of a bloody garment on the doors. We had seen that and were able to sort of identify, I guess, early on, the track that the offender took through the house, and so once again that was an indication that the offender was bloodied.

20 **BINNIE J:**

At what point did you measure the height of the swipe marks as you put it?

MR WEIR:

I can't, I can't recall.

BINNIE J:

25 Was it by Wednesday night?

MR WEIR:

Yes I think so.

BINNIE J:

Mhm.

5 **MR WEIR:**

I think so, yes. I'd say it was, yes.

BINNIE J:

The PCA report is quite critical of the photography records. If you want to turn to page 40 of the report, in sub-paragraph R the PCA says, "It should be
10 recorded considerable difficulty was encountered during the investigation, identifying the precise order of photographs were taken at the scene. Negatives were not maintained and ordered which made it difficult to establish the time and date, compounded by ex Senior Constable Gardner did not maintain a written record." But you, I believe, went through the scene with the
15 photographer?

MR WEIR:

Mmm.

BINNIE J:

And I know that you have testified that you didn't see it as your job to log the
20 photographs, but I'm interested in your view of your supervisory responsibilities. In other words, if one of the people who you brought in for a particular role wasn't doing the job competently, what do you see as your responsibility to step in?

MR WEIR:

25 The photographers in a crime scene back then were, or firstly Gardner was appointed to the scene by Robinson, so I don't, I didn't really see Gardner as being one of my staff. I'll try and answer your question shortly but – so staff were appointed to the scene directly under my control and that's the likes of

Trevor Thomson, who I appointed, who I told to do exhibits and things like that. The photographer is a full-time photographer and, in my view, should have been an expert in terms of being able to take photographs at the scene and should have been conversant with what was required in terms of later
5 being able to identify when those photographs were taken and everything. I'd never worked with Gardner before. I'd only been here for a year.

So that paragraph I'm familiar with because I think we were let down with the photographs at the scene. It certainly made my job a lot harder later on, trying
10 to identify where photographs were taken in the scene and when they were taken in the scene. So –

BINNIE J:

But you see, in paragraph R it says, "We do not believe," this is about half way down the paragraph, "We do not believe other people within the scene can
15 always be relied on to record a photographers every movement or photograph taken. They have other responsibilities." But was it apparent to you as the photography went on through the house that no such record was being kept by Gardner?

MR WEIR:

20 No it wasn't and had I been aware of that I would've certainly pointed out to him that I wanted, you know, a good record of when the photographs were being taken because it was important as we – because we took so many photographs, it was important that we knew when photographs were taken so that as we progressed with the scene examination we'd be able to know that
25 we had photographs taken before we started and part way through an examination in a room, and then as we progressed with that examination in the room. So it was very important.

BINNIE J:

But did you ask him what system he was using to keep the order straight?
30

MR WEIR:

No I didn't, no.

BINNIE J:

The video camera is also noted in paragraph R was – had a facility for
5 recording time and date for during the filming. This was not activated. Did
you ask the videographer whether the time and date function was operating?

MR WEIR:

Well, once again that was Gardner and I just – I don't remember thinking
about it specifically but I just assumed that he would do his job and be able to
10 advise when photographs were taken or if it had that facility that he would've
activated it.

BINNIE J:

So you draw a distinction between people like Gardner, who come in with a
specialty –

15 **MR WEIR:**

Correct.

BINNIE J:

– and you regard them as outside your direct responsibility as officer in charge
of the scene, whereas the officers working at the scene, designated as part of
20 the team at the scene did come under your supervision, is that –

MR WEIR:

That's correct.

BINNIE J:

– basic –

25 **MR WEIR:**

That's correct, although I would have certainly asked the photographer to take
certain photographs, so indicated to him for example, "Now, I'd like a

photograph of this,” or, “I’d like a photograph of that.” I wouldn’t go on and tell him how to take that photograph, you know, with what sort of lens or whatever, so he was a specialist photographer so you would expect that he would have the ability, having been to many scenes, to take the appropriate
5 photographs and document them properly.

BINNIE J:

The relationship with the scientists that you refer to and you’ll recall the discussion that went on at the 2009 trial about whether or not the luminol prints that you referred to a minute ago, whether that carpet should have been
10 taken up and retained, and the manual, which is attached to the book in front of you in chapter 22, which is at the blue tab, has a number of references. For example, at page 3205, it says, “The officer in charge of the scene,” do you see that?

MR WEIR:

15 Sorry, what page?

BINNIE J:

At page 3205 –

MR WEIR:

In the blue?

20 **BINNIE J:**

– under the blue tab and at the top it says 22.2, section 22.2.

MR WEIR:

Mhm.

BINNIE J:

25 In paragraph 1A, “The officer in charge of the scene is responsible for,” and then dropping down to four, iv, “Uplifting, inspecting and labelling exhibits,” and it says at 22.19, that’s over at page 3222 that, “One of the responsibilities

of the officer in charge of the scene is to preserve impressions on hard surfaces suspected of being connected with the crime by removing the area containing the impression, eg. shoe prints on linoleum.”

MR WEIR:

5 Mhm.

BINNIE J:

Now in your view, did you have any responsibility at all, or rather the carpet was uplifted or did you leave that entirely to Mr Hentschel?

MR WEIR:

10 I didn't leave it entirely to Mr Hentschel but the night that we did the luminol, the luminoling in the room and saw the footprints was the first time I'd ever been involved in luminoling, so it wasn't something that I was particularly familiar with. We –

BINNIE J:

15 Did he seem to be familiar with it?

MR WEIR:

Certainly did, yes he did. There were two ESR scientists there when we did that, so, there was Peter Hentschel and a female. I can't remember her name now. So I saw my role at that stage as assisting the ESR scientists and if they
20 had said to me, “We need to cut a sample of this carpet out and try and preserve that footprint,” I certainly would have done it. It's not something I thought of at the time. We were basically following the track that we were seeing, I guess, for want of a better term.

25 The carpet was protected again with plastic afterwards. I would have that if Hentschel, who was the scientist, the lead scientist there, had seen any value in cutting that carpet out he would have said to me and he certainly didn't, so...

BINNIE J:

You see, the difficulty I have is this. Hentschel is concerned with analysing what it is that he saw. My impression, from the manual, and from the PCA report is that the officer in charge of the scene is responsible for
5 collecting the evidence and really carrying that through until the trial.

MR WEIR:

Yes.

BINNIE J:

So there is that continuity of role.

10 **MR WEIR:**

Mhm.

BINNIE J:

So I don't see why Hentschel would be interested in the collection of exhibits when his focus is on the analysis, and why that would not have occurred to
15 you as your responsibility.

MR WEIR:

Well, I can say that it didn't occur to me at the time and what I'm saying is that I would have expected that Hentschel, being the expert in terms of the luminol and luminol examinations to be able to say to me, "This is something that we
20 should secure, Milton," in which case I would then have taken responsibility for securing it.

Peter Hentschel, when he was at the scene, took numerous samples himself of blood stains and things like that. So - and later on in the scene examination
25 we did lift a lot of, take a lot of the carpet for blood splattering and analysis.

BINNIE J:

Well, did you see it as Hentschel's responsibility to collect exhibits for the eventual trial?

MR WEIR:

No, I saw it as being my responsibility as the OC scene to arrange for exhibits to be secured at the scene, properly labelled and properly dealt with.

BINNIE J:

- 5 Did you wonder why it is, as you say, certain carpet samples were cut out? I think there was from Stephen's room and I believe in the Robin's – the lounge as well, why Hentschel was interested in preserving some samples and not others?

MR WEIR:

- 10 Well, it wasn't necessarily Hentschel. It could be, for example, it was a decision that I made to cut a piece of carpet out. So those decisions were – the night that we located the luminol footprints was on the very first night, the Monday night. The carpet samples, from memory, that we did cut out, was later on in the scene examination when we were further through the scene
15 examination. So I can't remember now whether Hentschel, for example, might have said, you know, "We need to secure that piece of carpet," or whether I just made the decision and took pieces of carpet just in case further down the track it was required to be analysed. At least it would be available.

BINNIE J:

- 20 Do you take it as your responsibility if samples at the crime scene that ought to have been taken up, were not taken up?

MR WEIR:

Yes, I would have to share that responsibility, definitely.

BINNIE J:

- 25 Who would you share it with?

MR WEIR:

Well, I'm using the luminol examination, for example, with the likes of Peter Hentschel because he's the expert and that sort of stuff I would have

thought that he would say to me, "There will be benefit in cutting that piece of carpet out for later examination."

BINNIE J:

5 But he's not an e – as far as I know he doesn't have any expertise in presenting cases in Court. He's not a part of the prosecution in that sense.

MR WEIR:

10 No, but the further examination I would have thought would be to examine the blood that the luminol showed. In the normal course of events you couldn't see it. It was only the luminol. I mean, for all I knew the luminol examination that we'd done might have destroyed what was there, so what I'm saying is, the first time I'd ever dealt with luminol, I had an expert there, from the ESR who would have been responsible for any subsequent analysis of it.

BINNIE J:

15 The – at page 72 of the PCA report, there's a discussion of the blood on the hands of Robin Bain not being preserved.

MR WEIR:

Mhm.

BINNIE J:

20 And again I'm looking at it not so much in terms of what it would have shown or what it wouldn't have shown. I'm just looking at it in terms of the investigation. Now there were photographs taken in the mortuary and as I read the record, those photographs weren't produced until the 2009 trial. As I read Dr Dempster, he seems to say – well he came across these mortuary photographs after the 1995 trial but before the 2009 trial. Is that your
25 recollection or –

MR WEIR:

I have no memory –

BINNIE J:

You don't remember one way or the other?

MR WEIR:

No I don't.

5 **BINNIE J:**

Okay. As the officer in charge of the scene, would it have been your responsibility to ensure that all the photographs that had been taken relevant to the scene were assembled for the prosecution?

MR WEIR:

10 All of the photographs that were taken at the scene were assembled for the prosecution. No, normally I would have – it would have been a combination of the staff involved in the investigation. So normally what would happen in my experience, the photographer would have put all of the photographs together and then the various people involved would have gone through and utilised
15 the photographs that they thought would help with the prosecution of David Bain or at the courtcase. So that's what I would have expected to happen in the normal course.

When we got the photographs – when I got the scene photographs from the
20 photographer, that's when I first discovered that they were in no particular order and that they were basically a shambles, I guess, is the best way to describe it.

BINNIE J:

On the photographs, and it's a little bit of a digression, this dispute over
25 photograph 62 and I'm not going to get into the controversy, except in terms of when it was supplied to the defence. They complain that the purpose or the object of the photograph wasn't explained. It just came to them with a bunch of other photographs. Was it your responsibility to put together this package of photographs and convey it to the Crown to convey it to the defendant?

MR WEIR:

Yes it probably was because by that stage the photographer, Gardner, had left the police. So this is part of what complicates things. So he'd left the police I think between the time of depositions and the time of the trial. So I
5 was given the task of taking the photographs from various booklets that we had produced at the depositions and putting them into one big album. So, I was given that task by the Crown prosecutor, who found that the individual booklets was confusing at the time of the depositions.

BINNIE J:

10 Now photo 62 was added?

MR WEIR:

Yes it was.

BINNIE J:

And was any explanation provided to the defence as to what you thought had
15 showed in advance of the trial?

MR WEIR:

I don't recall.

BINNIE J:

Was it your practice in conveying subsequent to the police to say what it is
20 that this evidence was attempting to show and why you were producing it?

MR WEIR:

Well, once again, I don't recall anything specific but it would have been known that it was an additional photograph there. I understand from the Police Complaints Authority investigation and stuff like that, that
25 the Crown prosecutor was certainly made aware of it and I think wrote to the Court, or wrote to the defence lawyer. I just don't remember exactly but, yeah.

BINNIE J:

Right, but the photographs taken by Dr Dempster, the so-called mortuary photographs, are you saying that that would trawl to the Crown attorney by a route other than you?

5 **MR WEIR:**

Absolutely, yeah.

BINNIE J:

Right, and would that go through McGregor, who I think was in charge of the bodies?

10 **MR WEIR:**

I would assume so. I – the only photographs that I'd have anything to do with were the scene photographs.

BINNIE J:

15 The – can you tell me, at the Dunedin Police Station, the samples that were collected either at the morgue or at the house on Every Street, what was the storage facility?

MR WEIR:

20 I don't recall, 'cos when we did the – when this happened, it was at the old police station. I honestly don't recall what the storage facilities were for exhibits. I know that some of the bigger exhibits that we took from the scene were put into a container at the scene, and that container was delivered and sat in the yard at the police station, at the old police station for quite a while.

BINNIE J:

There's some kind of a refrigeration unit for the human samples?

25 **MR WEIR:**

Oh, I don't know, don't recall.

BINNIE J:

So was this the officer in charge of exhibits who was concerned with –

MR WEIR:

Once the exhibits arrived from the scene then there was a separate – so at
5 the scene we had a – Trevor Thomson was appointed as the exhibits officer at
the scene. It was his responsibility to label and secure exhibits appropriately
at the scene and then they were delivered to another exhibits officer who was
in charge of all of the exhibits for the investigation.

BINNIE J:

10 In the manual, if you look behind the green tab to page 3279, being the
numbers in the top of the page 304055, and I'm looking at point 7 which says,
"On directions from the officer in charge of the scene," and that's you, right?

MR WEIR:

Mhm.

15 **BINNIE J:**

Yes, "Obtained services of police contract, undertake to remove body to
mortuary, A) Take care to ensure that no evidence is lost. B) Cover hands
and feet with plastic bags and place the body in a plastic sheet to avoid losing
evidence." Now do you accept that it was your responsibility to see that
20 Robin's body, in particular, was protected in this way?

MR WEIR:

No I don't 'cos as I've pointed out before, first of all, the detective manual was
just a, is a manual written to cover a lot of situations. In this situation,
because there were five bodies at the scene, Detective Steve McGregor was
25 appointed as the OC bodies and he appointed various staff to be responsible
for each of those bodies. So as we were able to bring those staff in, they
came in and they took responsibility for those bodies in the scene.

So, in the case of Robin's body, I recall the staff member in charge of that body was Mark Lodge and so it would have been Mark Lodge's job to secure that body, make sure that any samples on it were secured at the scene so that it could be taken to the mortuary.

5

In a normal situation where there might just be, for example, one body at a scene, then the OC scene might appoint a person, a scene member to be responsible for that body and would accompany that body to the mortuary in that sort of situation but in this situation, a specific OC body was appointed to each of the bodies and came into the scene and took responsibility for those bodies at the scene.

10

BINNIE J:

Well, given the complexity as you're describing it, did it come as something of a surprise for you to be put in charge of such a complex investigation as your first assignment as officer in charge of a homicide scene?

15

MR WEIR:

Not necessarily, no.

BINNIE J:

Was this the most complicated murder that occurred while you were with the Dunedin Police?

20

MR WEIR:

Yes, definitely. I mean, it's a complicated murder by New Zealand standards.

BINNIE J:

See, as I read the manual and the Police Complaints Authority report, what is envisaged is a pyramid that you have the, I guess, Robinson at the top, and then Doyle reporting to Robinson and then you reporting to Doyle with regard to everything to do with the scene, and as I envisage it the bodies are part of the scene, at least until they're removed to the mortuary. What I understand your perspective to have been, is that all of these people were functioning

25

rather independently according to their own responsibility and you had no line responsibility for whether they were doing their jobs properly or not. Is that a fair summary?

MR WEIR:

5 Absolutely, well it is in relation to, for example, Detective Sergeant Steven McGregor, who was appointed as the officer in charge of the bodies. I saw it totally as being his responsibility to brief his staff and how he dealt with the bodies. So my job was the scene. His job was the bodies. It's like the person, I guess, appointed as the OC of
10 the general inquiries, probably another detective sergeant. Their job to deal with how they dealt with those general inquiries and reported to Robinson and Doyle, so it left me free, I guess, just to deal with the scene.

BINNIE J:

But it just strikes me as so basic, and I know it strikes you as basic in a
15 homicide case that the body be protected as its removed from the scene, and I believe you were there when Robin was removed from the scene, were you not?

MR WEIR:

Oh, I think so. Yes I was, yes.

20 **BINNIE J:**

And did you make it your business to check whether the body was properly protected?

MR WEIR:

I don't recall.

25 **BINNIE J:**

As I understand it there was some plastic wrap around the body, but there was no specific wrapping around the hands –

MR WEIR:

That's my understanding.

BINNIE J:

– as called for by the manual. Do you know why the hands were not wrapped
5 to catch this firearms discharge residue that everybody is concerned about?

MR WEIR:

No I don't.

BINNIE J:

No, and did you at any time ques – discuss with McGregor how the body
10 should be dealt with –

MR WEIR:

No I didn't.

BINNIE J:

– to preserve evidence?

15 **MR WEIR:**

No.

BINNIE J:

You didn't, right.

20 Then the manual talks about, in a homicide case, there is a bullet hole that the officer in charge of the scene is to ensure that the skin around the bullet hole is cut out by the pathologist. Are you aware of that requirement?

MR WEIR:

Well, I am, yes, but once again I need to point out that the detective manual is
25 a general manual designed to cover a number of situations, and in this situation, once again, there was Detective Sergeant McGregor was appointed the OC bodies and he had staff and so those staff accompanied the bodies

back to the, back to the mortuary. So I remained at the scene and the bodies became a separate part of the investigation.

BINNIE J:

Was there a specific discussion that you had with Robinson or Doyle or
5 McGregor or the other members of the team as to your respective
responsibilities? In other words that the manual may prescribe a hierarchy, a
kind of a pyramid that in later the complexity of the investigation, this hierarchy
would not be operative for this investigation, but that each of the officers in
charge of the different aspects would be separately responsible.

10 **MR WEIR:**

So, is your question, did I have a conversation with –

BINNIE J:

Was this discussed or were you just assuming that McGregor, having been
appointed in charge of the bodies, that then lifted from you the responsibility to
15 deal with the bodies or any aspect of the evidence on the bodies?

MR WEIR:

Generally the answer to that question is yes, it did remove me from
responsibility, but what would take place –

BINNIE J:

20 Sorry, it would or would not relieve you of responsibility?

MR WEIR:

It would generally but what would h – what's supposed to happen is that it –
things work like a hub. So you've got the various scenes, the various aspects
of the investigation taking place. Information comes into the hub, for example,
25 that's Detective Senior Sergeant Jim Doyle, and then, so I would give
information to Doyle, Doyle would then pass – if he considered it relevant,
would pass it onto some other part of the investigation. So, for example,
information that might come from the scene in rela – that might impact on a

general inquiry, would then be passed to the general inquiry team. So the information comes into the hub, as opposed to me going and passing information onto that general inquiry team or whatever, it goes through the hub basically. That's how it works in principle.

5 **BINNIE J:**

But as I understand what is envisaged in the manual and discussed in the PCA report is that you are part of the hub that these conferences, as they describe them, that take place, I think you said, in the evening at the police station. Was that not the hub?

10 **MR WEIR:**

That's part of the hub working but also I would, I might specifically contact Doyle during the day to say, "We've found this," or, "You need to come and have a look at this," or whatever. So Doyle and Robinson did come to the scene on numerous occasions as a result of me contacting them and wanting
15 to speak to them about things and show them things.

BINNIE J:

When did it first come to your attention that the body wrapping of Robin Bain had been apparently thrown away without being tested?

MR WEIR:

20 Oh, I have no idea, I don't recall.

BINNIE J:

But it wasn't concurrent with your time at Every Street?

MR WEIR:

No definitely not, no.

25

BINNIE J:

Page 73 of the PCA report, that's the first document, explains, at the bottom of the page that the police did not have possession of ESR case notes, and then it goes over to the top of the next page, "As it transpires it was not confirmed
5 that there was blood under Robin's fingernails." I'm interested in the reporting relationship, if any, back to you from ESR. For example, you go through the crime scene with Mr Hentschel. He is taking blood samples. Jones is taking fingerprint samples, and they go away to do their analysis. What do you get back from them?

10 **MR WEIR:**

Generally, personally, nothing. The information comes back to the investigation and, once again, that would gen – the information would generally be assessed by Detective Senior Sergeant Jim Doyle. So, and a lot of the information we didn't – like the ESR examinations that took place back
15 in Christchurch, for example, we didn't get it for months –

BINNIE J:

Mhm.

MR WEIR:

– so, whilst I was at the scene and having discussions with Hentschel and,
20 you know, he might point to a blood splatter for me and tell me what that indicated to him, for example. Generally, once a scene exhibit was taken and then subsequently examined by the ESR, that information came back to the inquiry head and Jim Doyle.

BINNIE J:

25 Right. In the manual it talks about obtaining reports prior to making an arrest. If I can just refer you to the green tab, page 32 of 56? The last full paragraph on page 32 of 56 under sections 30.32 it says, "Before making an arrest i) read and evaluate witness' statements, ii) consider evidence, identification, fingerprints and so on," and, "iii) evaluate results from specialists, eg.

fingerprints, cause of death from pathologists, scientific analysis from DSIR.” I take it DSIR is the predecessor –

MR WEIR:

Yes they are, that’s right.

5 **BINNIE J:**

– ESR. “If scientific or other expert opinion is the main evidence against a suspect, obtain reports in writing.” Do I understand from the transcripts that this was a case where the main evidence against David Bain was the forensic evidence collected at the scene?

10 **MR WEIR:**

Oh, well I would say so, yes.

BINNIE J:

And you said a moment ago that these reports from Christchurch from the ESR testing and so on didn’t reach the Dunedin Police for months.

15 **MR WEIR:**

In some cases, yes.

BINNIE J:

Do you recall whether any of the forensic reports had been received either by the Wednesday night, when it was decided there was enough to arrest
20 David Bain or by noon, or lunchtime, on the night when he was actually arrested?

MR WEIR:

The best person to speak to about that will be Jim Doyle because I wasn’t involved in the decision to arrest David Bain, I was at the scene. What
25 information they had, or what reports they had, forensic report, they had at that stage, I don’t recall now, but for example, I understand that they – I don’t want to be wrong here but I understand that they had identified fingerprints of

David Bain's on the rifle, for example, so I'm sure that went to their, some of their thinking in terms of making a decision. But Jim Doyle – I'm not trying to heap everything onto Jim Doyle but Jim Doyle will be the one to be able to answer that better for you than what I can.

5 **BINNIE J:**

If I understand correctly that if there's continuity in this investigation, it is Jim Doyle.

MR WEIR:

10 Jim Doyle's job was to be aware of everything, read everything and be the centre of the hub basically.

BINNIE J:

But to the extent there were meetings, you were part of the hub at the police station.

MR WEIR:

15 Yes.

BINNIE J:

Did you continue to attend those meetings after you left the scene so that you scene responsibilities ended? Did your involvement with the case terminate?

MR WEIR:

20 It terminated. The day after I finished at the scene I was back running a burglary squad in the Dunedin CIB.

BINNIE J:

And then you came back into it in the trial preparation some months later.

MR WEIR:

25 That's correct, yep.

BINNIE J:

But there was this gap of about several months when you were not connected.

MR WEIR:

5 I mean, you know, Jim Doyle might have asked me the odd question, things like that but pretty much I wasn't on it full-time.

BINNIE J:

But were you getting reports from people who were carrying forward on the investigation as to keep up to date?

10 **MR WEIR:**

I would say so, yes. I know, for example, that I recall being frustrated at the length of time that it was taking to get reports from the ESR, so I was certainly involved in it, in that sort of regard.

15 I went to Melbourne, I think, at one stage to either drop some gloves off or pick some gloves up. I can't remember what it was now. Yeah, but, so I was – it's hard to explain but I finished at the scene. There was still a lot of work going on but basically once my paperwork went into that hub, I then carried on with my normal day to day duties in the CIB and then later on, got more
20 involved in it leading up to preparation for the depositions and the trial.

BINNIE J:

Right.

MR McDONALD:

Excuse me, Your Honour. I'm going to change the tape.

25 **BINNIE J:**

Would you like a break? So we'll break as long as it takes to be refreshed.

MR McDONALD:

It will either be a picture that will go to black probably on the far side a little bit while I change tapes.

- 5 I'm having to use recycled tapes because I didn't realise you would want this taped and some of these are not cued to the beginning, so we'll rewind the tape in a moment, about another 30 seconds to go.

BINNIE J:

Are you okay to continue or would you –

10 **MR WEIR:**

Yep.

BINNIE J:

They're supposed to be delivering coffee here at some point at 10.30 or so.

MR McDONALD:

- 15 I'll find out what time it's due.

BINNIE J:

They're supposed to come round at 10.30 or close enough.

MR McDONALD:

We are recording and they can see in there.

20 **BINNIE J:**

Sorry, I didn't hear.

MR McDONALD:

They can see and hear us Your Honour and we are all ready.

BINNIE J:

- 25 Okay.

MR McDONALD:

Sir, the coffee is here, so it's probably a good time to adjourn if you like.

BINNIE J:

Adjourn, all right, this is the New Zealand style.

5 COURT ADJOURNS

COURT RESUMES**BINNIE J:**

Just before we leave these issues on the organisation, how many senior detectives were at the Dunedin CIB in 1994? Again roughly, I don't need an
5 exact number.

MR WEIR:

Senior detectives, so when you refer to senior detectives, do you mean detectives of a rank, for example, like sergeant or senior sergeant?

BINNIE J:

10 Well, first of all let's take by rank.

MR WEIR:

Yep.

BINNIE J:

I was thinking of those at the level of Senior Detective Doyle, or
15 Sergeant Doyle.

MR WEIR:

Okay, so if we start at the top. There was Robinson –

BINNIE J:

Yes.

MR WEIR:

– he was in charge of the CIB. So the rank that he held, it was a rank that doesn't exist anymore. By title it doesn't exist anymore which is Detective Chief Inspector. So now it's just Detective Inspector I think. Then underneath him were two detective senior sergeants. One was Doyle and the
25 other one was a chap, Gibbons, who didn't play a part in this investigation.

And then there would've been – don't quote me but five or six detective sergeants in the CIB.

BINNIE J:

That's at your level?

5 **MR WEIR:**

That's at my level.

BINNIE J:

Yes.

MR WEIR:

10 And then probably, I guess 10 or 12 detectives, maybe four or five detective constables and then –

BINNIE J:

In terms of your level of the four or five at your level, how many were senior to you in experience?

15 **MR WEIR:**

In experience, well it's hard to say. My level, I'm just trying to think of the – I would've certainly been – the easiest way to answer this is I would've certainly been at the lower level of experience of detective sergeant in the Dunedin CIB.

20 **BINNIE J:**

My impression of all you say, it's Chief Inspector Robinson was in and out of the scene from time to time was that he was essentially delegating the investigation to Doyle or is that a misreading of the transcript?

MR WEIR:

25 Yeah, no, I wouldn't agree with that from my perception. Certainly once the main thrust of the investigation was over, that first couple of weeks, I would

say that he, you know, it was delegated to Doyle definitely but my recollection is that he was heavily involved in those early stages of the investigation.

BINNIE J:

5 Okay, and in terms of the other people at your level, the detective sergeants, were any of them involved other than you, or were you the only person at that particular level in the hierarchy in this investigation?

MR WEIR:

10 Pretty much they were all involved at the same level as me. For example, Detective Sergeant Steve McGregor's a good example. So he and I went through our basic training together –

BINNIE J:

Mhm.

MR WEIR:

15 – so we had seniority or experience in the police. For example, we went through the basic training when we first joined the police at the same time. So him and I were very similar. So his role was appointed as being officer in charge of the bodies, so, you know, in terms of that hub thing that I've talked about, he was on the same level as I was and the same –

BINNIE J:

20 Well they were all part of the hub at, you know.

MR WEIR:

Yeah, definitely, yeah.

BINNIE J:

25 And these meetings, were they structured in such a way that you were all present at the same time?

MR WEIR:

Generally, although it would depend on what was happening. I know that, for example, there was at least one or two meetings. They're called briefings or conferences. I didn't attend because I remained at the scene and carried on
5 at the scene, so I don't remember exactly, but because in the early stages of an investigation obviously the emphasis is on getting as much information as you can. So staff are working longer hours. So staff, for example, might be involved in carrying out an interview, for example, when the conference takes place, so – or the briefing takes place, so they won't be there for it.

10 **BINNIE J:**

Other than being on assignment elsewhere, you were expected to turn up for these nightly conferences.

MR WEIR:

Yes you were.

15 **BINNIE J:**

I'd like to come to page 33 of the PCA report and it all has to do with this question of timing, and I'm interested not so much of the details that you've already been through and the trial, as I am in the procedure followed by the Dunedin CIB because it is said in paragraph E, the time base that was an
20 accurate clock maintained at the police station that was, it says, "Regularly checked against the computer time base and was never more than a minute out or by as much as a minute," and I just take it from that that there was an understanding generally at the Dunedin CIB that it was important to be accurate on time?

25 **MR WEIR:**

Oh, I think that's a – I mean most policemen realise that it's important –

BINNIE J:

Yes.

MR WEIR:

– you know, to be as accurate as you can from a timing point of view.

BINNIE J:

5 Good, because when we go through this particular series of inquiries, at page 48 and 49, the PCA relates David Bain saying, according to his watch, it was at 6.40 at the corner of Heath and Every, and as I understand the evidence, and this is something that I would like clarified if I'm in error, that his watch was never tested for accuracy, is that right?

MR WEIR:

10 Once again, I think that's a question you'd be better to put to Jim Doyle because it's, as I understand it, it's – well, that's something I didn't have anything to do with at the scene, so –

BINNIE J:

Yes.

15 **MR WEIR:**

– I wouldn't like to answer that and be wrong, so...

BINNIE J:

Presumably the watch went with David Bain or off to the police station on the, around lunch time on the Monday?

20 **MR WEIR:**

Correct.

BINNIE J:

25 Now then the, this whole business of Denise Laney's statement as to when she said she saw the paper boy going through the gate. Did you have anything to do with that?

MR WEIR:

Not that I recall, no.

BINNIE J:

Now Mr Cox was summonsed to deal with the computer at the scene.

MR WEIR:

Yes, that's correct.

5 **BINNIE J:**

And I think it was Detective Sergeant Anderson was assigned to work with him?

MR WEIR:

Well, at that stage it was Detective Anderson. He wasn't a sergeant, yes.

10 **BINNIE J:**

Okay.

MR WEIR:

He was one of the staff that had been appointed to me at the scene and I had appointed him to do, at that stage I think, from memory, the room that the
15 computer was in, so, in answer to your question, yes.

BINNIE J:

All right, so he was part of your line of responsibility?

MR WEIR:

Yes he was.

20 **BINNIE J:**

Okay, and according to the PCA report, he seems not to have had a very clear understanding of what it is that he was supposed to be doing. Would that be a fair description?

MR WEIR:

25 I think so, yes.

BINNIE J:

And secondly, it's reported that somehow his job note went missing. How –

MR WEIR:

Job note?

5 **BINNIE J:**

As I – I'll put my finger on it in a moment but it seems that the Cox statement was not put together by Anderson. It was put together by Robinson.

MR WEIR:

10 Well my recollection of it was that Anderson met Cox at the scene, and one of the things that you have to bear in mind here is that this is, you know, 1994, so computers weren't in our lives the way they are now, but Kevin Anderson was given the task of being responsible for Cox while Cox carried out the computer investigation at the scene. Robinson was a detective attached to the general inquiries team, who later on was given the task of – by Doyle I
15 assume, of verifying the time on Kevin Anderson's watch.

BINNIE J:

Yes. But it seems most peculiar to me as an outsider that an officer who is not conversant with what Mr Cox is trying to do, and who has a watch that is not marked off in minutes, much less second hands, should be assigned to
20 what was obviously a high precision exercise of attempting to determine precisely when the computer was turned on and the message saved.

MR WEIR:

So, are you asking that question of me?

BINNIE J:

25 Yes.

MR WEIR:

Yeah, well it's not something that I –

BINNIE J:

Because Anderson, as I understand it was reporting to you.

MR WEIR:

Absolutely, so I asked Anderson to take care of that aspect of it, and it's not
5 something that we had an appreciation of at the time. I mean, you know, we
didn't know anything about computers back in those days. I would have –

BINNIE J:

What was the purpose of – why was this exercise done? Somebody must
have had some understanding of –

10 **MR WEIR:**

– well, the exercise was it was done to A) try and save that message on the
computer and try and determine when it was put on the computer. So that
was the guts of the exercise.

BINNIE J:

15 So it was important to have accurate timing?

MR WEIR:

Oh, yes it was, yes, and that should have been appreciated by Cox and
Anderson, and if passed onto me, me, but I delegated the task to Anderson
and Anderson, I think, has said many times that he just responded to the
20 information given to him by Cox.

BINNIE J:

But Cox asked that Anderson's watch be checked, so he was aware of the
importance?

MR WEIR:

25 Correct, yes.

BINNIE J:

And did you appreciate that Cox had made that request?

MR WEIR:

No, not at the time.

BINNIE J:

How did it get to Robinson to check –

5 **MR WEIR:**

My understanding is that, once again, it went into the – it was phoned in. Cox returned back to his office or whatever and made that request by phoning the inquiry –

BINNIE J:

10 The same day?

MR WEIR:

– the same day, was it? I don't remember now, but, and that then the job was given, I think, by Doyle to one of the general inquiries staff, which happened to be Chris Robinson. Well, probably, in actual fact, given to Chris Robinson's
15 supervisor, who would have been the officer in charge of the general inquiries team.

BINNIE J:

But why wouldn't it go to Anderson if he was the man on the job?

MR WEIR:

20 Because that's just how it worked. It was given to somebody else to go and pick up Anderson's watch and verify the time on it.

BINNIE J:

No, I'm speaking now of writing up the Cox report. According to the PCA with Robinson, who put the thing together, although he had not been present when
25 Cox did his work?

MR WEIR:

Oh, that's not my understanding that Robinson put it together. No, my understanding is that Robinson's involvement was only in going and picking up Kevin Anderson's watch from the scene, travelling out to the scene to pick
5 up Kevin Anderson's watch to verify the time on it.

BINNIE J:

So as far as you recall Anderson wrote up his own report.

MR WEIR:

Yes that's correct.

10 **BINNIE J:**

And that this report was the basis of the deposition provided to the defence.

MR WEIR:

That's certainly my understanding, yes.

BINNIE J:

15 And so far as you're aware, Anderson's note never went missing/

MR WEIR:

No.

BINNIE J:

And that Robinson's only involvement was with checking the accuracy of
20 Anderson's watch after the event?

MR WEIR:

That's correct.

BINNIE J:

And this apparently wasn't done for seven days?
25

MR WEIR:

That's correct.

BINNIE J:

Were you on top of why it wasn't done?

5 **MR WEIR:**

I had – I wasn't even aware that it had been requested. That's my recollection of it, so I have no idea why it wasn't done for so long.

BINNIE J:

10 Would you agree, with the benefit of hindsight, that these things ought to have been done more quickly –

MR WEIR:

Absolutely.

BINNIE J:

– and accurately?

15 **MR WEIR:**

Absolutely. Yes I would.

BINNIE J:

20 The paragraph 127 on page 55 of the PCA report, the last line in paragraph 127 has to do with Detective Sergeant Anderson's evidence and it says, "We reject the accusation that Detective Sergeant Anderson gave perjured evidence and that was in relation to the timing of the computer switch on. Is that what you have to say?"

MR WEIR:

Yes it is, sorry.

25

BINNIE J:

And was that part of the defamation action that you and Detective Anderson brought against Mr Karam?

MR WEIR:

5 Yes I think it was, yes.

BINNIE J:

And I want to put on the record this issue in the Auckland defamation case because as I read what's in the material, the jury determined that what Mr Karam had written about you in the, his book *David and Goliath* did, in fact, 10 allege perjury that the facts that he put in his book, or alleged in his book on which he based that opinion were justified and, in effect, he was, allowed the defence a fair comment. Does that accord with your –

MR WEIR:

Yes it does.

15 **BINNIE J:**

– recollection of the outcome of the proceeding?

MR WEIR:

Yes, that's correct.

BINNIE J:

20 Was there a discussion within the police following the receipt of the PCA report that such a defamation action should be brought? By that I mean outside of you and Anderson himself?

MR WEIR:

That I was privy to, that I was part of the (inaudible 10:38:57)

25 **BINNIE J:**

If you were a party, yes?

MR WEIR:

No.

BINNIE J:

Was there a discussion that you know of that such an action should be
5 brought to vindicate the police?

MR WEIR:

Quite probably, yes. I think – I know that the Commissioner of Police at the
time came down and spoke to us –

BINNIE J:

10 After the PCA report?

MR WEIR:

Yes, after the PCA report.

BINNIE J:

I think this is the commissioner in general, beyond Dunedin. This is the –

15 **MR WEIR:**

Yes.

BINNIE J:

– the top man.

MR WEIR:

20 The top man, yep.

BINNIE J:

And what was the purpose of that?

25

MR WEIR:

Well I think he came down to sort of show support for the staff in Dunedin who had been involved in this investigation and who had, well, speaking for myself, gone through a hard time as a result of the criticisms and everything and felt,
5 to some extent, vindicated by the Police Complaints Authority report. Did we discuss legal action? I don't remember specifically discussing it with the commissioner but, yeah, I can't answer that question categorically.

BINNIE J:

Whether or not you were party to the discussion, do you know that the
10 hierarchy of the police were contemplating that a legal action should be brought, encouraged by the PCA report findings?

MR WEIR:

I don't believe the hierarchy of the poli – well, I don't know, but it's not my recollection that the hierarchy of the police contemplated taking action. That's
15 certainly not my recollection.

MR WEIR:

No but they contemplated you and Anderson taking action.

MR WEIR:

Oh, they were certainly aware that we were contemplating it, yes. I would say
20 so, yes.

BINNIE J:

So would you say this was an individual decision on your part and on the part of Anderson to launch defamation proceedings?

MR WEIR:

25 Yes it was. We were supported by the Police Association, so there's our association basically. So it was in consultation with them.

BINNIE J:

Is the association, and I use the word 'union' loosely –

MR WEIR:

Yeah.

5 **BINNIE J:**

– but is that effectively what it is?

MR WEIR:

That's the union, yes that's right.

BINNIE J:

10 And they would have funded the defamation action?

MR WEIR:

That's correct.

BINNIE J:

15 And did you have a discussion with them as to whether it was in the interests of the police generally that you pursue this to vindicate their reputation?

MR WEIR:

Oh, I don't recall but I would imagine that that would be their, that would've been their thinking, yes.

BINNIE J:

20 I take it that the outcome of the defamation action must have been somewhat devastating?

MR WEIR:

25 Well, had I known the outcome of the action at the beginning, I wouldn't have, I wouldn't have got involved in it obviously. It was devastating for us. We felt – I can't speak for Kevin Anderson, but I felt that a lot of the control was taken

away from us by dealing with the Police Association and the legal representatives that they put in charge of the case basically.

BINNIE J:

So you weren't very happy the way the case was run?

5 **MR WEIR:**

That would be an understatement.

BINNIE J:

All right, let's move on to another area of concern which is this whole point of contention between you and Dr Sanderson about the lens, and I want to ask
10 you questions about it because it seems to me that the report of the PCA kind of misses the point of the debate because the testimony provided by Sanderson was – I'm looking at page 1214 of your 2009 evidence but I'm sure it's in the PCA report. Page 65 of the PCA report and the words that Sanderson claims you said to him was, "We will just ignore the fact that when
15 the lens was found it was covered in dust," and this refers to the lens found in Stephen Bain's room, and Sanderson says that he, the significance of the comment was that the lens being dusty may not have been worn for some time. Is that your recollection of what he was saying?

MR WEIR:

20 That's correct.

BINNIE J:

Okay, and your notes don't record whether there was dust or there wasn't dust at I understand it.

MR WEIR:

25 Mhm.

BINNIE J:

But your recollection, although I should just ask you, what was your recollection as to whether there was dust on that lens?

MR WEIR:

5 I don't recall noting dust on the lens, so that's my recollection of it. I don't, I don't even recall saying that to Sanderson. I don't recall there being dust on the lens. I don't know where it came from.

BINNIE J:

10 Is it your recollection that the lens, the left lens found in Stephen's room was clear of dust?

MR WEIR:

15 I don't have any recollection of dust or of it being clear of dust. What I've – I mean I've said this so many times in relation to this lens, found the lens, the lens was secured in a box, sitting on its edge as opposed to on its face or under f – at the side. It was exhibited at the scene in that state and then away it went, and I believe that the next person who examined it, and I could be wrong in this regard, was Peter Hentschel, the ESR scientist.

BINNIE J:

Mhm.

20 **MR WEIR:**

So whoever examined it next saw it in exactly the condition that it was found in. The photograph of the lens shows it in the condition sitting in situ that we found it in. So I didn't record that there was any dust on it in my notes –

BINNIE J:

25 The photo shows a clear lens.

MR WEIR:

Yes.

BINNIE J:

Is that right?

5 **MR WEIR:**

Yes it does. I would expect that if I had noted that it was dusty, particularly dusty, I would have noted that in my notes. That's all I can really say in that regard I suppose.

BINNIE J:

10 As it was noted, in respect to the lens in David Bain's room, that it was dusty.

MR WEIR:

Well somebody else made that note –

BINNIE J:

Yes.

15 **MR WEIR:**

– so it wasn't me, but here.

BINNIE J:

But it would be obvious that this was of some significance.

MR WEIR:

20 Mhm.

BINNIE J:

Now the point that concerns me, and I know you've been down this road before, is that I believe the comment surfaced when Dr Sanderson remarked on it at a dinner party and somehow this travelled back to the Bain camp and
25 Sanderson was contacted, I believe by Mr Karam, so is that information that

Sanderson volunteered either to the police or to David Bain. Was that your understanding?

MR WEIR:

That's my understanding, yes.

5 **BINNIE J:**

And I know you must have thought about this a great deal because you have this difference with Dr Sanderson as to why he would make up such a conversation and have you anything to add on that point to what you've already said?

10 **MR WEIR:**

I don't think Sanderson would lie. The only thing that I can think of is that he's misinterpreted something I've said, misunderstood something I said. That's my only explanation. I don't think he's a liar, I don't know.

BINNIE J:

15 Because it's not so much the dust on the lens, although that goes to this question of whether the lens might have been lying there before June 20th, but the attribution to you or the statement, "We would just ignore the fact," that's –

MR WEIR:

Exactly.

20 **BINNIE J:**

– the rub of what he's –

MR WEIR:

Yes it is, yes.

BINNIE J:

25 – saying, and you say that to the best of your recollection, there's nothing you could have said that would have conveyed that impression?

MR WEIR:

Well not that I'm aware of because I mean it's not as if I have notes that say that it was dusty. You know, that might have, that I might have made a comment to along the lines of dust, "But don't you worry about that, we're
5 dealing with that," you know. So all I can say is, I don't believe he'd lie about it. I don't recall saying anything to him about dust on the lens to Sanderson, and I don't have any recollection of there being dust on the lens. I don't have any notes of there being dust on the lens. The lens was the lens as we found it. There were other people there when we found it. The photograph shows it
10 in the condition that it was found. It went, in the condition that it was found, to be examined by other people outside of the scene and –

BINNIE J:

And then photographed?

MR WEIR:

15 Pardon?

BINNIE J:

And photographed?

MR WEIR:

And photographed, yes.

20 **BINNIE J:**

The other point that Mr Sanderson makes is that there's an allegation he recanted, and as I understand it, there was a conversation between you and Mr Sanderson and your recollection is that he, somehow, said he was mistaken that he denies it. Do you remember that element of this dispute?

25 **MR WEIR:**

Not particularly. Can you give me more detail about it, so – because a lot of what Mr Sanderson has said seems to have changed, so...

BINNIE J:

Yes, I can – here somewhere. I'm and I don't know I'm sorry, but I do you have the evidence before the Court of Appeal in October 2002. I'm referring to page 1105 and I'll read it out and I'll show it to you so that you can see –

5 **MR WEIR:**

Yep, that's fine.

BINNIE J:

He says that the significance was that, "The dust suggested the lens had not been worn for some time," and that was the experts.

10 **MR WEIR:**

Can I just make a point in that regard?

BINNIE J:

Yes.

MR WEIR:

15 So if the dust, if the lens had been found dusty I wouldn't necessarily have jumped to the conclusion that it hadn't been worn for some time. We wore dust masks in that scene. There was a hell of a lot of dust, so I would expect that anything lying and available for dust to get in contact with it, could've been dusty. So it didn't necessarily negate the lens. There's been dust on it,
20 so can you follow my line there, what I'm trying to say?

BINNIE J:

Yes.

MR WEIR:

Anyway, carry on, yes, I'm sorry.

25

BINNIE J:

Well it seems a bit strange that one lens is clear and one lens is dusty if they had been together during this – the events of June 20th. Would you not agree with that?

5 **MR WEIR:**

Just that the lens found in David's room was sitting on a chair. We created a lot of dust in the scene. You know, that could attribute. That could be how that happened, I don't know, but...

BINNIE J:

10 All right, at page 8 at the Court of Appeal transcript it says, "You accept you spoke on a couple of occasions to Mr Weir in general terms to just ignore comment." And Sanderson says, "That's correct."

Question, "Do you accept that Mr Weir says that when he spoke to you at the eye clinic, you conceded that perhaps it wasn't Mr Weir you had spoken to?"

15 and Sanderson said, "That's a generous interpretation. I think we agree to differ." So he's saying there wasn't any concession on his part that it perhaps wasn't you that he spoke to. Does that help to bring back what we're talking about?

MR WEIR:

20 Yes.

BINNIE J:

I can show you the...

MR WEIR:

No, no, that does help, yep.

25 **BINNIE J:**

Okay, so there's the question of the dust. There's the question of whether or not to ignore it. Then there's the question of it being explained away and, according to Sanderson, you're putting to him that you must have

misunderstood and him agreeing with you, and now he's telling the Court of Appeal, "I didn't agree with him. I beg to differ." So that's the sequence of events. So these things have a cumulative effect of the disagreements between you and Dr Sanderson.

5 **MR WEIR:**

They do. I agree. They certainly do. So my recollection of that is that I was out of the police by this stage, I think, from memory, and I met Sanderson at a local restaurant in town and I pretty much ignored him. And he came up to me and said, "What's going on?" you know, "We sort of got to know each other during the Bain thing and are you ignoring me?" sort of thing. And I said, "Well, you've said things about me which I don't agree with. I don't consider they're correct." So he gave me his card and either I rang, subsequently rang him. Something happened that I then went and visited him at the eye clinic.

15

So I'm out of the police at this stage and –

BINNIE J:

You'd left the force altogether?

MR WEIR:

20 Yes I had. And so I had a conversation with him and I said, "Look, it's important to me because you've attributed this to me, these comments to me and I don't believe I said them. Is it possible that you're getting me confused with somebody else?" and my – and I made notes at the time of this conversation with him and he said, "It is possible," or words to that effect, and
25 now he's recanted that basically. So, what more can I say.

BINNIE J:

So your general recollection of this is that you don't regard him as somebody inclined not to tell the truth but somewhere in here there's a misunderstanding and your best guess is that he must be mixing up the

source of these comments that he's attributed to you. Is that a fair summary of...

MR WEIR:

It prob – it is, yes.

5 **BINNIE J:**

Now then the other element of disagreement with Dr Sanderson is on the ownership and as you all know from the trial proceedings, he was initially of the view that the glasses were very, really a prescription of David's, that he was somewhat concerned with David's got a problem in one eye, a stigmatism
10 or something or another that his mother and he shared. You, then, showed him a photograph. He then concluded that they were Margaret's glasses, not David's, even though they were men's style of glasses, and he says he asked you that that be corrected and you differed with him on that point as well –

MR WEIR:

15 Can I –

BINNIE J:

Can you tell me what your position is?

MR WEIR:

Well I don't recall him asking to change his evidence. My recollection is that I
20 showed him the photograph and he said, "That could be them." But there was basically nothing more than that to come from it. I would have had no concerns with him wanting to change his evidence in that regard because it didn't really matter who they belonged to. So it wasn't really an issue.

BINNIE J:

25 Can I ask you this because at the 2009 trial, and I'm looking at page 1213, you say, "If Mr Sanderson had wanted to change his evidence, no problem. He could've changed his evidence. He gave evidence in person." And then the question, "Mr Weir, this is a respectable ophthalmologist. There's no

reason to come and tell any lies." You say, "I accept that." And then further down the page the question is put, "You have no recollection is what you say but you can't deny that he told you, can you?" and you say, "I can deny that he told it to me in the way that is expressed in the affidavit."

5 Question, "Well, if you've got no recollection, how could you possibly make that denial?"

Answer, "Because I know that never happened." So that sets up an absolute conflict between what you say and what Sanderson said.

MR WEIR:

10 That's right.

BINNIE J:

And that seems to me is more difficult to say there's some misunderstanding because he's the person you were dealing with on this issue.

MR WEIR:

15 That's correct.

BINNIE J:

And when it comes up again, and I'm looking at page 1242 of the transcript, we talk about the stance. You say, "Well, the prosecutor had a stance on the ownership issue." And if I understand the transcript correctly, what is being
20 referred to as the stance the prosecutor was going to take at trial on the issue of the glasses. Can you just tell me what you recall you meant by "the stance"?

MR WEIR:

Well I think my recollection is that the prosecutor's stance was that it didn't
25 matter who owned the glasses. It was that they would've been of benefit to David Bain and of no benefit to Robin Bain. That was my understanding of the prosecutor's stance.

BINNIE J:

But then the prosecutor, having taken that stance cross-examined David Bain at trial as if there was a difference between his view and Dr Sanderson's view. Do you recall that?

5 **MR WEIR:**

That's my understanding since the trial, yes.

BINNIE J:

He – the prosecutor is suggesting pretty clearly in the cross-examination that David Bain is not telling the truth about the glasses being his, about an earlier
10 prescription. Is that right?

MR WEIR:

I don't know whether I was present during that or not but that's my recollection of events, yes.

BINNIE J:

15 I'm reading from the Privy Council judgment where they reproduce – cross-examination and it's at paragraph 79 of the Privy Council judgment. He's reproducing what was said in 1995.

Question, "The pair of glasses which had been produced to the Court, the (inaudible 11:02:25) and frame?"

20 Bain, "Yes."

Question, "You say they are not yours but they are an older pair of your brother's?"

Answer, "That's right."

25 "The ophthalmologist, Mr Sanderson, from the hospital, was of the opinion that they were an earlier prescription of your existing optometry prescription?"

"This is incorrect," David Bain says.

Question, "The ophthalmologist was of the opinion 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?"

It says, answer, "I do. That is only in one lens, not the other," and that goes back to this oddity in one of his eyes.

Question, "You say he is wrong?"

Answer, "Yes." So that seems to me clearly that Bain is being told that his
5 evidence is in collision with Dr Sanderson over the ownership of the glasses.
Is that not the impression it conveyed to you?

MR WEIR:

Well, the impression that that conveys to me is that the Crown prosecutor,
Mr Wright, is saying that prescription was consistent with an earlier script of
10 David Bain's and the contention was I think that there's trying to set up that
they would have been of use to him. They would have been of use to
David Bain. They would've been helpful to him.

BINNIE J:

Well, that's another aspect of the debate but when the prosecutor says to
15 David Bain, "You say he is wrong about the prescription?" and David Bain has
just explained that although what was said about the one eye is not true of the
other eye, did it not strike you that it was being put to David Bain that he was
in conflict with Sanderson? I don't know how else to interpret the exchange
between the two of them.

20 **MR WEIR:**

Well, I don't know how else to interpret it either. It does seem that way, yes.

BINNIE J:

Right, and were you in Court at the time that he testified?

MR WEIR:

25 I don't recall. I was in Court off and on but I don't recall that conversation.

BINNIE J:

I just want to ask you something else because there's a bit of a conflict
running through here. At page 1242 of the trial, line 25.

Question, "You disagree with Mr Sanderson about his evidence over the glasses wanting to be changed? You disagree with that?"

Answer, "I don't disagree or agree with it actually."

Question, "So he might be true when he says that?"

5 Answer, "He may very well have said."

Question, "Well you see, if he did say that about he wanted his evidence changed and you did nothing about it that is dishonest as well Mr Weir?"

Answer, "At that stage there was a discussion with the Crown in relation to that, and the Crown had a stance in relation to it." Do you recall that
10 exchange in the cross-examination?

MR WEIR:

No I don't. When was that? What was it in?

BINNIE J:

This is in the 2009 trial in Mr Reid's cross-examination.

15 **MR WEIR:**

I don't recall it specifically.

BINNIE J:

It's just that what it seems to suggest is that at one point you're quite emphatic that no such discussion took place, but at another point you say, "Well, it may
20 have taken place but it didn't matter because the prosecutor had a stance."

MR WEIR:

Well, I don't know but what I'm saying is I don't recall that discussion with Sanderson, so.

BINNIE J:

25 All right, then we come to – do you want to have a bit of a break now. How are you doing?

MR WEIR:

Yeah, I'm doing all right. So is this – are we still on target to finish this at 12.30?

BINNIE J:

5 What time is it now?

MR WEIR:

That was my understanding.

BINNIE J:

What time is it please?

10 **MS MARKHAM:**

It's 20 to 12.

BINNIE J:

About three – not too far off.

MR WEIR:

15 Okay.

BINNIE J:

We're certainly through most of this.

MR WEIR:

Pardon?

20 **BINNIE J:**

We're certainly through most of this.

MR McDONALD:

I'll change the tape.

BINNIE J:

Okay. Set?

MR McDONALD:

Yes, we are recording, Your Honour.

5 **BINNIE J:**

If you look in the book of documents in front of you, in the manual, and I'm looking at page 32 of 57, behind the green tab? It says, "On arrest," so this follows the section of what is required before an arrest is made. "An examination is to be made of the suspect by the pathologist or police
10 surgeon." First of all, was Dr Pryde a pathologist or a police surgeon or both?

MR WEIR:

He's a police surgeon.

BINNIE J:

And does that mean he was an employee of the police?

15 **MR WEIR:**

No, it means that – well, Jim Doyle will probably be the one to explain this better but it means that he was called on to do examinations of people for various reasons at the police station.

BINNIE J:

20 And Dr Pryde made his examination during the afternoon of Monday June the 20th, is that right?

MR WEIR:

I wasn't involved in that. I wasn't present at it, so I understand that he did make an examination of David Bain though, yes.

25 **BINNIE J:**

The – I'm just trying to understand in terms of the police procedure, why, if David Bain was not a suspect on Monday, he would have been sent off to

Dr Pryde to do an examination which the manual says would be done after the arrest of the suspect?

MR WEIR:

I mean I had no part to play in arranging for the examination, so I'm assuming
5 that way Doyle and Robinson that arranged for that to take place, and you're
going to be speaking to Jim Doyle, so he's the one to ask those questions.

I was – as soon as David Bain was removed from the scene he was no longer
my responsibility and I had nothing more to do with him.

10 **BINNIE J:**

I just want to go through a few things just to, in effect, understand if it comes
within the scene.

MR WEIR:

Sure.

15 **BINNIE J:**

Universe of things that you didn't have anything to do with. Much of
the Crown's position was that no particular motive had been identified for
David Bain. This is according the PCA report. The police felt that he had
shown, "Odd and disturbing behaviour," and they give a bunch of instances.

20 Was that within your field of view at all or was this taking place entirely outside
your responsibility?

MR WEIR:

Entirely outside my responsibility.

BINNIE J:

25 Similarly, the controversy over funeral arrangements and his role in that, that
was outside your responsibility as well?

MR WEIR:

Absolutely.

BINNIE J:

5 The allegations also made that when he was at the scene on the morning of June 20th, he feigned a fit, and there was evidence that the police and the ambulance people in that regard. Did you observe David Bain at the time he was allegedly feigning a fit?

MR WEIR:

No that was before I arrived at the scene.

10 **BINNIE J:**

All right, this whole business about the incest allegation relating to Mr Cottle and Ms McNaught and so on, I take it that was also outside your field of vision?

MR WEIR:

15 That's correct.

BINNIE J:

But were these matters discussed at these meeting of the hub that you attended?

MR WEIR:

20 Not that I recall. Those meetings really only took place for the first week or so and then the conferences and the conference notes will show how long they went on for and there will be notes there outline exactly what took place, or what was discussed. So, certainly no – my recollection is that I certainly don't recall it, no.

25 **BINNIE J:**

You don't recall any discussion of "odd or disturbing behaviour"?

MR WEIR:

No I don't.

BINNIE J:

5 And you don't recall any discussion of an allegation of incest and whether this should be looked into?

MR WEIR:

10 No I don't, but having said that I'm not saying that it didn't happen. I'm just saying I don't recall, so, once again the briefing notes, there's a typist there, shorthand/typist, so she writes down everything that people say. So that will be in the notes one would assume.

BINNIE J:

And were the notes for all these conferences, as they're called in the manual, produced at the trial?

MR WEIR:

15 I wouldn't have thought so. What would happen is that they would become part of the file. So they'd be filed on the file, so...

BINNIE J:

Do you know in respect of whether those documents were ever produced?

MS MARKHAM:

20 No that's (inaudible 11:16:24). They weren't.

BINNIE J:

They were not produced? Was some sort of privilege claimed for them?

MS MARKHAM:

25 I don't know to be honest, Sir. I don't think I've ever seen it.

BINNIE J:

Can I just flag that as a request to understand what the status of those documents is and why they were not produced, and whether they were asked for?

5

This – another issue of credibility was raised and you dealt with it in the 2009 trial, which is the gathering at your house after the Court of Appeal decision in 2003, and you were asked whether police officers were there and you said, “Probably,” but you couldn’t recall anybody in particular. I’m looking at page 1236 of the transcript, 1237. I just want to put it on the table again because it strikes me as a little odd that a man who has pretty good recall of events going back to 1994 can’t recall whether any of his colleagues from the police were there at a party in 2003, and is it the case today you still can’t recall?

10

15 **MR WEIR:**

I can recall some people that were there, but I, for example, I would hate to say that Jim Doyle was there and find that he wasn’t. I would hate to say that Steve McGregor was there and find that he wasn’t. So it wasn’t a – my recollection of that night is that it was a function organised primarily by my wife, and it had been organised prior to this decision coming out because it was a house warming, or a pre-house demolition for a house that we were going to be doing radical alterations to. So, I can sit here and guess, if you like, as to who was there but I might be doing them a disservice if I’m incorrect.

20

25 **BINNIE J:**

Well if you could just give me what your recollection is and it will not be taken –

MR WEIR:

Okay, you will have the opportunity of asking Jim Doyle. I recall that Jim Doyle may have been there. I might be incorrect.

30

BINNIE J:

I will ask him. Anybody else?

MR WEIR:

Some of my neighbours were there. I know that earlier in the night –

5 **BINNIE J:**

I'm speaking of police.

MR WEIR:

Oh, okay, no I don't recall. I'm just trying to think who I might have been and associate this. I was outside the police by this stage.

10 **BINNIE J:**

Yes.

MR WEIR:

I'd left the police and when I left the police I basically didn't have much to do with any police officers – ah, Malcolm Inglis was quite possibly there.

15 **BINNIE J:**

How do you spell his name?

MR WEIR:

Malcolm M-A-L-C-O-L-M I-N-G-L-I-S. Once again, if he wasn't, I don't want to do him a disservice by saying that he was there.

20 **BINNIE J:**

I understand.

MR WEIR:

Yes, so it would have been – if he was there, it would have been him and his wife.

25

BINNIE J:

Mr Croudin?

MR WEIR:

Croudin, I don't think so, no.

5 **BINNIE J:**

And the other members of the –

MR WEIR:

– I've been –

BINNIE J:

10 - team that you'd assembled at the – the scene team?

MR WEIR:

Right, well I certainly didn't socialise with – let me think about that for a second, Kevin Anderson, potentially, Detective Anderson.

BINNIE J:

15 What we can do actually is look at the list of characters at page 7 of the PCA report. I just want to run down those names.

MR WEIR:

I don't think any of them were there.

MR McDONALD:

20 I might just change tape now, you know. There's four minutes left on this tape.

BINNIE J:

Mr McDonald, how much longer have you got on that?

MR McDONALD:

25 Four minutes.

BINNIE J:

That's fine, we'll just keep going. We'll break with the people next door.

MR WEIR:

5 So in relation to that list of people that you've shown me there on that, on
page 7, I don't think any of those people were there. I can categorically say
that Fitchett wasn't there, Stewart wasn't there, Bracegirdle wasn't there,
Briggs wasn't there, Lodge wasn't there, Barbara – and the only reason I can
categorically say that is because they're people that I don't associate with.
They're not friends or...

10 **BINNIE J:**

Barbara?

MR WEIR:

Barbara, no.

BINNIE J:

15 Thomson was the one you were (inaudible 11:22:11)

MR WEIR:

May –

BINNIE J:

He may well –

20 **MR WEIR:**

He may have been but he's not a person that I socialised with or anything,
so –

BINNIE J:

Dunne?

25 **MR WEIR:**

No.

BINNIE J:

Then there's a Binnie on there?

MR WEIR:

Binnie, no.

5 **BINNIE J:**

All right, I understand that the words "hang Bain" were sprayed and did you spray it?

MR WEIR:

Yes I did. Not my finest moment. I'll accept that.

10 **BINNIE J:**

How large were the letters?

MR WEIR:

My recollection was that they were on a bit of plaster above the head of the door and, you know, this size.

15 **BINNIE J:**

You're indicating maybe 18 inches.

MR WEIR:

Look, I don't even remember to be honest –

BINNIE J:

20 No, no but you –

MR WEIR:

– I just, yeah.

BINNIE J:

But still –

MR WEIR:

I'd be –

BINNIE J:

– was it above the door or –

5 **MR WEIR:**

Well, put it this way, they weren't the size of the wall. They were above the head of a door, done – above the head of an external door on the house, on an area of plaster that I knew was going to be demolished.

BINNIE J:

10 And apart from what I take it was a certain amount of triumphism as having prevailed in the Court, was there any reason why you would have expressed such a sentiment?

MR WEIR:

Oh, it was just exactly as you described it. You probably described it better
15 than what I could have, basically. I mean, it was a stressful time for myself and my family and it was just done in a moment of sheer stupidity. I'd point out that it was an area of the house that the neighbouring house could see. It wasn't the entr – it wasn't the main entrance to the house, from recollection, because the house has completely been rebuilt. You know, the house was up
20 a private lane. It wasn't as if people could, the public –

BINNIE J:

But I think what the significance is, is that it suggests a level of emotional involvement in the outcome –

MR WEIR:

25 Oh, well, I did have an emotional –

BINNIE J:

– rather than detachment.

MR WEIR:

Absolutely, I had an emotional – yeah, absolutely, I'd been and given evidence –

BINNIE J:

5 Okay, when did you become emotionally involved?

MR WEIR:

I think, I think my level of emotion increased when Karam wrote his first book indicating that I was a liar and a cheat and a corrupt policeman.

BINNIE J:

10 This is 1997?

MR WEIR:

Or whenever that happened.

BINNIE J:

So that's when it became personal?

15 **MR WEIR:**

Absolutely, and it took an effect on me. It affected my career in the police, obviously. It affected my family and friends.

BINNIE J:

20 Looking back, do you think that up until those allegations were made that you had remained relatively detached?

MR WEIR:

25 Absolutely, I was a professional policeman. I've been involved in cases that have been successful and unsuccessful for various reasons and that's part of the job. So, I'd just like to say, while that tape's going, I've never, I never cheated in the police, I never lied and I never, ever planted any evidence.

BINNIE J:

Right we will adjourn at that point and I will confer next door and I will be back shortly and we will try to get you out of here for a slap up lunch.

MS MARKHAM:

5 Sir, I take it I don't have any role next door or...

BINNIE J:

No, no, you're staying and if you wouldn't discuss anything. Just, the protocol as you know is that you would not discuss anything, not even with counsel, nor with Mr Doyle until after –

10 **MR WEIR:**

I haven't spoken to Jim Doyle for months, years probably.

COURT ADJOURNS

COURT RESUMES**BINNIE J:**

There's just a few –

MR McDONALD:

5 We are recording, Your Honour.

BINNIE J:

Just a couple of fairly minor clarifications, Mr Weir. At the 2009 retrial, you were asked a number of questions about your application for early retirement and your concerns about your relations with the other police officers, and I take
10 it that too was connected from the fallout from the Bain trial?

MR WEIR:

Sorry, can you just clarify what the question is, I'm sorry.

BINNIE J:

15 The question is, having regard to the fact you made application for early retirement and that you expressed at the 2009 trial the concern about being viewed with suspicion by other officers in the force, did all of that have a route in the Bain case or were there other contributing factors?

MR WEIR:

20 No, no, it had a route in the Bain case. I mean, I'll give you an example and I might even have referred to this in that application, but I worked on a murder inquiry in the Marlborough Sounds here, which were, a young couple had gone missing and a person was subsequently arrested for their, or charged with their murders. But during that inquiry, when it was, when the staff
25 involved in the scene examination were having trouble sort of finding stuff, somebody joked, "We'll send Milton there and we'll find some," you know, "And he'll find some evidence for us." Things like that.

BINNIE J:

So evidence on demand.

MR WEIR:

Yeah, I became the bunt of some police humour which may or may not have
5 been harmless but it certainly wasn't for me.

BINNIE J:

And do you regard the subsequent events as fallout from the Bain case –

MR WEIR:

Yes.

10 **BINNIE J:**

– or were there other events that independently gave rise to the concerns that
you've described?

MR WEIR:

15 No it came from the Bain case.

BINNIE J:

I was asked just to clarify one matter about the interaction between you and
the ESR, that when the depositions were being prepared for the trial of
witnesses from ESR, what was the sequence of the preparation? Who put
20 together the first draft and then how was it dealt with?

MR WEIR:

Okay, my recollection, and once again I think that you'll get better, a better
reply to this from Jim Doyle, is that Kallum Croudin, Detective Senior Sergeant
Kallum Croudin and Detective Senior Sergeant Jim Doyle were responsible for
25 preparing all of the briefs of evidence prior to depositions, but I understand,
and I could be incorrect, that the ESR provided, or produced their own
deposition statements.

BINNIE J:

And then they would be passed to the police?

MR WEIR:

That's correct.

5 **BINNIE J:**

And did you see any of those depositions or comment on them in any way?

MR WEIR:

Not that I recall, no.

BINNIE J:

10 The – I think really that's all I need to pursue at this point.

One other point, the survey, the plan, you'll recall –

MR WEIR:

Yes I do.

15 **BINNIE J:**

(inaudible 11:33:07) I'm referring to, I think was prepared by a surveyor by the name of Gardner, under your direction.

MR WEIR:

I requested that it be done, yes that's right.

20 **BINNIE J:**

And did you go around the premises to indicate what it was important to show on the diagram?

MR WEIR:

I don't recall. Clearly, he must have been given some instruction at some
25 stage about what was wanted on that plan, so I don't specifically recall it but –

BINNIE J:

Would that not – that would've come from you?

MR WEIR:

You would assume so, yes.

5 **BINNIE J:**

Yes, and there was some furniture that the Bain people are concerned with. Firstly, in the computer room and, secondly, in David Bain's room. Was there any selectivity going on as to what the surveyor would show and what the surveyor would not show, and if so, what was the criteria?

10 **MR WEIR:**

My recollection is that by the time the surveyor was allowed into the scene to do his measurements and in order to do that plan, a lot of the furniture and a lot of the stuff inside the scene had been removed, so, I mean if I can just explain, I don't know if you appreciate the extent to which we searched that scene. We basically boxed up everything and removed everything from that scene in due course. Like, we cut out door frames and that sort of thing. So, by the time he came in, really the only furniture that was left in the s – if we're talking about furniture –

BINNIE J:

20 Yes.

MR WEIR:

In the scene was furniture which at that time we believed might have been pertinent. So, for example, it might have had a blood stain on it that we were interested in or a mark on it something along those lines.

25 **BINNIE J:**

This is all stuff that went into the container and was eventually destroyed?

MR WEIR:

What happened to it eventually I don't know but did it all go into the container?
Probably, yes. I can't categorically say it did but...

BINNIE J:

5 Those are my questions. I much appreciate it. Ms Markham?

MS MARKHAM:

I didn't have anything to re-examine on thank you Sir.

BINNIE J:

We have made your luncheon deadline.

10 **MR WEIR:**

Thank you very much.

BINNIE J:

I do appreciate you taking the time.

MR WEIR:

15 Thanks.

BINNIE J:

And your cooperation, thank you.

END OF INTERVIEW WITH MILTON WEIR

Tab G

BETWEEN

JUSTICE IAN BINNIE

Interviewer

AND

DAVID CULLEN BAIN

Interviewee

Date of Interview: 23 July 2012

Place: Copthorne Hotel, Auckland

Attendees: John Pike and Annabel Markham (Crown Law Office)
Michael Reed CQ
Matthew Karam
Joe Karam
Stuart McGilvray (Ministry of Justice)

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

EXAMINATION: BINNIE J

Q. Could I have your full name please?

A. My full name is David Cullen Bain.

Q. And you swear that in answer to the questions I pose, you will give the
5 truth, the whole truth and nothing but the truth?

A. I do so swear.

Q. Now I can start by outlining a little bit of how I expect we will proceed.

A. Please.

Q. You have, over there, a book of materials which just contains copies of your statements to the police and then under the blue tab, the evidence that you gave at the 1995 trial as transcribed for the 2009 trial and then in the green tab, the note of evidence of Dr Mullen from the 1995 trial.

5 A. Mhm.

Q. And I'll be referring from time to time to pages in the book and you're free to track the book or simply listen to the question as you see fit. I will be putting questions to you. When I conclude, we'll have an adjournment and I will consult with the Crown Law office to see if there are additional questions they would like me to put to you and I will then take under advisement whether I will put those questions or not and then at the conclusion, I suppose Michael Reed will be asking any questions in re-examination simply to clarify points that he may feel have not been made adequately clear in the answers you've given to me. With that fairly clear way of proceeding and you know, this is not a formal courtroom. We are intending to make it somewhat informal and if at any time you want a break for any reason, just indicate it and we will have a break.

10

15

A. Thank you.

20 Q. We have no rigid timetable that we are working to.

A. Okay, that's fine.

Q. Can we start simply by you talking a little bit about your family as of Christmas of 1993? Just discuss who – recollection of your parents, your siblings, how they got along, the great house project, various other matters?

25

A. Okay sorry I'm – my memory of the time and specific, specific times is not overly clear I – but in general –

Q. I'm talking now well before the period that –

A. Yes, yes, no, the Christmases that we would have spent with whichever –

30

Q. Yes.

A. – and so on in the years leading up to '94 generally with – we would have, we'd make an effort to get all our family members together at Christmas time. Ah, at Christmas '88, when we first came back from

Papua New Guinea we spent that time with our relations in Paraparaumu, north of Wellington and – but apart from that our Christmases were spent in Dunedin together as a family all of us would have been there even in '93 despite the fact that Laniet was living away from home and had moved away from the family for her whatever you – and because of the difficulties that she felt she was having with ah, relating to my mother. Ah, she would still come back –

5

Q. Just pausing there, as I understand it, the family was being polarised by the tension –

10 A. Yes.

Q. – between your mother and your father –

A. That's right.

Q. Laniet tended to side with your father and the rest of you tended to side with your mother, is that a fair generalisation?

15 A. Yeah, it went backwards and forwards. As you know alliances within families do, you know, tend to happen. I mean I spent a lot more time with my father doing the, you know, the choral singing and working out the back on to the section with wood chopping. Just be we were, you know, good hard-working guys you know that's what we spent our time doing. Ah, heard talking a lot about bush craft and you know, working with machinery. He was good with, with cars and you know because we lived in Papua New Guinea for so many years and we had to be reasonably self-reliant. I mean he taught me a lot, you know, about that sort of stuff.

20

25 Q. But you have described tensions with your father?

A. Oh yes, yeah. There were –

Q. Can you talk a little bit about that?

A. The tensions that I, I personally had with my father?

A. Yes.

30 A. Ca – I guess, came from how my mother perceived the relationship and she would tell us all about the difficulties she had and that tended to spread, you know, things a little bit more. That's part – I think partly why, although I can't speak for her any, you know, any better than anybody else can but I think why Laniet had such difficulties because

she, I guess – I'm only guessing, I have no direct, I can't say for any specific, or with any specific reliance that Laniet had an alliance more towards my father because of this. It just – that's the way it seemed to have been at the time.

- 5 Q. Are you suggesting that, is it, your mother kind of ventilated –
 A. She –
 Q. – against your father –
 A. She did I –
 Q. – in the presence of the children?
- 10 A. Oh yes. I mean one specific instance, and this is – just goes towards I guess the the state of mind that was, that my mother was in, you know, she would use the pendulums, you might have read about that. Um, she went, she got into holistic medicine, using, um – she believed in spirit guidance and all that sort of stuff. She was –
- 15 Q. Self-hypnosis?
 A. Using self-hypnosis, massage, all those sorts of things for health, et cetera et cetera and she would use her pendulum to decide that one person would be, was – and she'll have it that the son of God, another person would be the son of Belial or the devil and she unfortunately
- 20 labelled my father as a son of Belial and referred to him in that fashion any time that we were together. And you know, as a group of kids, just my mum with, with us kids together. Um, I, I think I did talk about it in my statements –
- Q. Well, yes you do at – but there, there's also the, a discussion in the
- 25 evidence that you felt that your father was attempting to exert control, that he did this by laying guilt trips on you in particular and that in that sense he was seen by you as somewhat manipulative?
- A. Yes. Well it seemed that, I mean my father was quite a strong character, you know, very – he was a good teacher, articulate, creative
- 30 et cetera et cetera but with – in that family dynamic and nearer the end of that time, well, for the, for the two years at least in the lead up to '94 he became very withdrawn and shrunken and when he was – in the household. When he was outside of the house he sort of became his old self which I guess is why I have – I still have you know, good

feelings towards my father at the time we shared a lot of time together and especially in choral situations or doing shows. I mean I, I had to do a show for the youth group I was involved with, um, called "Trial by Jury" and he came, helped me do all the set design and construction 'cos I

5 knew you know, he and I worked well together so there was that, that was that aspect of our relationship. The manipulative aspect of things within the household though, that was what caused me difficulty because I couldn't – I had the direct command, so to speak, from my mother that this was how the situation should be but then my father,

10 who had every right to want to be, you know, equally contributing to the household in decisions within the household, his only way of having any impact so, whatsoever, was to be manipulative or to try and come in from the side whereas Mum...

Q. Did you describe to anybody your sense that your father was trying to

15 "rule the roost"?

A. I – you'd have to refer me to –

Q. No, well, we'll come to it. It's not an expression –

A. I don't remember the – that.

Q. Do you recall that Mrs Neasmith described the – your immediate family

20 as dysfunctional?

A. Yes, I do.

Q. And was that a fair description?

A. It was absolutely. And I am quite happy to admit to that now. At the time I didn't see it as dysfunctional 'cos that's just the normal thing. I

25 lived in that household, we were a very tight group and I just considered it to be how life was led or how we lived life. I didn't see it any other, as being out of the ordinary.

Q. You had nothing to compare it with?

A. Exactly.

30 Q. The, the house project seems to have loomed large –

A. Mhm.

Q. – in that time period. As I understand it, the idea was to demolish the house, put up a new and larger house and you were going to preserve the landscaping that you had been –

A. Yes.

Q. – working on? That there would be two large bedrooms with an adjoining bathroom and four smaller bedrooms and that the – your mother's thought was that your father would not be part of that new household?

5

A. Well, yes. That, that has come into being from various statements. I don't know where that information, you know, the way which you describe it.

Q. But you recollect it?

10 A. But my recollection was that my father was going to have a room. I mean, unfortunately, and I have no idea where this particular piece of evidence is or, but their actual plan that my mother spent so much time in Laniet's room drawing up, have each of the rooms labelled with the person going to be in and my father's name is on there.

15 Q. In one of the large bedrooms?

A. I don't know which room, I can't – I can't remember the layout anymore.

Q. I take it your mother had pursued some kind of a drafting course to enable her to her to work on the –

A. No.

20 Q. – cor –

A. She, she was very intelligent and she did a lot of the stuff herself. Ah, she would go to the Council offices and ask for information about where to, um, you know, what was required in planning a household and she went to the library. She did a lot of that research herself and just got big sheets of, um, grid paper and then just drew it all up herself. I mean she was planning on taking it to a draftsman to get a proper approved plans done at a later time.

25

Q. Had the plans been submitted for municipal approval?

A. I don't know.

30 Q. Okay.

A. All I know firstly that had been done was the destruction order.

Q. You were asked at the first trial whether or not you had told your father that your mother wanted him to leave the house, do you recall being asked that?

A. Um, I can't say I recall that now, I'm sorry.

Q. Looking at page 2666, right in the middle of the page, behind the blue tab.

A. Oh.

5 Q. At the back. You're quoted as saying, "As to whether I ever told him in the beginning of 1994 in the six months to 20th of June that I wanted him to leave the house knowing my mother never requested it really that she wanted me to do that."

A. Mmm.

10 Q. Do you recall...

A. I don't recall saying that but I, yeah, I mean obviously it's something that – I d – I remember being on the stand but I don't remember specifically the –

Q. You recall that arising as an issue?

15 A. Yes, yes.

Q. Well I appreciate you recall being on the stand. Do you recall an incident where you were a messenger to your father to leave the house?

A. No.

20 Q. In the cross-examination of Janis Clark, she was asked about a Mrs Joanna Dunn, who I gather 164813 was the wife of a Presbyterian minister known to the family? Does that name mean anything to you, Joanna Dunn?

A. No sorry.

25 Q. And it was said that she would relate that your mother, this is some years earlier, had been concerned that your father's mental state was such that he might get a gun and shoot everybody. Does that anecdote ring a bell? Were you ever to hear such a thing?

30 A. It doesn't ring a bell and I mean I'm surprised that anyone would say that of my father because I mean contrary to you know how things have proceeded through the trials and so on, I've respected my father. I still do and the man that I knew, not the man that committed these things, but the man that I knew would never have harmed his family. I mean that's a strong statement to state, to say right now in this sort of a situation knowing that, you know, my innocence, it depends on proving

my father actually did commit these crimes but I'm not saying the man who committed these crimes was my father in the mental state.

Q. If, if he committed a – these crimes, it was totally out of the character –

A. Yes.

5 Q. – the character that you recall, is that about it?

A. Yes.

Q. The – some evidence about the lounge at 65 Every Street and the computer and that the door to the lounge had a lock on it. Is that right?

10 A. I can't say that there were any lockable doors in internal walls that I – I'm sorry I don't, I don't exactly...

Q. Right – there was some evidence that you, and I throw this out for you comment, I'm not asking you to accept it, I'm accurately stating the evidence. I simply want to put to you to get your recollection that you had at – that there was a locking door, that you had the key and that you controlled access to the lounge and was quite restrictive insofar as your father was concerned and letting him in to use the computer. Is there any truth to any of that?

15

A. I have no idea where that has come from. It's an absolute fabrication.

20

Q. The relationship between your father and Arawa, I gather, was somewhat strained?

A. It was.

Q. And was she the most supportive of your mother in this family squabble?

25

A. You – yes, you could say that she was very supportive of my mother, that she was I think far more and led more to the fact that she was her own person. She was stronger in that capacity and I tended to be pulled in alliances between my mother and my father.

Q. Tended not to be pulled?

A. No, I tended to be pulled.

30

Q. Yes, and Arawa did not?

A. Arawa didn't. She was very firm in her, in her, who she wanted to be and it wasn't so much that she was supportive the mother against the father. It's just, have nothing to do with Dad than doing her – because she wanted to do her own thing.

Q. Well there's a great deal been talked about in this case about allegations of incest –

A. Mmm.

5 Q. – between your father and your sister, Laniet. What I'd like to ask you at this stage is was there anything, looking back, that indicated to you that such a relationship existed?

A. No.

Q. And you told me a moment ago about your view of your father, leaving aside the events of the 20th of June –

10 A. Yes.

Q. In the man you knew before the 20th of June, do you see the allegation of incest as compatible with the kind of man he was?

A. I'm sorry, I can't – I, no. I can't truthfully say that I – I'm very surprised that these things happened and that this stuff could have happened.
15 But then having read through assessments and you know by experts in this field, they've got far more experience and understanding and...

Q. I'm interested in your own –

A. Yep.

Q. – David Bain perspective.

20 A. Right.

Q. – now did you notice anything up to the 20th of June that would indicate to you, even with the benefit of hindsight, that there was some sexual relation between your father and –

A. With the benefit of hindsight?

25 Q. Yes.

A. Oh, now I could say that there were some signs, yes. If I look back and see the stress signs, see the, the fact that you know, Laniet even went out to live with you know, Dad at Taieri Mouth. Um, the fact that Dad would actually go to, um, to her flat where she stayed and paid her rent, you know. He supported her in those, in those instances. There weren't things I was aware of or ever really paid any attention to at the
30 time but – so if you think, asking in hindsight, yes I can see some of those things that might be indicative. If you're asking about my memories of the time, no I couldn't say that I had saw anything into –

Q. Right.

A. I was focused on being, you know, my own man and doing my own thing.

5 Q. So up until June 20th there was nothing that gave you a signal if there was something odd about the relationship between your father and Laniet?

A. No, no.

10 Q. With hindsight, you say there are certain circumstances, that you've indicated what they were, but these seem to me to indicate a closeness without necessarily anything sexual about it.

A. I know, absolutely. And that's what it seems to me as well.

Q. So either working back you don't see anything sexual in the relationship?

15 A. No. There was no thing everly – ever overtly sexual or, what's the word, right word? Um, unacceptable in –

Q. In appropriate?

A. Thank you. Um, in his behaviour towards any of us children.

Q. Mhm. And how about his relation with Stephen?

20 A. Oh they were fine. I think, though, that Stephen was my mother's – you know, he was the little kid, he was spoiled, he was, you know, Mum's little boy, all that sort of stuff. I mean he, he came out with Dad and I to go and do the boys' stuff, like going to the cricket and tennis and so on but when it came to life in general and guidance it was Mum that controlled that.

25 Q. I'm interested in this shooting that you and your Dad and I guess Stephen participated in from time to time. You had very recently acquired this .22 calibre rifle?

A. It was the year before, I think. '93.

Q. Yes.

30 A. Yes.

Q. And your dad helped you sight the gun?

A. That's correct.

Q. And after June 20th the police found a target in your room –

A. Mhm.

Q. – with five circles and the suggestion was made by the prosecutor that these circles each represented member of the family who was a victim.

A. Mhm.

Q. Where did this target come from?

5 A. Dad drew it up.

Q. And was it drawn up for the purpose of sighting?

A. That's correct, yeah.

Q. And had it been used by you since the rifle was sighted?

10 A. No. I think we – to give you the full story, I had, I'd bought that rifle right, as I said, in '93. I can't remember exact dates and times. It sat in the cupboard for a wee while until I got to, um, I took it to the, ah, to a rifle shop to have the silencer fitted. I got a sling and I think I got a case for it and a trigger lock and then at that point once you know –

Q. In – what, what sort of date does that point –

15 A. Oh, this is like a month or so after I bought it. And then this is still in '93, and then after I'd deemed it safe and my father deemed it safe, you know, because of – had the carry case and so on, it was legal to carry it in the car. Ah, we went, um, we organised a weekend to go out to Taieri Mouth and we stopped at his school where he got that piece of
20 card then we went further out past the school –

Q. And you're quite sure he's the one who drew the five circles?

A. Absolutely.

Q. Any particular reason why there were five?

A. No. I have no idea. I mean –

25 Q. Okay.

A. – I'm just guessing –

Q. His choice?

30 A. – it was, well it was his choice and I'm assuming that, well the way he, we looked at it was we would put, you know, half a dozen shots into one circle together, a grouping and move the target to the next circle and then put half a dozen shots so that we've actually got a comparison. Um, and then we went to a farmer whose wife I think worked at Taieri Mouth School and he allowed us to use his farm shed which had a vice in it and Dad put the vi – ah, the target against the fence post,

tied it there with some bailing twine I think. I can't remember now exactly. Um, and then we lined everything up and pulled the trigger.

Q. And after that, did you use the rifle for hunting rabbits and possum?

A. That's correct, yes.

5 Q. And did you father go with you on these hunting outings?

A. He came out with me I think twice only for the rabbit shooting. As for the possums, it was only if there were possums really – it was really, you know, out in Taieri this is, would be deemed illegal in New Zealand but we had a – big, a lot of big trees around our section in Every Street and often possums would come off the trees and onto our roof and you
10 know cause issues so I'd go out with a spotlight. Stephen would quite often come out and hold the spotlight for me while I shot the possum out of the tree.

Q. Now I believe that you told the police that you have not used the rifle for
15 some time prior to June 20th?

A. That's correct.

Q. Do you recall roughly when it was you last used the rifle?

A. Roughly January, middle of February. And I think it was, um, it was a –
20 one of the colleagues of mine in the opera live group had a family farm that we knew of or may have, may have owned or something and maybe his family owned. Anyway, we went out together shooting on that property.

Q. You mention the trigger lock?

A. Yes.

25 Q. And then famous two keys –

A. Mhm.

Q. – for the lock and one of them was on this necklace that you frequently wore?

A. Yes.

30 Q. And I think there was a key to a little bicycle lock and –

A. Yep.

Q. – a shepherd's whistle or something. Why would you wear this odd collection of things around your neck on a day-to-day basis?

A. Ah, I was in the habit of having the wh – the whistle in my mouth and just something to chew on while I biked to work and I had to, to university and obviously the key for the bike was the bike that biked to university on and the rifle lock was just if I wanted to go out shooting or
5 whatever then that's where the key was. I had one on my person.

Q. This, the second key –

A. Mmm.

Q. – which was kept in a jar in your bedroom and you told the police that nobody other than you knew the location of that spare key, do you recall
10 that?

A. Yes I do.

Q. When is the last time prior to June 20th that you recall actually seeing a key in that jar?

A. I wouldn't be able to tell you. I – because I didn't – I would go into the jar on odd occasions to you know, 'cos I kept trinkets and bits and
15 pieces in there so Isomething else in there but I don't – I can't say that I lifted the jar and – I can't give you an exact time of day where I last opened that glass. It may have been a day prior, it may have been months prior.

20 Q. So the – as you recall it the key, the spare key might well not have been in the jar as of the morning of June 20th?

A. It may not have, no.

Q. You don't know one way or another?

A. I have no idea. And I – in all honesty I couldn't say that I – the
25 expectation can, can change what you actually see and if I – I expected the key to be there all the time. So if I lifted the jar and, I may not even have noticed that it had gone.

Q. Mmm.

A. If that's what you've driving at, you know but...

30 Q. Mmm, well the spare key has taken on quite a –

A. Mmm.

Q. – dimension in this case so –

A. I have no idea.

Q. – I'm –

A. It's very hard to deal with it.

Q. The – with reference to the university and I gather that you had made a false start at one point and failed some courses and then –

A. Yes.

5 Q. – you did something else and then went back to university and it was on the second round at university that you were attending in 1993/1994?

A. Yes.

Q. What – just out of interest, what was the course that you were taking first time around where you failed the exams?

10 A. Ah, I was going for a, a degree in zoology.

Q. Zoology?

A. Zoology, yes. I had done, at the insistence of my parents, maths and science and it was all the way through secondary school and so because of – my grades weren't good enough to become a vet as I had shown some interest in working with animals, they decided that the second best option was zoology in which I can get a job in, you know, several different fields then the second time I went back to university was – I changed my course all together to an arts degree.

15

Q. Why is it do you think you failed out the first time?

20 A. I didn't want to pass. I lost interest.

Q. Jan Clark said that your mother told her on one occasion that she felt that you were dealing inappropriately with your brother and sisters, that you had been taking – I'm looking at page 2575 of the transcript – and you'd been taking on too much responsibility and "Margaret felt that he should be treating his sisters and brothers as a friend rather than taking on the additional role." In other words, the gist of her comments seems to be you were ac – you were taking on a fatherly role.

25

A. I understand what she was trying to say.

Q. Is there any truth to that?

30 A. No, absolutely none.

Q. Your mother ever make a comment of that effect to you?

A. Never put me, took me aside and said to me, "Look, back off."

Q. Did she ever say it out front?

A. No.

Q. This – the great chainsaw debate. I gather there was one chainsaw that travelled back and forth between Every Street and the school house and that there was something of a tug of war between you and your father as to where it would be?

5 A. Yes.

Q. Can you describe the circumstances on the 18th and 19th of June where in particular there seems to have been a dispute over the chainsaw?

A. Mmm. It was a regular occurrence, our – the tug – so-called tug of war as (inaudible). Um, I can't remember or I can't relate to you the actual
10 conversation that we had at the, on that weekend but all I can say is that there was a regular thing and we did have – tussled about it. Um, if I ran out of time on the weekend, I would prefer to use it during, during the week but obviously that would have been a little unfair towards him.

Q. At page 2686 of your testimony you relate arguments of the chainsaw to
15 your father's manipulation of laying guilt trips on you?

A. Yes.

Q. Saying, "Well, David you could have used the chainsaw over the weekend –"

A. Is that –

20 Q. He wants it during the week down at the school house and, and you thought this was manipulative. What I'm getting at is that it's, it's not just the chainsaw. The chainsaw seems to be a manifestation of a tug of war going on between you and your father that led to some resentment on your part?

25 A. I didn't necessarily resent anything about it. It was just, it was what I was used to.

Q. Feature of life?

A. It was a feature of life, it was a part of our relationship and this is how my – as I said earlier, this is how my dad exerted his authority within the
30 family dynamics within the household. It's not something that – I mean yes at the time you, you feel angry about these things and you feel maybe a little resentful but it's never led to any lingering angst that I had about the relationship with my father.

Q. The, the last thing I want to ask about this, the general family relationship is that it strikes me as a little bit odd that a family of children reaching the ages you were reaching, you in particular –

A. Mmm.

5 Q. I think 22 at the time is that right?

A. Yes.

Q. Would be thinking in terms of this new house as a permanent home for the whole family rather than the expectation that as the children grew to maturity they would –

10 A. Move on.

Q. – separate, move on, go flatting, I gather the expression is, but this was not part of your plan and I'm curious as to why not?

A. Again, this is just the background, an aspect of our family dynamics. Yes, they're abnormal in comparison to the rest of New Zealand society, western society, whatever, whatever you want to compare it to in our culture that we live in now but you've gotta remember where we grew up and the culture that we were used to was in Papua New Guinea, all of us kids, so to us living together and continuing that close, you know, so-called, you know, communal – that situation and we could bring our partners into the, into the household and so on, you know, wasn't out of the ordinary at the time.

15

20

Q. So that the idea was a sort of an extended family where, when you acquired partners and spouses, that you still anticipated –

A. There would be.

25 Q. – a high degree of integration?

A. Yes.

Q. With your own nuclear family?

A. Yes.

Q. But that wouldn't account for the house being built to accommodate four children and two parents on a permanent unending basis?

30

A. No, no. Oh there's incongruities to it all and I, look, I don't understand what, you know, my mother's state of mind was –

Q. Mmm.

A. – and what her plans were, what her, you know, overall dream was. I can't read – even now, especially now I can't tell you that but at the time these were just the things that she wanted, that she was, you know, pushing on all of us.

5 Q. On the weekend prior to June 20th and the coming together of the family, there were a couple of witnesses who came forward and said that you were really the instigator of bringing Laniet home. There's a music teacher, Ms Drydan, and Ms Madder Turner and this Ms Madder Turner recalls Laniet saying that you were a bit freaky and that you told Laniet that if she didn't go to the meeting at home, you would come and get her and take her kicking and screaming. If you had
10 to – is there any truth to that?

A. I have no idea. I can't speak for her but as –

Q. From your point of view?

15 A. From my point of view?

Q. Yes.

A. That's –

Q. She's saying that you said you would come and get her and take her home kicking or screaming?

20 A. Who said? Who said?

Q. This is Madder Turner.

A. Said that Laniet said?

Q. Yes, that's right. She is reporting a conversation she allegedly had with your sister, Laniet.

25 A. Okay well I – there is no truth from my point of view to that comment. I mean I can, all I can say is that – and you know, I have no real recollection of it but I can say is if my mother had said to me, and it was discussed as a family that, you know, prior to that Sunday that Laniet was going to come home and spend, ah, and have dinner with us so I
30 can only assume that at the time my intention with, if anything, towards Laniet would be, "Look, it would be good to have you home," and encourage her to come home. It'd be a natural response and you know, when I compare it to what my relation with Laniet was at the time.

Q. Are you indicating that this was something set up between your mother and Laniet, that Laniet would be home for dinner on the Sunday?

5 A. Yes. I think there is another witness amongst that group, um, or, you know, who talked about this particular topic who said that Laniet was actually quite excited, looking forward to coming over. Things were getting better with her and Mum. I think – I can't quite, I don't have any (inaudible) but to that extent.

Q. Now the fact is, I think, that you did go and collect her on the Sunday?

10 A. No. I was there but you gotta remember, I didn't have my glasses. I couldn't drive, as – the way that it worked out was I was at rehearsals on the Sunday –

Q. Well you drove on the Sunday night to go and collect the fish and chips?

A. That's correct, yes. With Laniet in the car with me.

Q. Yes.

15 A. But I was at rehearsals at the university. After rehearsals I walked up to the museum cafe where Laniet and Arawa were working. Um, I had a cup of coffee with them while they finished their shift then Arawa drove us all to the Countdown. We did a little bit of shopping, I think we then stopped in, ah, at Laniet's flat. I think she might have gone to, I dunno, she went in briefly anyway and then came back and then we were – then Arawa drove us home. 'Cos I didn't –

20 Q. Is that –

A. – if, in answer to your question, I didn't collect her. I wasn't actually, you know – it was both of us, Arawa and I were both in the car at the same time. It was just that Laniet was coming home with us.

25 Q. So the picture is that the – each of you were doing their own thing and came together to go home for the Sunday night dinner?

A. It was just, it was all organised the night before. It was all convenient because Arawa and Laniet were at the museum cafe. I was, I got a ride to the rehearsal with a couple of other girlfriends from university and they dropped me off at the rehearsals after the (inaudible). So it was all pre-arranged on the Saturday.

30 Q. Did you sense any reluctance at all on the part of Laniet to come home on that weekend?

- A. No. I knew she – again, in hindsight, I knew she was nervous. She had – and I don't know if nervous is the right word, agitated to be tense, whatever you might, might, you know, put to it because when we went off to get the fish and chips she – I went in and placed the order, she stayed out in the car and when I came out to, obviously just to – 'cos she was out there by herself, when I came out of the fish and chip shop we waited there for five minutes. She was actually standing there having a cigarette and I wasn't really fully aware, I guessed, but I had never actually seen her having a cigarette. So that was, to me, in my state of mind at the time or naivety at the time, a fairly obvious and blatant sign of agitation.
- Q. And to what did you attribute this agitation?
- A. I have – she didn't say anything to – about it, so I had nothing to it. I just said, "Oh, I didn't know you smoked," and I think I might have asked, "Oh, does Mum know?" Sorry I can't recall anything –
- Q. Mmm.
- A. – more specific.
- Q. Did you have, from any source, whether your mother or your siblings or your father, that there was some purpose for getting together on the Sunday other than simply having a meal?
- A. No. It's what I've said from the start. All we were told is that Laniet was coming home for dinner and, and there was – you know, it was good to have her home. It was, we were all – you know, you started off asking about the Christmases and that's exactly the same thing. We all made an effort to get together at Christmas time. It was a – one of the pleasurable aspects of our family is that we all supported each other, we had good relations and we liked being in each other's presence.
- Q. The, the Sunday night, and I'm looking at page 2670 of your transcript, you said you came in the front door, I'm looking at the top of the page, "I saw my father sitting in the living room with Mum and Arawa and Stephen. When I entered I could sense," do you see this, "Old tensions"?
- A. Mmm.

- Q. And then you say, "There was nothing there that I could see or feel that was different, nothing said at that stage that was anything different that weekend." Now initially, and we'll come to your statement to the police, your recollection's left on that basis that really it was an uneventful evening and you went off to bed at the usual time, read briefly and went to sleep. At the 1995 trial, as you see towards the bottom of the page, about eight lines down, you said, "During the evening I heard something else. I was woken up. I was still half asleep but I remember waking and hearing raised voices coming from the living room."
- 5
- 10 A. Mhm.
- Q. "Usually I mean I'm able to sleep right through because you can't even hear the TV from my room. I was not able to hear anything being said. It was just raised voices, that was all. In relation to the car going out it was before hand, I can't say what time it was but it was before the car went out." Now the evidence, I think, from the bank machine is that the bank machine was utilised around 11.30 in the evening so this would be some time between when you went to bed and 11.30 in the evening. Now these raised voices, you may not have heard what was said. Did you recognise whose voices they were?
- 15
- 20 A. It was only – I was awoken from sleep, I may have just turned over and got back to sleep but I have no specifics of who was arguing or shouting or whatever.
- Q. When you say that the TV would not ordinarily be heard from your room? I take it you're suggesting that the raised voices were louder than one would normally hear on a, listening to a television programme?
- 25
- A. Yes.
- Q. And...
- A. Well that's why it stuck in my mind at the time.
- Q. But it's not something you mentioned the police?
- 30 A. I can only say that at the time this is because of the, you know, what I was experiencing, the trauma I was undergoing. And there are things, there are incongruities and what I, in the initial statements I made and, you know, all through, right through to my trial. I accept all of that.

Q. Are you suggesting that these raised voices might have something to do with a confrontation between Laniet and her father that has been referred to in various parts of the evidence?

5 A. The inferences that can be made from this are up to any expla – I'm no, not able to make any inferences whatsoever other than this is what I experienced.

Q. You're stating the fact you're not drawing any inference from it one way or another?

A. That's correct. I've got – sorry but I have no other information.

10 Q. No, I, I –

A. So I –

Q. I'm only asking what you know –

A. No, no, no, that's not –

15 Q. I'm not asking that, you know, divine inspiration strikes and things suddenly emerge that were not there but it, it may be a significant element of the situation.

A. Oh, absolutely.

Q. You did hear these raised voices. You see at page 2577, the evidence of Jan Clark.

20 A. Um, sorry would you –

Q. I'm sorry, it's not in there. I can show you myself. I'll, I'll just read it. Here's what she said at page 2577, "I realise there had been difficulties between Margaret and Robin but I had thought things had, in fact, been improving so I asked him if there was any – asked David if there was
25 anything that had happened over the course of the weekend that could have caused such a terrible tragedy. David said to me, 'No,' nothing extraordinary had happened, that it was much the same as usual, that it was always a little tense at weekends when Dad was home." Did you not – did you have that conversation with your aunt, Janis Clark?

30 A. I accept that that's – yeah. But I, I can't remember that particular conversation, no.

Q. All right. So whether or not you mentioned raised voices to her, you don't recall?

A. I have no recollection of that. Sorry but at the time I was in such a state I, I barely remember anything, any conversations.

Q. She goes on to say, I'm looking at the bottom of page 2577, "I was surprised that Laniet was at home because I knew at the time she was living out at Robin's house in Taieri Beach and I said to David, 'Why was Laniet home? I was surprised that Laniet was home,' and he said he had, in fact, gone to the museum cafe and talked her into coming home." Now I'm interested in, "talked her into coming home," which presents a different picture than simply the family according to a pre-arranged plan getting together and getting home.

A. Mmm.

Q. Have you any idea why she would make that statement?

A. No.

Q. How were your relations with Janis Clark prior to the 20th of June?

A. Ah, fine. I didn't know – I can't say any more than that. We weren't closely related to them because we've spent 16 years in Papua New Guinea so we didn't have close family ties as you would with, you know, aunts and uncles that you spend a lot of, spend a lot of time with –

Q. Mmm.

A. – as you're growing up. I mean, to, to us kids, our nuclear family, we didn't spend a lot of time with any, any of them even after we came back to Dunedin.

Q. Even though the Clarks lived in Dunedin?

A. Even though they lived there it would be months between, you know, brief visits, um, so you know I, I could only say it was, you know, they were relations but there was no close family ties –

Q. There's no intimacy between the families.

A. There's no (inaudible), no.

Q. All right, there's one other thing she mentions on page 2578 is something about a tattoo that I think perhaps –

A. I found, I find – I'm sorry but I find that particular part of it –

Q. Mmm?

A. – very strange.

Q. Well that's why –

A. If you read –

Q. That's why I'm asking you about it.

A. Yes, okay, if you read, please read it out?

5 Q. Well, she says that you, "Had a long discussion, talked about many things in terms of the family about his dog, Sasha, about various things, that tattoo, all sorts of things," I know somewhere else in the transcripts there are more ample references to the tattoo and that it was a reaction to something or other but what was your recall of the tattoo incident? If
10 you have any recall?

A. Oh yes, I've got plenty, you know, fine – my recall is absolutely fine about that but the – sorry, the reaction I have to her statements about it in – as in how she found the tattoo and why it came up, she said she was sitting there stroking my arm and you've gotta remember this is the
15 middle of winter, we're all dressed up in warm clothes so I don't understand why I was sitting there in a state of shock with just a t-shirt on or something that exposed my arm and she would be sitting there stroking it to eventually expose the tattoo and see – it's up here. It's –

Q. So it would be higher, would it be higher than the sleeve of the t-shirt?

20 A. Yes.

Q. So the t-shirt would cover it?

A. T-shirt would cover it.

Q. So the suggestion is that her fingers were creeping up under the t-shirt and raising it?

25 A. Well, exposed it. She says she was stroking my arm and then exposed the, the tattoo. So I'm sorry but that's, you know, I don't know why she would say anything of that nature but to me that's...

Q. What was the origin and timing of the tattoo?

A. It's okay – sorry, going back to that. Um, after my German Shepherd
30 dog was killed, taken away by the Council and killed, I was quite, quite upset about the situation. Ah, I – as I said before, I have an affinity with animals, I like working with them. Um, recently – oh, since I've been out of prison I've been heavily involved with horses and training them and all sorts of things so that's just a current indication of it but my – at the

time being as upset as I was, I've just – was out walking in South Dunedin after one of the rehearsals I believe, and I went past a tattoo parlour, um, and I just, that, I mean, "I'll just go in there and get, and have a look." While I was in the shop – it wasn't planned, it wasn't
 5 anything. It was just a, an off the cuff inspiration, you know, oh, not inspiration, what's the word?

Q. Spontaneous.

A. Spontaneous thing and partly because I was thinking of, you know, my dog and just feeling down about the whole situation because there had
 10 been nothing that I could have done.

Q. Now in the same part of her testimony, I'm looking at page 2579, she says that you were sitting at breakfast and, "David, Heidi and myself," is Heidi one of the Clark children?

A. Yes she's Jan's child, not Bob's.

15 Q. "David sort of rubbed his eyes like that you know and I said, 'Oh, are your eyes troubling you dear?'" Question, "When you say 'rubbing his eyes,' you were –" Answer, "Yes, it was sort of movement like that just as though his eyes were troubling him and he said, 'Yes they are a bit. I really need my glasses,' and I went to get up to go and get them,
 20 saying, you know, 'Where are they?' He explained his own glasses had been broken the previous Thursday when he was leaving his music lesson and I asked him how he had been managing in the meantime and he said he had been wearing an old pair of Margaret's glasses." Now we'll come to the glasses in due course but did you have such a
 25 conversation with Janis Clark?

A. I can't remember that actual conversation.

Q. Is it true that you said you had been wearing an old pair of Margaret's glasses?

A. I don't think I would have said that to her.

30 Q. Had you been wearing an old pair of Margaret's glasses at any point since the Thursday, I think it was, when you took your glasses in to be fixed?

A. No. No I haven't thought of them, seen them, worn them, let alone wear those glasses at any time that (inaudible).

Q. Did you know where they were?

A. I had an idea of where they were, yes. But that's, again, benefit of hindsight.

Q. And I understand they were kept in Margaret's room?

5 A. They were, in one of her drawers. I couldn't be more specific than that.

Q. And was it understood that you were free to help yourself to use them whenever a need arose?

A. If I needed them, I would ask her. I would ask my mother for them but the – as I say, the, the last time – oh, sorry, I hadn't even thought to use
10 them that particular weekend. Um, the last time I ever thought of using them was months before. I can't be any more specific.

Q. Now I understand that according to Dr Sanderson's evidence, the one lens would give you 90% of normal vision but the other level was adjusted for a condition that your mother had –

15 A. Astigmatism.

Q. – which you did not share and therefore it was somewhat difficult for you to wear them –

A. Exactly.

Q. – for any length of time. Can you just explain what you meant by that
20 discussion in the evidence?

A. Ah, well, the 90% improvement was really just for one eye. Um, the other eye, because she suffered astigmatism, and I can't be certain now which particular eye it was, meant that I couldn't see anything. In fact, it gave me a headache to see out of that particular eye through that lens
25 and so I would generally sit with my fingers over my, over that particular eye so that – to stop that from happening so I could only, as I say there was a partial improvement and only enough to see a black board at the lecture or if I wanted to watch, you know, TV from you know – at the back of the lounge. But in general, I didn't really need them.

30 Q. The lounge or the living room?

A. Ah, okay sorry – the livi – we refer to the living room as the, the TV room at the far end of the house just near where my mother was.

Q. Mmm.

A. Our lounge was the front room –

- Q. At the front, yes.
- A. – where the computer was.
- Q. Mmm. I think you testified that on the Sunday evening, the family was watching a video?
- 5 A. Yes.
- Q. And were you watching the video with the family?
- A. I watched part of, parts of it, yes. Oh, the first part of it.
- Q. And did you think it would improve your view of the video if you wore your mother's old glasses?
- 10 A. Well it may have but at the time I didn't even think to use them because I believe I sat in a big, you know, if I wanted a chair, just by the table which is closer to the TV. I can see well enough to do a lot of things without, without these glasses and I often go horse riding even now without them. I – then I was orienteering and quite successfully. Um, I
- 15 went running all the time. I mean middle of winter it's hailing and snow – and raining, it's pointless wearing glasses and I was quite capable of driving without the glasses even though it was a legal requirement.
- Q. What sight is involved in orienteering?
- A. Sight? Oh, it's – well, it's a big part of it. For a start you've got to
- 20 identify –
- Q. Could you just describe it?
- A. Okay. You are given a topographical map you're given a chart with co-ordinates on it and the co-ordinate given to you is the first point so you have to use the map, get your bearings from the surrounding
- 25 landscape and maybe hills, valleys, streams, road markings, fence markings et cetera, plot your path to the first point which is given to you and then at the next point you were given – you gain the second co-ordinate. Again, plot yourse – your path, use the compass to set yourself up and off you go.
- 30 Q. Now are you saying that it requires close vision to read this map or the instructions?
- A. No. Well, I mean I can read this book without my glasses.
- Q. Yes.
- A. So yes, you've got to have it obviously within arm's reach.

Q. Right.

A. So...

Q. But orienteering also involves –

A. Far –

5 Q. – identifying distant markers?

A. Yes, yes.

Q. And you say that you were able to do that without glasses?

A. I was.

10 Q. In your testimony you, at one point, said that beyond 30 centimetres or a foot, things began to get blurry?

A. They do, that's correct.

Q. I suppose "blurry" covers quite a spectrum. What did you – what do you mean by "blurry" beyond a foot?

15 A. Ah blurry as in I can't distinguish letters beyond, you know, this distance.

Q. You couldn't read a road sign?

20 A. No. I – well, the road as in, like, the name of the street, I couldn't read the name of a street until you know, it was close enough. I mean the lettering on those things is quite large but I could see a stop sign and a give way sign quite easily.

Q. In the typical orienteering problem, what is the distance from marker to marker to marker? Or is there any norm?

25 A. There's no normal. It could be, could be 500 metres, it could be, um, you know, three kilometres, just depends on the terrain, where the course is set up on that particular day.

Q. Well let me come to June 20th and perhaps you could just outline your recollection of the events without my interrupting you and then I'll come back with more specific questions.

A. Um, so just starting from when I woke up, is that what you –

30 Q. Yes. I gather the alarm goes off at 5.30?

A. Um, okay then. After the alarm would go off, I would wake up, obviously turn it off. Ah, it was one of those clock radio style alarms. Ah then I'd lie there for a moment or two gathering my wits and gather my courage to get out of, out of bed on a cold morning and my, as per my habit I

would set my clothes for the run on the chair beside beside my bed so in the dark I would get up, put on my clothes, my running clothes and so on and then, um, I ga, grabbed my walkman, put on my shoes, grabbed my bag and then as quietly as I could, left the house.

- 5 Q. Right. There's just three points of clarification. You talk about the coldness of the winter morning. Was the house heated?
- A. Yes.
- Q. How was it heated?
- A. Ah, we had a coal range on the – the old style cast iron coal ranges
10 downstairs in the kitchen. Ah, we had a stove in – old style stove in the living room at the top end of the house where the TV was and we had a pot belly stove, all wood burners in the hallway just outside of my mother's room.
- Q. So was the heating on?
- 15 A. It wouldn't have been on, no. The fires would have died by then.
- Q. So the wood fires from the night before?
- A. Yes?
- Q. Would have heated the house Sunday evening but had extinguished themselves by 5.30?
- 20 A. Yes.
- Q. Had you been up out of bed between the time you went to bed around 10 o'clock or whatever it was Sunday night and 5.30 when the alarm went off?
- A. No.
- 25 Q. Did you turn the light on in your bedroom?
- A. No I –
- Q. When you were getting dressed?
- A. No.
- Q. How do you see well enough to get dressed without the benefit of a
30 light?
- A. I have very good spatial recognition. I don't know what the term is but after I've spent a certain amount of time in a, in a room, I mean the current house I live in, I've got, as per habit, I regularly walk around in the dark. Because – and I can only say this after, with bad eyesight,

having a very good spatial recognition. It was just a habit. I didn't – there was enough, also there was enough ambient light outside the house showing in that you could, you know, see enough features to, you know...

5 Q. Ambient light from the street lighting or what?

A. Street lights, street lights.

Q. Street light, there was a street light outside the house?

A. I believe so yes. Across, it was across the street. I mean it's fairly, it's a wee distance but it's still shining through the curtains and, and it may only be that the curtain was highlighted enough that you could see, you know, that – there is it on my right, okay so the door is just there.

10

Q. All right, so we have you setting off out the door as quietly as possible?

A. Yes.

Q. And then just carry forward the narrative?

15

A. Um, okay, just out – out the door, shut it and, out the door, go on up the, um, turn left at, out the gate and up the street, up Every Street, go past the, the rest home and turning left again and then I pick up my first bundle of papers from, um, ah, sorry I don't have the exact number but it was just around the corner in Aytoun Street I think. Um, loaded that up and check the, check inside the parcel of papers because the, any changes to the run the manager would note on a piece of paper so I'd make those changes, I don't remember if there were any that day, make those changes and then start delivering papers.

20

Q. So was there anything unusual that occurred during the paper run that morning?

25

A. No.

Q. Now the – there's some evidence that you did the paper route earlier than usual, is that correct?

A. It's incorrect. I did it at exactly the same time I always did it.

30

Q. And then you gave evidence that you've got to the corner of Every Street and Heath Street about 6.40. Well I think earlier than that you, you made a marker at 6.22, you were somewhere on your route?

A. Okay. Sorry you'll have to remind me.

- Q. Well I'll, I'll turn it up here but I'm more interested in the 6.40. You were wearing a watch?
- A. Yes, I was.
- Q. And had you checked the watch for accuracy?
- 5 A. No.
- Q. And do you know whether the watch was ever taken by the police to check it for accuracy?
- A. Ah, no. I – 'cos I believe I was in prison with – I had it in prison. I had it with me.
- 10 Q. So when you went off on the Friday to the prison and they took some clothes and so on, you kept the watch?
- A. Well no, they took everything off me. I mean I had, excuse me, sorry I just might be wearing this but...
- Q. Good.
- 15 A. I had this necklace –
- Q. Yes?
- A. – which is a gift that my mother had given me. Ah, my glasses, shoes, my belt and my watch were taken when I was taken into custody by the prison officers.
- 20 Q. And when did you get your watch back?
- A. I have no instant recall of it.
- Q. Was it within hours, days?
- A. No, would have been a few weeks after.
- Q. A few weeks, right.
- 25 A. Yes. There was a cert – because I was considered a risk to myself, the prison guards and system only allowed me to have a, a mattress and a blanket and a piss pot, a bucket sorry. Um, and it was how I lived for the first, at least, two weeks until I was deemed – and I don't know what changed or how it was, how the system worked but –
- 30 Q. Mmm.
- A. – a few weeks afterwards I started getting other terrible hassles.
- Q. So you head up the Every Street hill?
- A. Yes.
- Q. From Heath Street.

A. Oh sorry, from the bottom, yes, yeah.

Q. From the bottom? And I have to say I visited it on my trip to Dunedin.

A. Steep isn't it?

5 Q. It is a steep hill and you estimated that it would take you two to three minutes in your statement to the police. How accurate, in your view, was that estimate and what was it based on?

A. At the time I, it's not accurate because I've since walked it myself and it took quite a bit longer. And considering you know I was having to wait for Casey, my dog, um, you know, she's not as fit as our
10 German Shepherd, not as athletic. You know, she's a, more of a barrel on legs than –

Q. Mhm.

A. – a sleek running machine. Um, and I had to wait for her so I was walk, definitely walking, having to encourage her to keep going 'cos she
15 wanted to stop and rest. So it wasn't accurate.

Q. In any event you walk up the hill and you –

A. Mhm.

Q. – arrive at number 65 and you go in the garden gate. Now one of the witnesses, Mrs Laney, said she saw you squeezing in the garden gate
20 at about 6.45 as it turns out. Did you notice her?

A. No.

Q. Do you know her?

A. No. No, I've got – there, there were – I've never actually, aside from the one or two people that I would meet on the paper run there's only one
25 constant lady and that was – she lived at the, um, about half – about halfway around the paper run and which she –

Q. She's the one you give the paper to?

A. Yes. She would al – she would give me bags of fruit at Christmas time.

Q. Special service?

30 A. Well it was just because I delivered the paper to her front door so she, she started giving me chocolate and I said, "Look, I don't actually eat chocolate. I'm very lactose intolerant," and so she, "Oh, what can I give you then?" And she said, "Oh," and we organised between us that she would give me bags of fruit.

Q. The – just tangentially –

A. Sorry.

Q. On your route and in connection with your eyesight, were you wearing glasses on your paper, on the paper route?

5 A. No.

Q. You say you identify, you were able to identify, I think it was a Mr Robinson or something who gave evidence?

A. I think he was –

Q. He was in a red car?

10 A. Yep, which is a, just around the corner from that lady.

Q. The –

A. Or just up the street from that lady I think.

Q. And did you recognise him at the time on the 20th of June?

15 A. I couldn't recognise him apart from the car but I got – I've never actually met him face-to-face.

Q. But I think you indicated that when you saw him testify that you were able to recognise him or am I mixing that up?

A. I don't believe so. As in I don't believe I ever recognised –

20 Q. Well, it's suggested by the Crown Law office that perhaps you were popping in and out of 65 Every Street so that if you were seen by Mrs Laney at 6.45 perhaps you'd gone in and then come back out for some reason?

A. Mmm.

Q. Did that happen?

25 A. No.

Q. There's also some dispute or conflict as to whether you collected the paper or your father, Robin, collected the paper on the morning of June 20th?

A. Yes.

30 Q. What's your recollection?

A. I don't recall collecting the paper but in hindsight and evidence and so on, and I have no actual memories to support this but, paper was where I would normally put it if I had brought it in so (inaudible).

Q. Where was that?

- A. Um, on the, just beside my door, on the right-hand side of my door, there was a, a pottery head of a, an island dragon and it was, I think it was right beside that somewhere and I would normally put it there and then Dad was normally the person who would read it first and he would
- 5 grab it from there and take it downstairs if it wasn't in the letterbox.
- Q. Do you have a recollection of seeing the paper inside the house when you entered it on the morning of 20th of June?
- A. No I don't.
- Q. Can you then carry forward and explain what you did from the point you
- 10 entered the house?
- A. Ah, from the point I entered in the house, came in the front door, closed it. Noticed that my mother's bedroom light was on, really obvious to see since the, the curtain to her room sits about this far off the floor so any light coming through is obvious. I saw that her light was on so, you
- 15 know, went into my room. Ah, kicked off my shoes, put the – oh, put the paper bag on the back of the door.
- Q. So you're turning left?
- A. Yes.
- Q. Into your bedroom?
- 20 A. Yes.
- Q. And did you turn the light on?
- A. No.
- Q. Why not?
- A. Ah, again, out of habit, I just – I, when I – I wasn't going to be in there
- 25 very long so I just – because my first thing is to get rid of the printer's ink. If you've ever handled a newspaper, it leaves – even one leaves the residue on your hands and it just goes everywhere. Anything you touch it just leaves smudges so as per habit, it's just dump that, get rid of the headphones, dump the bag and then get downstairs, wash.
- 30 Q. Right. The – so you're taking off your shoes and the evidence that you gave was that you were wearing these laser running shoes I believe?
- A. Okay. I – yes, I accept that. I –
- Q. I mean did you have – what, well I should just ask you – what running shoes were you wearing?

- A. A pair of running shoes. That's as specific as I can get. I don't really recall what colour they were, um, I know I had, a new, a newer pair.
- Q. Yes?
- A. And I had an older pair that I used to wear in the garden but I think they
5 may even be, like, odd pairs from two previous running sets of shoes that I had. Ah, the only ones that survived and they were full of holes and all sorts.
- Q. So –
- A. But –
- 10 Q. Which pair did you use?
- A. Paper run?
- Q. On the paper run?
- A. Ah, it would have been the newer pair.
- Q. Right. And were there more than those two pair of shoes or –
- 15 A. Oh yes.
- Q. – one pair and one odd set in your bedroom?
- A. Ah, as in sports shoes and so on?
- Q. Any kind of shoes.
- A. Oh, okay, all sorts of shoes. I had boots, um, the horrible boat shoes,
20 um...
- Q. Right. In any event, are you clear that it was the newer pair of running shoes that you wore –
- A. Yes.
- Q. – on the paper route that morning?
- 25 A. Yes.
- Q. Fine. So you now emerge from your bedroom unburdened of the paper bag and shoe, walkman and shoes and then what do you do?
- A. Ah, went, I went, turned left out of my room and then directly downstairs. Ah, and...
- 30 Q. Why wouldn't you go over to your mother's room? I gather there was a curtain across her door?
- A. Yes.
- Q. To see if she was up and whether she wanted a cup of tea or something?

- 5 A. Well I had the thought, I believe, of making her a cup of tea and because I saw her light on, assuming she would say as soon as she was awake and she normally did wake before I left to go to the university anyway so I mean it was just one of those things that I would have done. I mean, sorry, not a cup of tea, a cup of coffee. She'd preferred coffee in the morning. Um, so why wouldn't I have gone straight to her room? It's because I was sweaty and dirty and, and I wanted to clean myself up. I mean after doing that, you know, I'm still –
- 10 yes, I'm hot and sweaty from doing a paper run but you, as soon as you stop any exercise in cold weather, you get chilled so the first thing that I have to do is clean myself up and get myself dressed for, you know, warmer clothes that I can then go to university. You've gotta remember it's a cold, cold house.
- 15 Q. Mmm. Two things on that. The allegation is that at some point during the morning of June 20th you were wearing this green, loose-weave jersey with a v-neck. Were you aware of that?
- A. I'm aware of the jersey, yes.
- Q. Yes. And did you wear such a jersey at any time on the 20th of June?
- A. No I didn't.
- 20 Q. The police found track pants which they believe were yours, and a pair of corduroy trousers in the wash. At any time on the morning of the 20th of June, were you wearing long pants?
- A. No.
- Q. Over the black shorts?
- 25 A. No.
- Q. So you descend the stairs. You say you were sweaty and getting chilled. Did you take a shower?
- A. No I didn't.
- Q. Where is the shower located in the house?
- 30 A. Ah, right at the bottom of the house if you go down the stairs through the kitchen and into essentially the bathroom laundry, so it's the very bottom of the house, essentially as far as you can get in the house.
- Q. Where, where is the washing machine? Where was the washing machine located in relation to the bathroom?

- A. It's in the same room. The washing machine is – if you go in the, through the kitchen and through the bathroom door, turn immediately left and there was a sink and there was a shower/bath combination with a curtain around it and then straight through in the right, far right corner of the room there's a wash tub with the washing machine inside that.
- 5 Q. There's a bit of a conflict in the evidence as to whether you washed your hands before doing the laundry or after. Do you have a clear recollection of when –
- A. Yes.
- 10 Q. – you washed your hands?
- A. My memory up until a specific point is absolutely clear and –
- Q. And now just that, that point is when you saw you saw your mother's –
- A. Yes.
- Q. – dead body?
- 15 A. Yes. And so I washed my hands before I did the laundry.
- Q. Okay.
- A. As I said, printer's ink is very, you know, it comes off and it, it smudges and it's difficult to get, like, it just dirties everything. It's horrible stuff. So, you touch clothing, it goes straight onto the clothing. It'll actually stain white for instance.
- 20 Q. Did you wash your se – your hands a second time after putting on the laundry?
- A. No, there was no need.
- Q. Right, so you're downstairs, you wash your hands and – did you wash your hands in the porcelain basin?
- 25 A. Yes.
- Q. And the police say that there were some drops of blood in, in the porcelain basin identified as part of the examination of the crime scene.
- A. Mhm.
- 30 Q. Do you have any explanation of how that blood got there?
- A. No.
- Q. Did you see blood in the basin when you washed your hands?
- A. No.
- Q. Can you describe the lighting in the, this –

- A. Very dim. Far dimmer than it is in here.
- Q. Well is there a light bulb in the ceiling?
- A. Yes, in the centre of the room I think.
- Q. And any idea what wattage light bulb was in there?
- 5 A. Oh, I could guess but – 40? 60?
- Q. But – it's a, so, you then did what after washing your hands?
- A. Um, then put – went over to the washing machine and sorted the darks in to go into the wash because I wanted to squash my sweaty, the sweatshirt, the red sweatshirt that I had been wearing on the paper run.
- 10 Q. Mhm.
- A. And I wanted to put – so and there's enough colours and so on there so I decided to put them through, um...
- Q. This was a normal routine I gather?
- A. Yes be, because I was first up generally, I did things like the wash and
- 15 put the kettle on, you know, start the coal range fire and you know did those, the little chores that would actually help the household before I then got myself ready and off I went to university.
- Q. And did you throw the red sweatshirt directly into the machine or into the laundry hamper?
- 20 A. No, into the machine.
- Q. And did it go into the machine before or after you loaded the hamper?
- A. Before.
- Q. So you threw the red sweatshirt in?
- A. Yes.
- 25 Q. You then did the sort?
- A. Yes.
- Q. Of the whites from the darks?
- A. Yes.
- Q. You then put the darks in the washing machine?
- 30 A. Yes.
- Q. And do you recall that the, this green sweater was in the wash, sorry in the hamper of dark clothing?
- A. I, I'm sorry I don't recall now the specifics of the clothes that I pulled out. I can only rely on the statements that I made at the time.

- Q. So those – that bundle of clothing was then thrown into the machine?
- A. Yes.
- Q. And do you recall how full the machine was, that load?
- A. It was a full load I think.
- 5 Q. Fairly full load?
- A. I think. I'm sorry, I can't even picture, um, how, you know where the clothing would have been in relation to the top of the machine but I think it was a full load.
- Q. Does a, does a full load fill faster than a partial load or do you know?
- 10 A. I don't know. I guess it would fill? I mean I, educated guess, it would fill faster because more clothes means less water going in.
- Q. The statement that you gave to the police was that the washing machine cycle was between 45 minutes and an hour?
- A. Yes.
- 15 Q. What was the – what caused the variation if, are you saying that at times it took 45 minutes, at other times it takes an hour? Or are you saying that –
- A. I don't – yes, it does, yeah, it did, it did vary and based on the experience of doing various – you know, the cycles of different – oh,
- 20 sorry, putting a wash through at different times of day it did change or it seemed to be a bit longer later in the day and that's – I can only assume that it had related to the water supply into the property, I mean the pipe work had never been dug up and replaced by us, so – and I understand that a lot of rusty pipes are in the area, um...
- 25 Q. But I'm interested in the variation.
- A. The variation of it?
- Q. You have sometimes – if you say sometimes it seemed to go faster and other times slower, I think one of the variations you're referring –
- A. Like (inaudible).
- 30 Q. – to is water pressure.
- A. It, look – that's only based on you know, what I've heard in testimony and, and all the various experts that have, you know, given evidence at various points in time, the, you know, theories that we have bandied around together to, you know, to explain the situation, I –

Q. But I'm interested in the figure you gave the police which is 45 to –

A. Well that's just based on experience. What I had experienced.

Q. Right. The detergent, I think, was kept in a container?

A. Yes. Blue tub with a white top I think.

5 Q. And the – presumably you would have reached for the container after the load was –

A. Yes. Sprinkled it –

Q. – in the machine?

A. Sprinkled it all on top, yeah.

10 Q. Right. And would there have been any reason why you would have had any blood on your hands at that time?

A. Not knowingly, no. I – sorry I don't know how to answer that question other than –

15 Q. Well the – I'll come at it in a different direction. The evidence is that there were clothes which the police believe to have been blood stained in the wash that you loaded.

A. Mmm.

Q. And did you notice any blood stain or blood in the load when you put it on?

20 A. No I didn't. And you know, if that – you'd – taking into consid, consideration the dimness of the light in the room, the fact that there had been, you know, a wash done the previous day and somebody forgot to take the towels out of the tub which caused a flood – and it happened regularly, just a common mistake that it did seem to happen.
25 Um, you know if I had touched clothing that had any wetness to it, and I can't remember, this is only postulation, is that you know, my assumption would have been that it was just from the, you know, wet from the flood the previous day.

30 Q. Mmm. I want to ask you about that assumption because what you observed in the morning of June 20th was that the floor was wet?

A. Mmm.

Q. And did you observe on the Sunday evening that the floor was wet?

A. No.

Q. So based on your observation, could it have become wet at some point between the time you went to bed and the time you went down to the laundry after returning home?

5 A. Possibly, yeah, possibly. Um, I can only say that the – my memories of the night before, when I went down to clean up and you know, have a shower, go to bed et cetera, no, sorry I didn't, I didn't have a shower. I think, I think I may have just brushed my teeth and then gone to bed. Um, I wouldn't have gone over to where the machine was so if it had flooded during the Sunday, ah, yes, Sunday, the patch of wetness
10 wouldn't have gone right across the floor to where that sink was.

Q. So you wouldn't have noticed one way or another?

A. I wouldn't have notice one way or the other, no.

Q. But just in attempting to reconstruct this, if these murders were committed at some time when you were out on your paper route –

15 A. Mmm.

Q. – and there had been a attempted clean up whether the floor might have become wet at that time, would that be compatible with your observation?

A. It may have. It may have.

20 Q. You have no knowledge one way or another?

A. No.

Q. No.

A. The only thing I can say is there were no towels in the tub. There was nothing in the tub from my recollection when I came home and did the laundry so there was nothing there to, that would have caused the flood
25 if you know what I mean.

Q. Yes. So the, the supposition that the flooding was caused by the drain being blocked by towels would not operate based on your observation, because there were no towels that you saw in the tub –

30 A. Yes.

Q. – to have created such a blockage?

A. Exactly.

Q. So there could have been such a blockage, the towels removed before the morning of June 20th?

A. Yes.

Q. Now the, there is evidence that there was a towel with some blood stains on it in the laundry area.

A. Mmm.

5 Q. Do you know anything about that?

A. No, no. I mean if you showed me a photo where it was and what colour the towel was, I might be able to say that it was a particular person's but other than that, I have no comment.

10 Q. I suppose that the point is whether you recall using a towel after putting the laundry on.

A. No I didn't.

Q. The – this –

A. Sorry, I, okay let me clarify. I don't recall using a towel –

Q. Yes, well...

15 A. – other than the one in the laundry.

Q. Would there have been any reason for you to use the towel?

A. Possibly, my hands were a bit you know wet, or – but they weren't wet because it was dry laundry. I don't know.

20 Q. Did you see any blood on your hands at any point after putting the laundry on?

A. No.

Q. Did you notice any blood on your hands at any time during the morning of June 20th?

A. No.

25 Q. The machine, I gather, is initiated by a dial that you turn and then push in to initiate the cycle?

A. Mhm.

Q. Can the cycle be initiated at different points depending on when you, where you push it in? In other words, is it possible to do a partial cycle?

30 A. Yes. Ah, from memory I think it didn't matter where you turned the dial to, you just turned it anywhere obviously if you wanted it longer you kept it right at 12 o'clock, if you want it shorter, just turned it even, you know, further around.

- Q. So the, for example if you were in a hurry and wanted a very short rinse?
- A. Short wash and then just a rinse cycle with it, yeah.
- Q. Then, then you could adjust it so that you would get a short programme, as it were?
- 5 A. Yes.
- Q. Now the statement to the police was that, to the best of your recollection, you set it for a full cycle?
- A. That's correct.
- 10 Q. And I take it that would have been the normal course?
- A. Yes.
- Q. You didn't have a specific recollection of the morning of the 20th of June, setting it for a full cycle?
- A. As in this, where I, where I –
- 15 Q. As opposed to your general practice?
- A. As in where...
- Q. Where was the cycle initiated?
- A. I don't know exact, specifically. All I know is that I, I turned the dial and pushed it. I know it was after – there was, there was a small section, it was the start of the – looking at the dial from 12 o'clock between 12 and one or two there's a super wash which extends, makes it an even longer cycle and generally we put it after the super wash so wherever –
- 20 Q. So you exclude the super wash?
- A. Yes.
- 25 Q. And you started on what you've described as a full wash?
- A. It would just be a normal wash.
- Q. And so my question was when you say you put it on full wash, are you saying your normal practice was to put it onto full wash or are you saying you recalled at the time you were speaking to the police officer that you had, in fact, pushed in the full watch, wash, on the morning of
- 30 June 20th?
- A. It's that yeah, that I, I turned the dial, pushed it in at the full wash somewhere. Be more specific, saying two degrees past that mark, I can't do anymore.

Q. So you're saying there's some flexibility –

A. Oh yeah that was (inaudible) –

Q. – within the full wash?

A. – because we just, we just spin the dial and then push it. There's no – I
5 mean...

Q. But there's no reasons why you would not have wanted a full wash?

A. No. I always put it on a full wash.

Q. Then what did you do?

10 **UNKNOWN MALE SPEAKER:**

Excuse me, Sir, wouldn't it – talking, perhaps the time to stop now and the –
or whenever it suits you?

BINNIE J:

15 Yes, I'd just like to finish this bit and then we'll stop. I have my watch here, I
can assure you.

EXAMINATION CONTINUES: BINNIE J

A. After doing the wash?

Q. Yes.

20 A. Um, after that I, I went back up towards my room, back up through the
kitchen towards my room.

Q. Can you estimate how long it took you to deal with the washing?

A. Not now. I don't – I would only be guessing.

Q. No?

25 A. I would have to rely on, if there was any, anything that I've made in the
statements then I'd have to rely on that.

Q. So you went back up the stairs?

A. Yep, back up stairs, turned right at the top, towards my room, and with
the intention of getting dressed for university, changing my clothes from
30 my running gear into clothes for university. Walked in the door and
turned on the light and from memory the light switch is just on the right
as you go in the door and that was one of those – the bullet case and a,
a trigger lock on the floor in my room because that was...

- Q. Did – what went through your mind when you first saw that?
- A. Oh, confusion. Um, confusion, concern, um, I didn't know why it was out and I – so at that point I thought, “What’s going on?” I had to find out what’s going on and –
- 5 Q. Can I just stop you there? Did the – you say that when you got up at 5.30 you did not turn the light on?
- A. That’s correct.
- Q. So is it possible that this state of affairs with the cartridges and the ammunition and so on, that these items were already there when you
- 10 left at 5.30?
- A. I don't think so. ‘Cos I, um...
- Q. Could you have seen well enough to?
- A. No, I wouldn't have been able to see well enough to discover it but I
- 15 generally kept my door closed with a cushion just behind the door, it tended to swing open and so if the dog pushed the door open, or anything I would hear the cushion being pushed back and I didn't wake at any point in the night.
- Q. Right.
- A. So –
- 20 Q. So there you are, the light is on, you see what you see?
- A. And so the – yeah, it was just the question in my mind. I was confused, an element of panic not sure what was going on and needing to find out because obvious a rifle walking around the house is not a, you know, without, with only one light on there was – concerned. Um, I went down
- 25 towards my mother's room because well, she was awake and I thought, oh, she, she'll know what's going on or if it's all okay, I carry on, if not, you know, get it locked up again and went to my mother's, ah, to the curtains in my mother's room pushed it to the side and saw her at that point.
- 30 Q. And was her body quite well lit by the light that was on in the room?
- A. It was lit, certainly lit well enough for me to see the image that I still have. I don't know if that image is correct but it certainly stays with me.
- Q. Was it her reading light that was on?
- A. Yes.

Q. And can you just briefly describe what you saw?

A. I saw her, um, propped up (inaudible) several pillows, I wouldn't say it was a sleeping position, it was just – she was slightly elevated and, um, ah, I just remember the, you know, there was blood on her face, um, just purple in this, in the eye, well, of the eyelid.

5

Q. Her eyes were open I take it?

A. I, I – in my recall of this, of this, seeing her eyes were open.

Q. How sure are you of that? That, the –

A. I'm not at all.

10

Q. – the pathologists say it is more likely they were closed?

A. It, it, it's that image I have is only through trauma and I believe because now I'm sorry the images that I have of my family are so distorted that, as in, you know, I sometimes if I'm recalling a scene, I see a photo from the evidence, other times if I'm recalling a scene, it's something that has come from a dream that I've had. You know, I might...

15

Q. You were quite specific with the police –

A. I was.

Q. – on the morning of June 20th, that her eyes were open.

A. Yes. And I can only say that that was not (inaudible), a false reflection.

20

Q. When you discovered your mother in the position she was, did you touch her?

A. No, not to my knowledge.

Q. Did you – why didn't you, at that point, call emergency?

A. I'm sorry I can't give you any rational answers from this point on.

25

Q. This is the break point in the memory.

A. Yes Sir.

Q. All right. Now on June 20th, your recollection was that you went from your mother's room to the lounge and did not go to see the other rooms where your brother and sisters were? I believe Stephen's room led off your mother's room?

30

A. Yes it did.

Q. Could you see into Stephen's room from your mother's room?

A. You can do.

Q. Did you see anything in Stephen's room on this first sighting of your mother?

A. I have no recall of it.

5 Q. Now when you spoke to the police, you said you went in search of your father and the question is why would you look for your father in the lounge?

A. Ah, again I can only give you what I made in my, in the statements and, and in evidence and so on and that was really his influence, he was most concentrated, he spent a lot of time in that room either working on
10 the computer or praying or, you know, discussing things with visitors that he might have had.

Q. Well, I think it's this idea that, that it's the room where he had exerted the most influence?

A. Yes.

15 Q. I understand from that but because he was living in this van, that that was the room within the house that he did whatever he had to do.

A. Mmm.

Q. Is that what –

A. Yes that's correct.

20 Q. It's an odd way of putting it, this is a room where his influence was focused –

A. Oh he was just –

Q. Can we kind of get at what you mean by that?

A. Well, it was the room where he could be away from Mum and still, I
25 guess go about his business that he would do and in the household without her being overbearing or beating him down and telling him off or, you know, the various things that she –

Q. It's a bit of a sanctuary?

A. Well, for him it was. And it was, it was deemed that for, for all of us as
30 well that if we were to have, um – 'cos we, we kept that room cleaner and tidier and – all the rest, than the rest of the house in order that if we did have, you know, visitors that was when have the, you know, a cup of coffee with them and you know, chat with them. Formal, a formal room so to speak.

Q. Rather than the living room where the television was located?

A. Yes, yeah.

Q. Right. And so what do you – the lounge door was closed when you went out on your paper route and I think you indicated it was closed
5 when you returned from your paper route?

A. I think – I'm sorry, I only know from –

Q. Well, we'll look at the statement. You don't have a present recollection, all right. In any event, you had access to the lounge and then you saw your father?

10 A. Yes.

Q. And did you turn the light on?

A. I don't believe I did.

Q. How was your father's body illuminated?

A. From the light in my room.

15 Q. Just shining across the hall?

A. Goes acro – the, the two doors are directly opposite.

Q. As of June 20th, and we'll come to the recovered memory in the, after the break, you didn't recall anything really from the discovery of your father until calling the emergency services some time later? Do you –

20 A. What's some time later? I said in my –

Q. 7.08 I think it was you called the emergency, the 111.

A. Ah, yeah, oh, I don't know exactly what the difference in time was between finding my father and making a phone call but that's because I have no memory. I mean isn't it also – and something that I could have
25 been directly out of there and to the phone.

Q. Well we shall pursue that after the break.

A. Okay.

INTERVIEW ADJOURNS

30

INTERVIEW RESUMES**EXAMINATION CONTINUES: BINNIE J**

Q. If you look in the book in front of you at page 390, this is –

A. Is this in the blue sections?

5 Q. Yes, no. Right there. The number's in the upper right-hand corner.

A. Ah yes.

Q. Page 390.

A. Mhm.

10 Q. You're talking about the discovery of your mother and father as we had talked about before the break and then you, you say about midway down the page that, "He was grey/white. I saw the blood on his temple. That's when I went to call the police."

A. Mhm.

15 Q. What satisfied you that he was dead other than the colour and the blood? Why did it immediately strike you that he was dead?

A. Um, I don't know other than – sorry I've gotta go back into that place in my memory on entering the room, I – was only the, the impressions that I have now is that I mean it was, he was still also, I don't even have a picture in my mind of what I saw.

20 Q. On the next page, 391, its second and third series of questions, you were asked, "Did you go into any of the other rooms?" And you say, "No."

A. No.

25 Q. "Did you try to wake anyone else?" "No." Do you have any recollection of your thought processes at the time. I mean did, did you have any indication that your memory wasn't what it might be?

A. Oh yes.

Q. Even at that stage after your discovery of the mother which you said is the dividing line?

30 A. I actually remembered and then I, I strike, I mean I did my absolute best at the time despite the fact that this, you know, within such a short space of time after what I had experienced they were questioning me at length and I was doing my best and even then trying as hard as I could

with their urging and the questioning and lines of questioning, trying to find answers and I s – could not. I had no explanation for, you know, a period of time that morning. I had no, no answers whatsoever.

5 Q. Mmm. Because this, the – this is not reflected in the statements. The statements are quite definitive.

A. Mmm.

Q. When he says, “Did you go into any of the other rooms?” You don't say, “I don't recall,” or “My memory is confused.” You give a flat, “No.”

10 A. Ah, okay now I make the distinction that's what's recorded. All of these statements were hand-written.

Q. By the detective?

A. By the detectives.

Q. Yes.

15 A. So that's what was recorded and that, and hasn't already been shown some of the conversations and things that have been stated to me were not recorded and there are situations that could have had an impact on my thinking at the time.

Q. But you do sign the statement at the end?

20 A. Yes. I have no, look I've got no problem with accepting that these are the statements that I made and I, and I was doing my best but what they – I mean considering what I was going through, I wasn't going to read through that many pages of hand-written notes and look for every spelling mistake and look for every, you know, situation where, you know I – okay, there's a point, there's a poignant question and answer there. Yes I should – maybe I should have spelled it out a bit more, maybe I did.

25 Q. You're saying that as you spoke, the detective was making hand-written notes?

A. Yes they were.

30 Q. And he may or may not have been taking down the full content –

A. Everything that I said.

Q. – of what you said.

A. That happened on several occasions.

Q. Right. So...

- A. So I mean all I'm saying with – in regard to this particular situation and the question you were asking, I don't know. I have no memory of, other than looking at this, won't say any more than that or less than that.
- 5 Q. In terms of your father, at page 392, over the page, the second question there?
- A. Mmm.
- 10 Q. "What time would your father normally arise – this morning?" Answer, "It varies between twenty to and 10 past seven." The suggestion has been made that if you got home at 6:45 and didn't call the emergency services until 7:11, that the delay is explained by waiting for Robin to come into the house where, as you know, you're accused of ambushing him. Can you comment on, first of all on that allegation?
- A. The allegation is untrue. I had nothing to do with the deaths of any members of my family.
- 15 Q. In terms of Robin's practice in the morning, the – you referred a few moments ago to he would go to the lounge when he was doing his personal things and you mentioned praying –
- A. Mhm.
- 20 Q. – as one of the things? Was there a ritual that he had in the morning in relation to prayer?
- A. Not that I remember. The only rituals that I ever really observed was, you know, reading in the paper, he liked, he liked reading the paper and he would make himself a cup of coffee and have some breakfast and to shower and head off to school.
- 25 Q. Now there is, there is one witness who said that she observed your father at prayer?
- A. Yeah, Barbara Neasmith observed him doing it on a, you know, regular basis and, um...
- 30 Q. And what is your recollection?
- A. Well it didn't happen on a regular basis at our home because he wasn't there between Monday, well, all Monday through to Friday evening.
- Q. When he was there?
- A. So when he was there? No, it wasn't a regular habitual thing. He would – sometimes he would go in there after an argument with Mum.

Sometimes he would go in there, yes, first thing in the morning and just sit and contemplate for a while no matter what, what he was doing. Um, at other times he might do that, um, you know, mid way through the day on the weekend.

5 Q. When you did see him in prayer, was he on his knees?

A. No.

Q. What position did he pray in generally speaking?

A. Ah, well I don't know what he was doing but he was in contemplation, I would say either sitting on the bean bag or in one of the chairs, the lounge chairs, comfortable chairs that are in, arm chairs, sorry.

10

Q. When you talk about a bean bag, this is a kind of a piece of furniture? It's a fluffy thing that you can sit on like a chair?

A. Yeah, well it's a, it's a big loose bag that's filled with little polystyrene balls.

15 Q. Mmm.

A. And so when you sit into it, it moulds around your body.

Q. It serves the purpose of a chair?

A. Oh, it's a chair, yes.

Q. If you look down the bottom of the next page, 393, you do refer to raised voices at the bottom of the page but it seems to be in relation to an argument on the Saturday night over the guttering?

20

A. Mmm.

Q. Do you see that? I'll just read it on the record. Question, "Did anyone have any recent arguments with him?" Referring to Robin, "Apart from the argument I had last night?" I take it that refers to the chainsaws.

25

A. Mmm.

Q. "Mum had an argument with him on Saturday over the guttering. We had to put new guttering in. I don't know what it was about, only heard the raised voices." And that seems to be raised voices on the Saturday?

30

A. Yes.

Q. Do you think you may have confused the raised voices you talk about on the Saturday with what you later recall as raised voices on the Sunday night?

- A. No, no.
- Q. There were two?
- A. I don't recall, I don't recall that argument now that I'm referring to –
- Q. The guttering?
- 5 A. – on Saturday. The guttering thing.
- Q. Yes?
- A. Ah, but I definitely recall waking and hearing raised –
- Q. On the Sunday night?
- A. – voices on the Sunday night.
- 10 Q. Mmm. As to the famous green loose-weave sweater, I think it's exhibit 98, it's somewhat confusing in the record, there seem to have been a penchant for green sweaters in the Bain family. There were some high-necked, some v-necked, different people having different green sweaters. First of all, in your statement of the police, and we'll come to
- 15 it if you don't recall it but if you do recall it we can proceed now, that the green v-necked sweater was attributed by you as having been worn by Arawa?
- A. Mhm.
- Q. And then – now was that exhibit 98? Was that the green loose-weave
- 20 sweater that apparently was worn by the murderer?
- A. I believe so, yes.
- Q. And when did you see her wearing it?
- A. Ah, it was most recent –
- Q. Most closely to the June 20th?
- 25 A. Ah, weeks, probably a couple of weeks before.
- Q. Mmm?
- A. Sorry I –
- Q. No, it's all right.
- A. I can't – actually I can't, I can't be definite of it all.
- 30 Q. And whose sweater was it?
- A. It belonged to my father. I think, I think he had several similar jerseys.
- Q. Yes?
- A. Um...
- Q. Were they all green?

A. No. But he had – because of the physical work that he and I both did around the property, you know, chopping wood primarily and doing a lot of gardening and so on, we had rough jerseys or bush shirts or whatever that we would wear out and – and around the property. I mean I've got several photos, family photos actually. If I'd known, I would have brought them but – oh, he and I and Stephen were all involved in cutting down trees, he was wearing something very similar to this exhibit.

5

Q. Exhibit 90? There's also reference in the evidence as to a higher necked green sweater?

10

A. Yes I think that was – from memory that was a better quality one which he wore to school.

Q. So that was also your father's?

A. Yes.

15

Q. Did anyone else –

A. But –

Q. – in the family have –

A. – I'd have to have it, and see it, I'm sorry.

Q. I understand and I understand you're working from recollection.

20

A. Yes.

Q. Did anybody other than your father own a green loose-weaved sweater?

A. I don't know.

Q. You don't recall?

A. No.

25

Q. Right.

A. I don't think so, no. Um, the only – the only green jerseys that I can think of, and I certainly don't own a bright orange and yellow and...

Q. Yours, I gather, is somewhat famous isn't it?

A. Apparently reasonably famous in New Zealand, yes. So everybody knows all the jerseys I've had.

30

Q. All right. The – in the evidence in 1995, you said that your father had been wearing what I'll call exhibit 98 on the weekend prior to the murders?

A. Yes.

Q. And this is not mentioned in your statement to the police?

A. Okay.

Q. But you have – is this something you remembered at the time and simply weren't asked about it or it wasn't recorded or was this something that you came to recall at a later date?

A. I don't know. I, I – is this evidence I gave in, on the stand?

Q. Yes.

A. I can't recall exactly when I, when I gained that memory.

Q. All right, the page 388 it looks like, we're talking about the lump on your head.

A. Three pages ago?

Q. Yes. No, it's not right. I'll read you what it –

MS MARKHAM:

398.

BINNIE J:

298 is it?

MS MARKHAM:

The numbering's very vague.

BINNIE J:

Q. Yes it is. Yes you're right, 398. Top of the page, it says, "Outlined situation 15/10," do you have that?

A. Mhm.

Q. In the second series of questions, the police ask, "Can you think at all how you got that lump on your head?" "I can't remember anything –" Answer, "I can't remember anything that would of done it except when I blacked out. I don't know how I got this skin on my left knee on." Off, I think it should say. "My left knee either." Do you see that?

A. Mmm.

Q. Now can you explain what you are referring to when you talk about "blacked out"?

A. Fainting.

Q. And when did that occur?

5 A. Ah, I – again, I, I have no memory of it, of it happening other than testimony and so on but the only recall I have of that, of that period of time, um, is you know, the door being, the window being smashed and the police officer coming through waving his gun, ah, pistol around and then him calling out about “five found” or “five bodies” or something and that’s when, I think, of that, I fainted.

Q. Right.

10 A. And what this is referring to.

Q. So on the morning of June 20th you were, the estimation you were offering was that this fainting might have been the cause of the injury to your head and to the –

A. It was the only situation I could remember.

15 Q. Yes?

A. That I had actually fallen on – in any fashion, that’s why it is the only one that came to mind at the time and why they offered that as an explanation. As to any other situation that could have happened between finding my mother and that moment, there’s nothing that comes to mind.

20

Q. Well, could the lump on your head have occurred at some point prior to leaving on your paper route?

A. No.

Q. Why do you say that?

25

A. Because my memory’s absolutely clear. I didn’t get it before I went to bed, I didn’t get it after I got into bed.

Q. Now the evidence that has been given by some of the ambulance people and police suggest in their view, you were feigning a fit. You’re aware of that –

30

A. Yes I’m aware of it.

Q. – testimony?

A. Yes.

Q. What do you have to say about that?

- A. Well it's – falls in line with everything else they came up with as well to try and point the finger at me. And they come up with 111 tapes that say things that aren't there. They come up with, um, you know, you know “evidence” from, you know, witnesses and it's proved untrue. And
5 this is exactly just another one of those situations. I wasn't faking anything and I did my best through all of these, you know, interviews to try and help the situation and to try and get some, um, sorry – my frustration is not obviously at this situation with you, I – understand – I'm trying to help here but it's that the constant array of things that are
10 coming up over time especially –
- Q. This is the time to say what you've got to say.
- A. My frustration is that the so-called new evidence that keeps coming up, the new proffered, you know theories and suppositions and so on and I've – you know, I'm quite sick of it and I'm having to constantly defend
15 myself when I've been proven. This situation, sorry, to get back to it, I don't know they say it to answer the question directly other than, look, I – this is my evidence. This is what happened to the best of my recall.
- Q. Can you tell me the incident with the 111 tape that you just referred to?
- A. Oh that was in the lead up to the second trial. They just, they suddenly
20 found apparently and this is the – accor – you know, according to them words that were proven not to be there. A so-called confession.
- Q. Is this the thing about the key? There was something that –
- A. No, no the –
- Q. – somebody had purported to hear on the tape about –
- 25 A. Yeah, while I was talking to them.
- Q. – the key?
- A. No, oh, no it's not the – it's not anywhere in here.
- Q. Mmm.
- A. No it all led up to the trial. Now I don't know whether it's anything I'm
30 supposed to talk about or whether it's actually the material and the stuff that you covered, I'm sorry.
- Q. Right.

A. But it's just an – it's an example of the things that have kept up, kept coming up and I've had, I – you know, my team and I have had to deal with from, you know, day one.

5 Q. I'd like to ask you to look back at to page 378 which is the start of the red tab?

A. Yes?

Q. And he says that he arranged for you to see Dr Pryde?

A. Yes.

10 Q. And at the time the police say they regarded you as a witness rather than a suspect?

A. Mhm.

15 Q. But Detective Dunne says that – this is mid-way down the page, "The accused was wrapped and carried in a portable seat both for the accused's comfort and also so as to preserve any forensic evidence." Did you appreciate at the time that they were looking on you for evidence that might point to your guilt?

A. Um, well in relation to that no. In relation to –

Q. I'm speaking of your, the episode with Dr Pryde.

20 A. Oh, in the, in the, um – is that, um, not examination room, interview room?

Q. At the police station.

A. Um, at the police station.

Q. Is that where Dr Pryde examined you?

A. Yes.

25 Q. Mhm?

A. One (inaudible) spent this whole time with the detectives and so on. Um, as Dr Pryde stated to me at the time that it was to, um – he needed to gain these samples to eliminate me as a suspect.

30 Q. Did you understand by that that at that time you were a suspect until eliminated?

A. No because –

Q. Until and unless eliminated?

A. Well, yes, I suppose you could say that but only in hindsight I believed that. At the time my, my belief was, "Look, I'm a witness. This is what I've experienced, I'm trying to help you." That was my mindset.

5 Q. Mmm. Can you describe just what physical examination was carried out by Dr Pryde?

A. Sure. He, um, I – until he arrived, I stayed completely wrapped up with this blanket thing and I wasn't – and the detectives told me not to move as much as possible just to try and stay still. I was seated through all that time then when Dr Pryde arrived he supervised, explained what he was going to do. The table was, I was fairly close to the back of the room and there was a table right there so the detectives had to move the table away from me to give the doctor room to work with me. Um, he then went through the various series of things, starting with making me strip and examining –

15 Q. You say "strip", did you –

A. Take off, naked – take –

Q. – take all of the clothing or what did you take off?

A. – all the clothes that I had on at the time were taken off.

Q. So were you naked at the – some point in the examination?

20 A. Yes. Completely naked.

Q. So if there were marks on your chest at that point –

A. Oh yes.

Q. – they would have been evident to Dr Pryde?

A. Very much, another example of the stuff that's come up that's just proven to be ridiculously false.

25 Q. What samples did Dr Pryde take?

A. Ah, he took fingernail scrapings, and sorry, I can only go on –

Q. No, no, what you recall.

A. – what I recall from memory, he took fingernail samples, saliva samples he put a swab up my penis, he...

30 Q. Did you wonder why he was doing that? Seems an odd thing to do?

A. Yeah. Each sample he took, he outlined why he was taking it and he said there he wanted to – if the question of sexual assault came up, he wanted to be able to exclude it.

Q. Yes?

A. Did I have any problems with that? And I said, no, that's fine. I'm – I've not done anything.

Q. What other swabs did he take?

5 A. Um, sorry, can't (inaudible).

Q. And –

A. And I can't – I thought they took a blood sample but I can't even be sure of that now.

Q. So he is the one, I think, who asked you about a "whack" on the head?

10 A. Okay. I don't remember sorry.

Q. All right. Do you recall him asking you whether you had sustained an injury to your forehead?

A. No.

15 Q. Do you recall him asking about this abrasion on your knee, scrape on your knee?

A. I do remember him asking about that, yes.

Q. And what was that conversation?

A. Think I might have said something about maybe when I fell over? But again I –

20 Q. This goes back to the black out?

A. Yes. I, I – again I'd have to, I would have to refer to the statements.

Q. So in summary, you understood these tests were for the purpose of elimination and you had no difficulty –

A. Nothing to hide.

25 Q. – with complying with whatever it is he wanted to test?

A. Exactly.

Q. Just before leaving this business on June 20th, this insistence on your part that everybody in the family knew about the rifle, nobody knew about the spare key?

30 A. Mmm, to my knowledge.

Q. To your knowledge. Is this something you attempted to keep secret or simply didn't talk about?

A. I just didn't broadcast the fact that this is where I put the key and I, I mean for pri – well, partially because it's a control issue, you know. I

just wanted to be sure that you know, I'm the person licensed to own this gun and I want to be sure that if it's being used, I am in control at the time for the safety reasons and because I'm the one answering for that.

5 Q. Mmm.

A. And so I just didn't tell people where the spare key was. As I said, to my knowledge. And it's been proven that that is probably false by the fact that there were spent cartridges in my father's van, um, the van, the Commer van and caravan and there was spent cartridges in Stephen's room. So, I mean those don't just materialise.

10

Q. You didn't know about those cartridges –

A. No I didn't.

Q. – before June 20?

A. No.

15 Q. People keep switching back and forth between the van and the caravan?

A. Yes.

Q. There's a Commer van?

A. A Commer van which –

20 Q. And that was the commuting vehicle?

A. Yes, yes.

Q. And did he live in the Commer van on the property or was there –

A. No.

Q. – also a caravan?

25 A. There was a caravan. You know, those old-style elliptical shaped things?

Q. The question of blood found on your clothing that you testified, that subsequently recovered memory, you recall going into Stephen's room and you, you used the expression, "He looked as if he had blusher all over his face," I'm not familiar with that term. I'm looking at page 2673 of your testimony? What does blusher mean?

30

A. Um, it was a phrase that, I guess, I used it because of my acting because of being on stage, they use blusher to make the skin, you know, pink, give it, um, you know the pink – when you un – when you're

under lights on the stage, they make it look pale, make your natural skin look pale and without feature. If you put blusher on, you then get the pinkness of health and so on.

5 Q. You say, and I begin at 2673, "In his room I can't remember seeing anything else. Just him. I touched him. I got down beside him and touched his shoulder to see if I could wake him but he didn't move at all and then I left the room." Now there was some blood found on the clothing you were wearing at the time the police arrived?

A. Mhm.

10 Q. In particular on the t-shirt but my present concern is with the blood Stephen, identified as Stephen's blood on the crotch of the shorts?

A. Mhm.

Q. Do you have any explanation for how that blood could have got there?

15 A. No. I have no – I barely, and the record you just read out to me I barely even have that.

Q. Mmm. When you say you touched Stephen's shoulder, do you recall touching anything else?

A. I don't even now recall touching him.

20 Q. Did you get up – do you recall getting close to Stephen at the time you touched him? Could there have been some contact with your clothing and his?

A. Sorry, sorry.

Q. You don't recall?

25 A. I don't recall at all. I mean the memories that I was relating then were sporadic and patchy as it was and even then though it might – it was like trying to explain the scene that was within, that was on the TV, you know. That is all – the, the periphery is fuzzy and you only just just seeing an image and they're not flowing images as a memory or a dream might be. They were snapshots, that's the best...

30 Q. It's all right.

A. That's – you know, that was at the time. Now it's even worse.

Q. Mmm. So if I can use a theatrical expression, it was as through a glass darkly, is that the idea?

A. Yes.

- Q. Let's come to this whole issue of recall because a point was made by the Crown that you sat through the depositions hearings in October of 1994. You sat through the expert evidence depositions in December 1994, you saw Dr Mullen after sitting through all those depositions?
- 5 A. Yes.
- Q. And suddenly in your sessions with him, memory came back and the suggestion is it was very convenient, having heard the Crown's case then to recover memory and in effect manipulate memory to provide a defence to what the Crown had already laid out before the Courts. That is the allegation that we're dealing with.
- 10 A. Yes.
- Q. First of all, just in terms of timing, am I correct that your first session with Dr Mullen was after the last session of the depositions filed –
- 15 A. I believe so, yes.
- Q. – by the Crown? And what do you have to say to the allegation that this was a convenient recovery of memory?
- A. It's false. It, it's not convenient at all. This is just what I was experiencing. Again, doing my best under difficult circumstances to try and help explain the situation, to get myself out of prison.
- 20 Q. How did all of this happen with Dr Mullen? You sat down and you had sessions with him?
- A. Because my lawyer at the time was pushing me, or putting, yeah, pushing me and pushing the situation to try and get a potential not verdict, defence of –
- 25 Q. Acquittal?
- A. No, defence of insanity.
- Q. I see.
- A. So I don't know who called on Professor Mullen to come see me whether it was a Crown thing or my lawyer but it benefitted him, my lawyer at the time. It was prudent to have psychological issues.
- 30 Q. Okay.

A. I underwent CAT scans and numerous examinations from, you know, psychiatrists and – as well as Professor Mullen, there were others that came and saw me as well.

Q. Yes.

5 A. And none of this, none of them proved me – that I had any psychological disturbances whatsoever. They've only proved that I've had, I've got PST –

Q. Post-traumatic stress disorder?

A. Yep.

10 Q. Before you – if you just turn over to the green tab –

A. Mmm?

Q. – Dr Mullen's testimony is there and he's at the psychiatric centre in Melbourne.

A. Yes.

15 Q. And you don't recall at that stage how he was brought into the picture?

A. No.

Q. You mention Michael Guest?

A. Yes.

Q. Had you ever met Michael Guest prior to June the 20th?

20 A. The first time we met –

Q. I see there on the Friday, that would be the 24th I guess.

A. No, the first time I met him was on Monday, on the Monday the 20th.

Q. On the 20th?

A. Yes.

25 Q. Right.

A. My – no. Sorry, 25th. The Friday the 25th.

Q. It was a Friday, yes.

A. When I was being arrested, sorry. I apologise for...

Q. The –

30 A. I was in the same room so that's why the confusion, sorry.

Q. Yes. Did you – had you ever met Mr Guest before?

A. No I had not met Mr – until that moment that he was called.

Q. How did his name come up as?

A. He was an associate of my Uncle Bob.

Q. Of your Uncle Bob?

A. Yes.

Q. All right. When you say associate, you mean a business associate?

5 A. Ah, I guess they'd have dealings. I don't – I don't know what practice of law Michael Guest had but (inaudible). Ah, bread and butter, so to speak, was but was assuming it had to do with corporate stuff or finance and business or something because my Uncle Bob was working, like a job-seeking company.

Q. Head hunters?

10 A. Type of thing, yeah.

Q. In any event, I just want you to describe this process up until December 13th or so, you had these gaps in memory?

A. Mmm.

Q. And in sessions with Dr Mullen you had a partial memory recovery?

15 A. Mhm.

Q. And just describe what he did, what you did and how this partial memory recovered occurred?

A. Ah, end of – I have to make a, you know, an apology again. The trauma of those sessions was so great I've blocked out a lot of them. Of the
20 conversations that we actually had and I've never heard the tapes of those conversations so I've got no – the last memory I have of those interrogations, I termed them at the time, was the last session we had if you understand –

Q. With Dr Mullen?

25 A. Dr Mullen. So this – I've never refreshed my memory. I'm not really, I'm not up with his statements other than knowing that he was hamstrung by the Court. He wasn't allowed to give the full testimony that Michael Guest wanted but sorry in answer –

Q. Back to my question.

30 A. In answer to your question, he would sit there – ah, sorry, we would be situated directly opposite each other. He would essentially lead me back to the situation. Um, as more intensely than you have in your questioning. He would describe situations. He would describe what I had explained to the police detectives as – in relationships to get my

mind back into that situation as much as possible and then he would start asking the questions and that's the only recall of how it went.

Q. Yes, well that was the methodology.

A. Yes.

5 Q. And you remember the last session. What, what surfaced in your mind as a result of this questioning with Dr Mullen?

A. I'm sorry I don't, I don't actually remember the last session or any of them whatsoever. I just remember going, having to go into these sessions on a Wednesday evening and coming out and one of my
10 friends had permission to come and support me afterwards and then I'd sit with her and just bawl my eyes out.

Q. And the testimony that you gave at the 1995 trial –

A. Mmm?

Q. – in relation to this recovered memory then flowed out of the sessions
15 with Dr Mullen and the sequence that, as I understand it, was that you saw your mother and then you went into Stephen's room from your mother's room?

A. Yes.

Q. And Stephen's room lead off your mother's room?

20 A. That's correct.

Q. Right. And then where did you go from Stephen's room?

A. Went across back through my mother's room out and across the hall to where Laniet was sleeping.

Q. Right. And we're still on the upper level?

25 A. Still on the upper level.

Q. Right, now this gurgling issue?

A. Yes?

Q. What precisely do you recall of the gurgling?

A. Precisely? Nothing precisely, sorry. Um...

30 Q. Where did the word "gurgling" come from? Is that your word?

A. I think so, yes.

Q. Mmm.

- A. I think I may have written, written it in the notes as reading through so-called greens, what you'd call, um – and I don't, I don't remember when I wrote that.
- Q. All right but in any event you have a recall –
- 5 A. Yes.
- Q. – now of hearing this gurgling noise?
- A. Do I now? No.
- Q. But you did at the time.
- A. Did at the time, yes. The description I gave at the time is the best that I
10 can give you now. It was all, is that it sounded like, you know water running down a drain, you know, gurgling down a drain. It's, um, but it, it was –
- Q. There's some suggestion by your counsel in, at the nine – at the 2009 trial, as I understood it, and I may have misunderstood what he was
15 saying –
- A. Mmm.
- Q. – is that you may, in fact, have been hearing –
- A. Hearing the washing.
- Q. – the washing machine.
- 20 A. And that's, I'm sorry that is impacting on my memories actually are now so I can't be 100% honest in what I'm able to recall.
- Q. Or 100% precise rather than honest?
- A. Sorry. Okay sure.
- Q. Right. Now the –
- 25 A. Honest to myself perhaps?
- Q. The, the allegation firstly, of course, is Laniet must still have been alive –
- A. Mmm.
- Q. – and that's, the experts argue all about that. But the allegation against
30 you personally is if you heard noises from Laniet, your instinct should have been to rush over and try to help her?
- A. Mmm.
- Q. And as I understand it, you did not, in fact, touch Laniet –
- A. Not to my knowledge.

Q. You, you heard this noise, whatever it was, and then left the room and this is...

A. Well, the, the statement they gave, I think I went into the room up near the bed. I don't recall doing that but I...

5 Q. What you say, and I'll quote it to you, it's at page 2673, "I can't remember walking through anywhere else but the next thing I remember is being in Laniet's room and I could hear her gurgling. I could see blood all over her face and on the pillow. I can't recall if I touched her. I went right up beside the bed. I must have left the room at that stage. I
10 don't recall it." So is that as good as it gets in terms of recall?

A. Yes it is. That's better than what I have now.

Q. Right.

A. More than what I have now.

15 Q. And then the – at page 2673 you're describing to – going into, downstairs to Arawa's room?

A. Yes.

20 Q. And I'll read you what you say. "I saw her face. She was on the floor. I can't recall how close I got to her. I didn't touch her, not that I can remember anyway. Arawa appeared dead. She was white, she was just white, pasty. I don't remember. I don't remember leaving the room but I remember going into the lounge and I saw my father there." So the sequence, if I've understood it correctly, is that you come in the house, you go into your room, take off the shoes and the bag, you go downstairs, go into the laundry, come back upstairs, go into your
25 mother's room –

A. No, my room.

Q. Yes, I'm sorry. First, your room, then your mother's room, then Stephen's room, then across the hall to Laniet where Laniet was sleeping, then downstairs to Arawa's room –

30 A. Yes.

Q. – and then back upstairs to the lounge where you found your father?

A. Yes.

Q. And can you give an estimate, and I don't want just a guess, but if you can give some estimate of how long it would have taken from the time

you entered the door, the front door of 65 Every Street, until you ultimately wound up in the lounge and saw your father?

A. No. Um, I – I have no frame of reference I'm afraid and even at the time of these recalled memories, there was no explanation for how – or no given timing for how long I spent with any individual because I have, again, no frame of reference. There was no sense of time at all within the memories at this point that was reported for the Court.

Q. So what, what you're telling me is that you remember the sequence?

A. I remember the sequence, absolutely.

10 Q. But you don't remember the time that elapsed on this –

A. No.

Q. – trip around the house until you got to the lounge?

A. No. I don't know if I fainted, if I hit walls, you know, stumbling around. I mean these are all suppositions but – and obvious things that could have happened, being in the state of shock that I was in, but that's – there's no – I can't put that out there because I've got no memory of it.

Q. Right. Now I just want to spend a minute or two on the Tuesday.

A. Mmm.

Q. We have Val Boyd testifying that you asked to look at the Otago Daily Times that the police had said it's best that he not see the newspaper but he wanted the paper, she gave it to you, and that you were very distressed by what you read and what she says, what she attributes to you as saying, "They'd had to have been out of bed.' He was referring to Arawa and Stephen. He, that's David, said, 'They lied to me, they lied to me. They'd had to have known.'" Question, "Did he explain further who that was referring to?" And answer, "The police, yeah." And I take it from the rest of the testimony that there was some sort of diagram in the newspaper that set this off, is that right?

A. Yes.

30 Q. Can you tell me –

A. It was the first, it was the first time that I had any factual idea of, and imagery of what, where the bodies were found and where, you know, each of my family members had been and the numbers of shots and all that sort of stuff, you know, I was – and it was a shock because all I'd

been told I think by Detective Dunne was that, um, you know, before his interview, was that Mum and Dad were dead. That "your mum and dad are dead." And –

Q. But you told the poli – you told the 111 operator that "they're all dead."

5 A. That they're all dead, yes, I know. But I don't remember – I didn't remember at the time that I was having my first interview that I had given that information. I don't recall even being carried out on the stretcher let alo – you know, and only have a vague memory of being in the ambulance. I mean I've – lying on the floor in that state of shock, I
10 didn't even – I mean apparently I asked for my glasses and had a splitting headache. I've got no memory of that either.

Q. Do you recall being pulled out – pulled off the floor by the detective?

A. No and I don't have any recall of being wrapped in, in a blanket. I mean I had to have been either, well, rolled over or lifted up or something to
15 me because apparently I was in a cocoon-like thing with this blanket all wrapped around me. It's – that's the memory I have of being at the police station when that happened. When Dr Pryde took that off me, I don't have any recall of that either.

Q. Mmm.

20 A. So – sorry I continually digress and I apologise. Um, but seeing those –

Q. We're talking about the police lying to you.

A. Yeah, the only information I've had to go on up until that point and my insistence to see the newspaper was because something – I knew something terrible had happened. I had no information. No one was
25 talking to me and telling me these things.

Q. But you knew the whole family had been killed other than yourself?

A. Yes. But no one was telling me what, what had happened. I mean it's a natural part of, you know, any person to want to protect their family, to want to, you know, "Look, these are my loved ones. These are the
30 people I've spent the last 22 years with," and I – of course I've got an interest in them. Of course I've got concern. I didn't expect to be confronted with these images. I didn't expect to be and so my reaction at the time was obviously justifiable.

Q. Well, two questions. One is why do you say the police lied to you?

A. Because they hadn't gone into detail and told me what had happened.

Q. So they hadn't lied, they simply hadn't explained what had happened?
Of what they did say, are you suggesting they told lies?

A. No.

5 Q. Or these are lies by omission?

A. Lies by omission perhaps.

Q. Right. Then at page – I'm looking at page 2580 of Jan Clark, she says,
and this is on the Tuesday, she went up to the bedroom where you were
staying and David, "had his head in his hands and his arms down on his
10 knees, bending forward and I went over to him straight away and said,
'Oh you know sweetheart, we didn't – this is why we didn't want you to
read the paper,' and he said, 'They lied to me,' and he said, 'They – they
weren't asleep.' He said, 'They knew they were going to die. He had to
look them in the face, in the eye and shoot them.'" Can you make
15 sense of that? I don't know the who – "They lied to me," is the police.
"They weren't asleep," as I interpret it what you're saying is that the –

A. My family.

Q. The family had apparently been aroused and weren't asleep at the
time –

20 A. Mmm.

Q. – they were killed. "They," again as I understand it, the family "knew
they were going to die," and "he," I take it, you're referring to your father,
"had to look them in the eye and shoot them." Have I interpreted this –

A. I – yes.

25 Q. – correctly?

A. Yes. As best as I can as well, yes.

Q. But I mean do you recall saying this to Jan Clark on Tuesday the
21st of June?

A. No. Not this specifically. I remember several – I remember being upset
30 several times and you know, feeling, I guess being inconsolable at
various stages through the time, those three, few days that I was there.

Q. Well I think it's just about 1 o'clock and I'm going to get off into black
hands and the like. So if we adjourn at this point, what I'm suggesting is

if we can make it as close to half an hour and we will just start as soon as everybody gets back?

A. Certainly.

Q. Is that enough time for you?

5 A. (no audible answer)

Q. All right. Everybody agreed?

A. Sure.

Q. Okay, thank you very much.

10 INTERVIEW ADJOURNS

INTERVIEW RESUMES

EXAMINATION CONTINUES: BINNIE J

Q. Mr Bain?

15 A. Yes?

Q. You lunched well I hope?

A. Um, I had a little food, yes thank you.

Q. Good. We were talk –

A. Enough to keep me going.

20 Q. I'm sorry?

A. Enough to keep me going.

Q. Before the lunch break we were talking about your conversations with Jan Clark on Tuesday June 21 and she makes another of – statements attributed to you. First of all, she talks, she reports that you were talking about black hands. “They were taking them away, black hands. He couldn't stop them. They were taking him and them away and he repeated this over and over.” What's all this about black hands?

25

A. I, I don't know why I called it black hands. The imagery, it still comes to mind now, I can only exp – I can only say that the reason I used “black hands” at the time was because that what is kind of what it looked like, the imagery that comes to mind now is just a, um, essentially fingers of dark, you know, coming in from all, you know, 360 degrees over the centre of my vision of my family.

30

Q. So “black hands” really just refers to the notion of darkness closing in rather than –

A. From the outside. Like tunnel vision of, you know. I don’t know – I don’t know I called it “black hands”.

5 Q. And then she says you said, “‘Dying, everyone dying,’ and ‘black hands.’ It was all quite jumbled,” she said, “He was going from one thing to another.” Do you recall saying, “Dying, everyone dying.”?

A. Ah, I don't recall saying that, no.

10 Q. And then she says, I’m reading from page 2581, “‘It’s just like Schindler’s List.’ He said, ‘It’s just like Schindler’s List.’” Did you make that allusion?

A. Apparently yes. I’ve got no contention with any of that because that’s stuff that came up through, you know, during the first trial and the first – just – it’s fine.

15 Q. I mean it is put forward to establish that you were quite a disturbed man.

A. Well yes I was disturbed.

20 Q. It’s tied back to the pre-June 20th to the so-called trances and déjà vu and that you had bizarre behaviour and black-outs and now you’re talking about “black hands” quite incoherently. So the picture that is being presented is somebody who’s essentially unstable.

A. I understand and I can only say –

Q. That’s what I’m, what I’m asking you to comment on.

25 A. I understand all of that. No, it – the allusion, or trying to link the two together is completely unfavourable and unfair. The experiences that I have of so-called déjà vu and, you know, just not blacking out but what I think I’ve better described it as, um...

Q. You described it as “blacking out” to the police.

A. Yeah, going – going off into dreamland.

Q. Well I’m sorry this is the pre-June talk.

30 A. Pre-June, yeah. Well that’s –

Q. You’ve talked at one stage about being away with the fairies.

A. I was away with the fairies and all that sort of stuff, yes. All of those things cannot be linked to that experience and what I’m describing in that situation right there.

Q. Well there's one link at least and that is –

A. (inaudible) is it in there?

Q. – with ~~ZARA~~ where you told her that you had a premonition
 of something terrible was going to happen and after June 20th, she
 5 asked you was the murder of the family that something horrible and you
 said yes. Now I want to be fair because you don't have the transcript
 but this bad outing in cross-examination of ~~ZARA~~ was the – that
 when you said something horrible was going to happen she thought you
 were referring to you and ~~ZARA~~ or something happening to ~~ZARA~~ but
 10 still after the event, reference was made to “Was this the something
 horrible?” And you say, “Yes.” So there is that linkage.

A. I accept that and I have no idea why I said yes to that stated question at
 that time but...

Q. You see, you reject the, the word “premonition” –

15 A. Yes.

Q. – as inappropriate but by putting those two statements together you
 anticipate something horrible and yes, what is horrible has happened, in
 fact, describes a premonition because if this is what you expected to
 happen and it did happen then you had a premonition it was going to
 20 happen.

A. It wasn't – yeah, okay. I don't, I don't think or believe that in that
 conversation that I had with ~~ZARA~~ I was in, again, any fit frame of
 mind. I don't remember what, other than being totally upset and
 extremely distraught to make any distinc – you know rational comment
 25 or remarks or have, have rational discussions and that and later I tried
 to exp, to explain that – I think, I think later perhaps, I'm not too sure but
 that what I was referring to in that conversation was that this is, I feared
 that something was going to happen that would pull ~~ZARA~~ and I apart
 and I don't know why I answered yes to this being that particular thing
 30 that I feared would happen.

Q. But you, are you satisfied that you said it or that, or do you think there
 may have been a misunderstanding on her part?

A. It's too late in the piece now to postulate.

Q. At page 2674 of your 1995 testimony is when you said that you didn't use the word "premonition".

A. Mmm.

5 Q. And then you carry on talking about déjà vu and flipping sausage into the orchestra pit.

A. Mmm.

Q. But you do say that these experiences, whether it's blanking out or day dreaming or trances or déjà vu, that the intensity and frequency seems to have increased in the time leading up to June 20th, is that right?

10 A. Oh, I'm – apparently I did say that and I have no memory of saying that.

Q. Well, I'm asking for your view now.

A. Now, I have no memory of the frequency increasing or decreasing at the time.

Q. Okay.

15 A. I mean I can certainly give you examples now of what, of what it was I was trying to describe then as in rit – now going out for a run but certainly I can't pin in my mind this day, that day and that day.

20 Q. You see the reason why the prosecution focused on the word "trance" is that you described being at this concert and I think two movements were played in this orchestral piece that you had no recollection of.

A. Mmm.

25 Q. So this goes to the idea that your mental structure, as such, that you can tune out and have absolutely no recollection of what went on in that intervening period and therefore you might have done what you're alleged to have done and not remembered it.

A. That's all – autom – aut – word?

Q. Automatism.

30 A. Automatism, yeah. No, that's – I've never ever conceived that I, that's something that I could do. I've never ascribed to myself that, that that's some – that is something (inaudible) that I've never even experienced.

Q. Well in a sense, running, you become like an automaton.

A. Oh – okay, that experience that I've tried to describe to the various fre – psychiatrists and so on that I've seen, experts that I've seen said that that, that is actually quite a common occurrence in sports and rhythm.

And it's something that they are fully aware at that time that they're doing the run or the cycling or whatever it may be, of everything around them in the moment.

Q. But this wasn't true at the concert?

5 A. No. I ma – well, look, I don't remember.

Q. Just because –

A. Exactly, exactly the same thing would happen on a run. I'd go out for my run, come back and not have any memory of, after the moment, where I've been but at the time that I was running be fully aware of
10 where I was and where I was going. Who's to say that at the time that I was sitting there listening to the, at that concert, other than this lady's – um, ~~AVIA~~ testimony that I wasn't actually listening to the music but I was off in a fairy land as well, the same. The two things can happen.

Q. Do you then reject any suggestion that your mind in 1994 was such that
15 you could have committed the murders and not recall anything about it afterwards?

A. Absolutely. Absolutely. There is not a moment in time during any period in the lead up to 1994 or that morning.

Q. So when you say, as you told me earlier today, that you are positive that
20 you did not kill any member of your family, you say that on the basis that there is no reason to think that you could have done anything in a so-called trance and not afterwards recalled it?

A. Sorry? Ah, no. There's – no. I – there is no –

Q. What is, what is being said is that perhaps in good faith you're saying, "I
25 didn't murder any of them," but in fact you did murder them but you cannot recall it and therefore –

A. I reject, reject that completely.

Q. – your disavowal could be in good faith but nevertheless be correct?

A. No. I reject it completely. No, I didn't commit any of those crimes for
30 the simple fact that I know I didn't do it.

Q. Mhm.

A. I – within myself through all these sessions that I had with every person that I've ever talked to in confidence and the experts that have been –

there go at me, never once felt, let alone come up with a single memory, that would implicate me in this, in this – in any of this.

Q. Well there is the rather odd incident where you're speaking to your aunt and as you explained in 1995, had to do with the three options put to you by the police. It was somebody outside the family, it was your father or if it was you and you say, "If it was my father, I could never forgive him and if it was me –" and then [. . .] says, "Don't go there." So that appeared at that stage –

A. Mhm?

10 Q. – that you were unsure in your own mind as to whether there is, was a possibility that you had committed the murders?

A. Yeah but then of course, at the time that had been also been put to me to try and explain why there was a missing 20 minutes.

Q. Yes.

15 A. Which I couldn't do at that time but following all the, all the time that I spent in prison and being examined by Professor Mullen, I was quite satisfied with my own innocence. That missing 20 minutes was the only thing, or so-called missing 20 minutes was the only thing that ever, to me, gave any possibility but even then I could not have put myself in the situation because my memories were of finding my mother and that's where things stopped being clear.

20 Q. Now the explanation that the prosecution puts forward, as we touched on this morning, is that you were wearing clothes over the clothing you were found in which included the green sweater that we've discussed and also some long pants and I think I asked you whether at any point you wore long pants on June 20th and you said no. But there were apparently in the wash a pair of track pants and a pair of corduroys which I think the police believe to be yours. Is that correct?

A. I do not believe that I own a pair of corduroys.

30 Q. Right.

A. I wouldn't have been seen dead walking around the street in them.

Q. These are on fashion grounds?

A. Ah, yes.

Q. Right. But you do own track pants?

A. I did own track pants, yes.

Q. And were there low track – were the track pants in the wash yours?

A. I'm sorry you would have to hold them up and show them to me.

Q. Well I can, in fact, be of some help on that because it's in the, the exhibit
5 is in the crimes book at page 44.

MS MARKHAM:

Page 42, Sir.

10 **BINNIE J:**

Q. 42? Right.

A. Which pair will it – is...

Q. Well there are, they're comparing your track pants and Robin Bain's
track pants and they're measuring them and their –

15 A. Mmm.

Q. – indicating that the track pants pulled out of the wash could not have
belonged to Robin.

A. Well the – in all honesty I don't recognise that, those track pants. The
ones I do remember having, I had, I had a track suit set, you know, the
20 top and bottom were the same material bought at the same time and I –
those I cannot say belong to me. Um...

Q. Could be another member –

A. But I – I definitely remember two other pairs that I had, one being a red
colour, another being a grey colour.

25 Q. The – this whole question of the track pants and the sweater and the
sizes, because I think at the first trial you were asked to try on the
sweater and –

A. Mmm.

Q. – position, the defence position was it was too small for you to wear.

30 A. It wasn't the defence position, it was too small for me because when I
tried to put it on, I could barely get my hand through the sleeve of the
sweater but this is, sorry the jersey, and once I had put it, put the thing
on, the actual jersey was up to here.

Q. You're indicating about 10 inches from the tip of your finger?

A. Yes, well at least six inches from my wrist.

Q. From your wrist, right. Now one of the suggestions is that of course once the woollen jersey is thrown in the wash that it will shrink. This explains why it was too short at the trial.

5 A. And do old jerseys shrink? Certainly that – surely if they shrunk, shrink, it would be why they – just after they've been knitted and made and then they only shrink so much. This is a, already accepted that this is an old jersey. It's not gonna shrink anymore so again, it's just finding excuses.

10 Q. At – you say in your testimony that Arawa occasionally wore your father's sweaters because she liked them because they were "big and bulky," I think is how you put it?

A. Mmm.

Q. What was Arawa's height in – compared to your father's?

A. She was about the same height.

15 Q. About the same height, mmm?

A. Five foot 10, I think they were both.

Q. And what about in terms of weight?

20 A. Ah, she – Arawa, excuse me, Arawa was a slight girl. Dad was fit and you know quite well built and broad across the shoulders. He was a good swimmer, athletic, so...

Q. The – I'm going to come back to the rifle but you talked before lunch about your going into the lounge and you told the police that you did not touch the rifle. You indicated this morning, I think, that you looked into the lounge –

25 A. Mmm.

Q. – but didn't really touch anything, backed out, is that right?

A. Well I, no I don't think I got to the point of indicating what had done but –

Q. All right, then could you do that now?

30 A. Um, now the only memories I have are of, that, was that I was in the room, past the door frame itself.

Q. Yes?

A. Um, as to whether I got any closer to what, to my father or not I, sorry (inaudible).

Q. In the police statement you indicate that you did not pick up the gun.

A. Mmm.

Q. Is that right?

A. Yes.

Q. And...

5 A. From memory at the time.

Q. Yes.

A. That's correct. That's – I'm accepting, though, that I you know, possibly touched things in any room so I'm not excluding that but it's me being prudent.

10 Q. There is the suggestion made by the defence at the 1995 trial that the fingerprints identified on the gun could be attributable to your picking it up on the 20th of June by way of "innocent transfer"?

A. Yes.

Q. Do you say that is not a possibility?

15 A. I don't believe it to be a possibility, no, no.

Q. So you – your – the best you do on that is the notion that the fingerprints are in animal blood going back to the summer?

A. Exactly because I don't have any memory of picking up the rifle or touching it that morning and the only other time that I, that I used it was
20 January or February that, that year.

Q. Mmm.

A. When I had been hunting.

Q. Now in this conversation with Jan Clark, at – she quotes you as saying, "If only I had run faster, I might have saved have saved them." And she
25 says, "They weren't the exact words," and the question, "Words to that effect?" Answer, "Yes, he said, 'If I had gone faster,' he didn't say, 'I could have saved them.'" Do you recall that conversation with your aunt?

A. Vaguely I do, yes.

30 Q. I think in fact you said something similar to the police. Was it – the assumption built into that response is that they must have been killed in the few minutes prior to the time you actually got home and that therefore by running faster, getting there quicker, you might have intervened in the series of murders. What, what was that based on?

A. Why did I believe that?

Q. Yes.

A. Because if – it's interesting, no one's ever asked me that. Um, because at the time, you know, when I walked out of the house there were I –
 5 there were no lights on so when I walked back into the house, the light was on so you know I had no – if you know what I mean, when I left the house nothing was out of the ordinary. When I walked back into the house there seemed to be you know, the light was on and then I found the bullets and you know, things all suddenly went haywire so that's why
 10 I had the assumption.

Q. But that, that would explain why you thought it would be in the time you were out of the house on the paper route?

A. Yes.

Q. But not why you thought if you'd run faster and completed the paper route sooner, you could have saved them. There's this event described
 15 by ~~XXXXX~~ I keep shifting back and forth. It's ~~XXXXX~~ Isn't it?

A. ~~XXXXX~~

Q. With a ~~XXXXX~~ How did you know her?

20 A. Um, through music courses at university. We – um, bumped into together whether it was some of the classes that we, you know, took. She was quite a few years ahead of me. Um, and had, I think she was doing like a masters or like her second degree or something of that nature, you know. It was the association, she was already a friend of
 25 ~~XXXXX~~ whom I got attached to through the opera, the live group.

Q. Mmm.

A. And I –

Q. You used her as a confidante?

A. Yes.

30 Q. Sorting out your issues with ~~XXXXX~~?

A. Well we just – because of that relationship that they already had, I sought her advice and sort of sought her – you know, as you say being confidante.

Q. At page 2365 of her evidence, and you don't have it in front of you but I will repeat it, and this is when you were taking a walk on the 22nd of June –

A. Mmm.

5 Q. – so that would be the Wednesday night. And I think you and ~~ZEEA~~ and ~~ZEEA~~ went for a walk and at some point she said something which evoked the events of the 20th of June and you are described as having fallen to your knees and screeched and so on for some minutes and I think it was a follow on to the question, “Was the something horrible anticipated before January – June 20th, is that what happened on
10 June 20th?” And you apparently said yes and went into this quite powerful reaction. Do you recall that?

A. I can only academically. You know what I mean, as in I've heard such, a lot of testimony about it, read about it, but – but I don't...

15 Q. Do you have any present recollection of reacting in this way?

A. Vague, vaguely, yes but again, what caused it, the emotions that I was feeling at the time, I don't think – I couldn't.

Q. Because at page 2377, she's asked the – she asked, “Was it your Dad?” And he said he was really angry with him and clenched his fists.”
20 “Now do you remember saying that?” Answer, “Yes.” Question, “If it was his dad, he was going to be very angry,’ in your brief of evidence you've got here. We recorded the following that immediately following that, and you were asked by Mr Raftery, but it's in there, he then said, this is David, ‘I didn't do it,’ with his fists clenched.” Do you remember that?
25

A. (no audible answer)

Q. So you don't have that – again is lost in the mists of time at this point?

A. I – I'm sorry.

Q. I don't like returning to this wash load but there's something referred to as a black skivvy and I don't know what a black skivvy is.
30

A. Ah, I think it's like a light jersey. It's got a, a neck, a long neck.

Q. A sort of turtle neck, comes up to cover the neck?

A. I think so. Is that correct? That's all that comes to my mind.

Q. Right. I just – for the record at page 417 at the, your statements to the police is recorded, “If he had run home he might have saved them,” so that’s what I was referring to earlier.

A. Mmm.

5 Q. And then he comes up with his three possibilities that we’ve already discussed. Now on Wednesday there is this session at the Clark home in the early hours of the morning and it is said at that time that you said you hated your father and this is Val Boyd giving evidence this time. “He talked about the family situation so while he talked about his father,
10 he talked about that he hated his father. He said he was sneaky, he used to listen in to conversations that had nothing to do with him.” Did you have that conversation with Val Boyd?

A. I do believe so. I do believe so.

15 Q. Right. And this is somewhat at odds with the picture of a healthy relationship that you described this morning.

A. Mmm. Well it, it, this is, to me, this is only natural considering what it was I was trying to accept had happened to my family. I put myself in the situation where I was you know, here I was that there’s a father that I respected and spent a lot of time with and you know, as I described
20 earlier on, and then trying to accept that he’s just killed my entire family. What’s your reaction going to be? Naturally your emotions change and.

Q. Emotions change but the, the idea that he was sneaky and used to listen into conversations and so on –

A. Well, yeah but that’s –

25 Q. – that relates back to an earlier period?

A. Yeah, it does and that, that’s, yes it’s a factual aspect of who he was and it’s just one of those things that, okay, you don’t talk about all the, all the bad things that happen in your own particular family. I’d not wanted to talk about any of that to – you know, in this entire
30 investigation. It’s been forced on me. I never wanted to bring up the whole thing about incest.

Q. Mhm?

A. It was, you know, put on me to prove that I was innocent and I don't want, you know, if the police had done their job right the first time it wouldn't have happened. None of this would have happened. Sorry.

5 Q. But the question at the moment is the consistency between these pictures.

A. Yes.

Q. You're presenting of your father at different stages of this narrative and how they –

A. Okay.

10 Q. – can be integrated.

A. Consistency, well, I – I'm not perfect in my retelling. That's obvious. And this is one of those situations where they were asking me questions about you know the relations in my family. I was doing my best to tell them, and it – you know, the most amount of information that would be helpful possible. Here's a private conversation that has been taken, you know, from what I considered to be a private, you know, situation and a confidence type of situation and now related it against me. I – that – telling my aunty what my father, father's behaviour was like, there's nothing wrong with that in my view. My mother was nutty. I accept that now looking back in hindsight. There were relationship issues between the two of them. I accept that now looking back in hindsight. My father was reacting to this breakdown in his relationship with his wife of 30-plus years, 25-plus years if she is, and how he behaved wasn't all explainable. I was a 22 year old kid trying to get on with my own life, doing my best out there in the world and just, and having a ball and having a lot of fun. I'm not a counsellor so trying to explain – or a psychologist who can do assessments on people. These are just some of the things that I observed. Okay they might be slightly incongruous because here I was showing up this picture of a wonderful, up – you know, upstanding man as my father. Well isn't that exactly what you would try and portray to the world? That you come from a perfect environment? And then in a private situation where I've ridden by grief and, you know, anger and all these other emotions and something comes out that is negative, the two aren't mutually – aren't exclusive.

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You know, they don't – they can't – the two can't still be in, you know, equally true.

Q. So what, in effect, you're saying is that after June 20th, certain elements of the relationship and your father's behaviour before June 20th became more of a focus because of your reaction to the killings?

A. Yes. I mean no one knew about the incest thing but that still came out.

Q. Mhm.

A. And that's a negative aspect of, of his emotional state and his, you know, mental – you know, mental and emotional state but I didn't tell anybody about that because I didn't know anything about it.

Q. I want to talk a little bit about your uncle, Michael Bain.

A. Mmm.

Q. Who I think only arrived in Dunedin on the Thursday of the 23rd of June and he says that when he spoke to you, you simply said, "I'm coping," but that you seemed to be, "relaxed and welcoming." What – can you describe your relations with your Uncle Michael to the extent they existed?

A. That existed at the time?

Q. Yes.

A. It was similar to the boys.

Q. Except he didn't live in Dunedin did he?

A. No. No, I mean –

Q. No. What was his wife's name?

A. Anne.

Q. Okay.

A. Ah, sorry, this is Michael?

Q. Michael's wife.

A. Yes, Anne.

Q. So he comes to the, to see you on the 28th of June? What seems to have happened is he arrived on the Thursday. He doesn't really describe very much interaction between you on that date.

A. Mmm.

Q. We know from the police that they had decided as of the night before as of the Wednesday that they were going to charge you and that's why

they didn't come and see you on the Thursday but you had this exchange with Michael. In your conversation with your uncles and aunts, was there ever any suggestion that they were going to stand behind you in this thing and they were going to provide any financial support or?

5

A. Oh yeah, they all, they all came with, I don't know what Michael specifically said but I remember them all offering support and my uncle, who – ex-husband of Jane actually, um –

Q. What's his name?

10

A. Um, Stewart Lansborough, the father of Heidi and Kim.

Q. Yes?

A. Ah, he lives in Wanaka and he offered free run of his place in Wanaka for as long as I needed because at that time I don't think he had a partner. You know, Jane was going to welcome me into her family and then they all were quite welcoming, quite supportive at that time.

15

Q. Mhm. Now you say at that time. Once you were charged on the Friday, did that attitude change?

A. Yes.

Q. And at –

20

A. Sorry I don't know when exactly their attitude via police changed. All I know is that at some point during the first few weeks they were convinced by the police that I was the killer and they all turned against me and the – from then on I was interrogated not only by the, by my lawyer by the psychiatrists and experts that came to view me but also by my family who would come in and ask extremely leading and open and hurtful questions and then apparently go and relate it straight back, straight to police officer after walking out of the prison and seeing me so totally, you know, misusing their relationship with me to the point where I actually – you know, it became so hurtful I stopped actually allowing them to see me.

25

30

Q. Well Michael relates that when he was in Dunedin in October for the deposition hearings that you declined to see him?

A. Exactly.

Q. But then you did see him in the December?

A. I'm sorry I don't remember that particular time.

Q. Then well, we'll come to it but the – when you were charged on Friday the 24th of June –

A. Mmm?

5 Q. – was there any subsequent discussion of bail or application for bail?

A. (inaudible) I'm sorry.

Q. No? Did you, in fact, remain in prison from then up until after the Privy Council –

A. That's right.

10 Q. – decision in 2007? The incident you just referred to, your Uncle Michael contacting the police as referred to at page 2464 of his testimony where he's asked that – “David had begun to distrust you, hadn't he?” And Michael says, “I don't know.” And then the question, “Well, you see we have your diary note of where you were liaising with

15 the police a lot weren't you?” “Well, I had to, yes.” Question, “But more than that, Mr Bain, you were actually talking to David and then immediately ringing the police and telling them what David had said.” Answer, “No that's not correct.” Question, “Well, we have it in your diary here you see? ‘Visit David, he had two other visitors. Asked David

20 about his pet being put down by the Council after a complaint by a postie. I mentioned the gruesome play. He commented it was only a Greek tragedy then.’ ‘I rang that information through to Jim Doyle,’ is the next entry.” Answer, “Okay.” Question, “Well, you see you were asking questions of your nephew and promptly ringing the police, weren't you?”

25 Answer, “Not on every occasion. If I did that then there would have been a reason but I can't remember doing that but it certainly wasn't my practice to keep the police informed with every discussion that I had with him.” Do you have any knowledge other than this diary entry that your aunts and uncles were feeding back to the police things you told them?

30 A. It wasn't until the investigations leading up to the second trial that I learned of this. It was only the style of questioning that I was getting from my aunts and uncles in the visits, and the, you know, the methods that they – I had one of my cousins come in after my mother's birthday and say, and asked me extremely hurtful questions about whether I had

even remembered my mother's birthday. The why, you know, and this is the sort of, you know, rel – family support that I was getting while I was on, you know, on remand and no support other than from stran – total strangers and people that became friends because, out of concern.

5 Q. Well there's quite a furore about the funeral.

A. Mmm.

Q. And your choice of music and clothing and so on and I – you've explained all of that in earlier testimony but the issue of attending the funeral –

10 A. Mmm.

Q. – on the Saturday which I think was the Saturday, the day after you were charged?

A. Yes.

15 Q. Do you know whether the prison authorities would have made arrangements for you to attend? Was the barrier to your attendance from the family or from the prison authorities.

A. From my family, from the police.

Q. You say the police were opposed?

A. I believe so, yeah.

20 Q. Why were they opposed?

A. Well I don't remember. I wasn't ever given any piece of paper but my, my lawyer passed on, you know, messages from my family but that this is not going to happen. The prison authorities, as far as they were concerned, they would have, you know, their job is just custody so they would have had 10 sort of prison officers standing around me if that was what was required.

25 Q. Mhm. And is that one of the hurtful incidents you referred to?

A. Yes.

30 Q. On the 28th of June, Michael says that he attended to see you at the prison with some others. He says, "Another member of the family had posed the critical question. I took it on myself then used the words, 'Did you do it?' Meaning did you commit the offence that's been alleged against you?" Question, "What was his reply, if any?" Answer, "He didn't answer he did it. He did not say he didn't either. The words that

he used from memory were, 'I told my side of it to the police and I'll stick to that.' That's what I remember vaguely that he said or words to that effect." What do you remember of that conversation?

A. I don't remember that conversation.

5 Q. Mhm. This is the Tuesday after the funeral. Had you, at that time, become somewhat suspicious of your uncles or was this before suspicion set in?

A. It was before suspicion set in. I think the suspicion actually came, came about later on in the piece. You know I'm talking as in a few months.

10 Q. It seems a very odd response that you were asked by a member of the family by the brother of the deceased, Robin, "Did you do it?" And to get the response, "I told my side of it to the police and I'll stick to that," it doesn't –

A. It doesn't seem overly certain that that is what I said. I – I mean it's well known that he's, he – right from the start had believed that I was guilty.

15 Q. Michael?

A. Michael. And he's been on TV crying me down and having a go at my defence to constantly – he's, he above anybody else in my, of my extended relations has been against me and driving at least – sorry supporting, if not you know, aid – actively aiding the case against me.

20 Q. Do you –

A. So –

Q. Sorry, go ahead.

A. So I'm not overly certain that he's being entirely factual at that stage.

25 Q. So...

A. Of course, he's never been put to the test whereas every single word that I have ever uttered has been put to the test.

Q. Right. You would agree with me that if you said, "I told my side of it to the police and I'll stick to that," it would have been a –

30 A. It's not definitive.

Q. – an inappropriate answer?

A. It's not, it's certainly not definitive, no, exactly.

Q. It's not responsive.

A. I – and I've been – I've done nothing but deny any aspect of this, you know, action in this case, involvement in this tragedy.

Q. Well when he says, "David didn't say yes, he didn't say he didn't either."

A. Mmm.

5 Q. That would be inconsistent with what you say was your attitude at the time –

A. Exactly.

Q. – and throughout.

A. Exactly.

10 Q. Right. Would there have been any reason why you can think of why you would have been fencing with him as opposed to simply telling him outright that you didn't do it?

A. Well if he – if I was back there right now and in that, in the situation I was in I'd be extremely disappointed that he would even ask me that
15 question as a family member. I would be extremely hurt that he would ask me, even think to ask me that question considering everything I, that I had been through, the fact that I'd, you know, been denied a basic right to be able to say goodbye to my family. And that was by their choice, my family, my relative's choice.

20 Q. When you say your relatives, who do you attribute the decision to?

A. Well I, I can't - I don't know how made the decision (inaudible). I mean the, the, a lot of the family decisions were made by the trustees of the estate and that was John Boyd and Michael Bain as far as I'm I aware but in all honesty, I don't...

25 Q. So the trustees come and see you on Tuesday July 5th about the disposal of the house?

A. Mmm.

Q. And I take it you had no objection to the house being demolished? Burned? Destroyed?

30 A. Yes I did have objections to it. I didn't want that. But then that, if we go back a little bit that situation is just another, an example, really to me of how I was being manipulated in my, in the state of mind that I was in to make decisions and to have things happen with my so-called blessing.

Q. Mmm.

- A. They, they discussed it with me and put it in terms that made it seem reasonable and so in the end I have, had no come back essentially because even now I can't say that it wasn't my decision.
- Q. Well they seem to have a couple of reasons. One is the cost of security.
- 5 A. Yes.
- Q. Secondly, the police had taken a chainsaw to parts of the house so that it was –
- A. It was certainly –
- Q. – derelict.
- 10 A. Yeah, it was unliveable and, I mean I certainly – yeah look. I accept it, I didn't – I wouldn't have gone back into the house to live, definitely. The place would have been, possibly ended up being demolished and so forth but in dealt - in terms of, you know, preservation of the scene, you know, I don't understand why the rush to have to burn the house down and that's only looking back in hindsight.
- 15 Q. Did you ever request your uncles as executors of the estate for financial help in mounting a defence?
- A. No.
- Q. Had you at that time in mind retaining experts for the defence?
- 20 A. I have no – I was 22 years old, never been involved in a situation of this nature and I had no idea what was required so that, only aid I asked for was with Bob Clark in getting Michael Reed, ah sorry, Guest.
- Q. Michael Guest?
- A. Michael Guest involved and after that –
- 25 Q. You have a weakness for Michaels?
- A. Sorry? Yeah. Um, and after that point I was reliant on them to give me the best advice as to what was required or not required, I had – even the last, you know, 16 years that, or so that Joe has been involved in my case, I've been totally reliant on him to give me the best advice because
- 30 these people have, are the experts in this situation and my mental capacity to take into account all of this is totally insufficient.
- Q. Mmm.
- A. I don't know the rules. I don't know how the game is played and I don't, certainly don't know what was required so asking for financial

assistance, I wouldn't have had a clue. I certainly have no money on me. It had been taken by my, you know, into custody, so-called, by my – as trustees of the, of the estate.

Q. Yes.

5 A. And how they dealt with that after that was up to them. I trusted them to, to look after it for me.

Q. Now eventually as I understand it, after the various properties that had been sold, and after your conviction had been upheld by the New Zealand Court of Appeal, the money was divided amongst the family?
10

A. That's correct.

Q. And I take it you did not share in that distribution?

A. No, no, I've got nothing.

Q. And you know approximately the size of the estate?

15 A. Approximately 600,000.

Q. The Crown Law office refers to Mr Mark Buckley?

A. Yes.

Q. And they say that he says that you had confided in him around 1990 that you were sexually interested in a female jogger and that you could commit the sexual offence against her, use your paper round to get away with it and as we know that evidence was eventually excluded by the Court of Appeal but what – how did you know Mark Buckley?
20

A. Ah, very innocuous question after all that.

Q. There are others to follow.

25 A. Um, I'm sure there are yes. Um, Mark Buckley was, became a fairly good, well, a close friend of mine after I started in, at Bayfield High School in sixth form, 1989.

Q. 1989, yes? And did you – were you close enough friends to exchange confidences?

30 A. Ah, yes, I guess so, later – you know, after obviously a settling in period.

Q. Did this discussion that he related to the police ever take place?

A. No.

Q. What reason would he have for coming up with an untruthful anecdote?

- A. Because our friendship had ended. Ah, at the, pretty much the end of, or faded out and then ended towards the end of the, our seventh form year and we essentially, you know, I – just, it all ended on bad terms.
- Q. So it was more than drifting apart? It was actually –
- 5 A. No, no, it ended on bad terms.
- Q. And what was the – why was that?
- A. I had witnessed him – because we had goats on our property and I had witnessed him performing a deviant act in that situation. I'm not, I wasn't completely fooled but it was certainly, you know, looked stupid and obviously embarrassing for him. Ah, and as we know you have to do to take, get the blame away from yourself is point it at somebody else, "It was him, it was him." So what happened is and you can see, can see in this, in the yearbook for my last year at high school –
- 10
- Q. Yes?
- 15 A. – he made comment –
- Q. Why don't you just read the comment into the record?
- A. Well under my photo he says well there's several different things there, all totally innocuous but, "Known by friend as Dirty Dave," which was the first time I'd ever heard that phrase used and then later on, "Most embarrassing moment – ask Mark Buckley," and finally, "Most wanted thing on a desert island," is, "Goat," so he was quite obviously trying to put, you know, shift the blame of the, that situation onto me when it was him who performed this, you know, silly act.
- 20
- Q. And when silly act you're talking of – act of a sexual nature with the goat?
- 25 A. Yes. So that's what ended our friendship and anything that he has to say, I mean, it's totally untrue.
- Q. I want to just deal briefly with some of the substantive issues. I'm not going to go through them in detail because there are piles and piles of transcripts discussing each of these issues but the first of all the gloves which were found in the bloodied condition in Stephen's bedroom after the murders and as I understand it, you left them in your drawer and had not used them since this ball for which they had been purchased fairly recently, is that right?
- 30

A. Yes. Been about two weeks prior.

Q. And do you have any explanation at all as to how those gloves could possibly have wound up in Stephen's room?

A. No, I can only provide postulations.

5 Q. Well, the postulation would have to be that if Robin was the murderer, then Robin got a hold of the gloves and took –

A. Well that's –

Q. – them into Stephen's room?

10 A. – that's assuming, yeah that's assuming that the gloves were used in the murder.

Q. Well they were covered in blood.

15 A. And so was the carpet and so was, you know, Stephen's t-shirt and so was, you know, a thousand pieces of evidence that were found in that room, his mattress. I mean all I'm saying – I'm not saying that, that they weren't produced, you know, that Robin didn't come in and take the gloves from my drawer and use them but then in saying also that Stephen could quite possibly have, 'cos he was well-known for coming in to, and borrowing stuff of mine just because he looked up to me as his big brother. He liked getting dressed up in the things that I had like
20 the scuba gear, you know, so there's two possibilities there. That's all I'm saying, without ruling both out but as for, no, I have no other ideas that I can come up with.

Q. So you're not satisfied as a result of what you've heard in that they were actually established to have been part of the murder fight? Is that right?

25 A. That's correct.

Q. Now the glasses we've had some discussion about them and again there's this whole notion of whether or not a lens was planted and I'm leaving that to one side and the question of whether or not you used them on the weekend we have dealt with. But I want to be sure that I
30 have whatever help you can give me on the police evidence that when you were in your bedroom of the morning of June 20th at 7.30 or whenever it was the police officer was there, you asked for the glasses or you asked for glasses.

A. Ah yes, I accept that based on the evidence presented, yes.

Q. Ah –

A. I'm sorry I can't help in that really because I don't remember asking for glasses.

5 Q. No. But you were aware at the time that your own glasses were in being fixed?

A. On the Monday morning or just?

Q. Yes, on the Monday morning.

10 A. Well no, I wasn't really aware of anything at all so – I mean apparently I, I mentioned that I needed to go off to university and I talked to, you know, talked to the dog as well but I don't remember any of that.

Q. Mhm.

A. So what was my state of mind at that time?

15 Q. Can I get this from you, that to the extent that you asked for glasses, you would have been asking for your own glasses, not for your mother's spare pair?

A. I believe so, yes. Yes I would have been.

Q. Use of the computer by Robin, I take it that he was quite an – a computer enthusiast?

A. He was.

20 Q. And you indicated in your testimony in 1995 that you had not used the computer for some time prior to June 20th and you had not used it on June 20th, is that correct?

A. That's correct. I believe the days I gave was May for an assignment or something.

25 Q. And did you – you have a recollection of Robin as being a more regular user of the computer?

A. Yes.

Q. And this was located in the lounge?

30 A. In the front, yes, in the front lounge area or – and we had a little alcove that had the computer set up on a makeshift desk.

Q. And did you – can you give me some idea of how frequently Robin was using it when he was at home?

A. He would, frequently, ah, he would use, use it – oh, he'd use it most days for, when he was at home. And certainly use it, you know, during

the evening to you know, do stuff for school or whatever if none of us kids were using it he'd be on there. Because both Arawa and Laniet, ah, Stephen used it as well. Laniet didn't use it hardly at all other than to play some of the games that we had on it.

5 Q. Would you say you used it less than your brother and sisters?

A. Equally the same amount. There were some games that I had on there and, and I used it for. I didn't really know much at all about computers at the time other than how to start some of the programmes that were useful for university.

10 Q. At –

A. Dad, Dad was certainly the primary user of it because of the sorts of things that he was doing at school and only aware of the types of, and all this networking and so on that he was setting up down there.

Q. Yes, I've read the evidence of what he was doing.

15 A. Okay. I mean and that's – to me, I, I had no understanding of any of those sorts of things and what he was up to down there but comparative aspect of it would be to turn on the computer and double click on word and type a letter and that's pretty much all I was doing at the time. Whereas Dad would play with the programmes that were on it – and to do, I'm gonna shift files around and, yeah. I would watch him on occasion and just – and have no, no dint of what he was doing, get bored and go off and muck about in the garden or go for a run.

20 Q. When your Uncle Michael saw you in jail in December 1994, he says at page 2465 of the transcript that you objected, "to being described as unfeeling and unremorseful and lacking in grief." Did you have that discussion with your Uncle Michael?

A. I can't remember that discussion.

30 Q. There is some suggestion, at least in the evidence, that you seemed quite unemotional in dealing with a series of events that most people would have been highly emotional about?

A. Okay we've just discussed today several situations in which I was extremely, highly emotional to a point of you know, being out of control.

Q. Mmm.

- A. Go – it flies in the face of that evidence so, I mean, my – the way I deal with things, personally deal with things, and this is, you know, got nothing to do with anything that’s on a piece of paper at the moment but the way I deal with things is I internalise my feelings. I take control of them and this is exactly what my father used to do as well. He was, you know, he – my mother – I’m my mother’s and father’s son. They taught me how to behave in society and to, in the, in the world to be, to give outward signs of you know, control and um, pleasure and being respectful and all the various social norms, that situations where I, where I was able to let go were few and far between. I wasn't in an environment in within those first few days where I felt able to confide and on the situations where I did, you know, express some emotion, they’ve then been turned against me so on one, on one hand I’m being damned for being in control of my emotions and trying to be trying to cope with this enormous situation and when I am being emotional, being told it is inappropriate. I can't win.
- 5
- 10
- 15
- Q. What, but the point I take out of your Uncle Michael’s testimony is that you recognised that you had been described as unfeeling and unremorseful and resented it so the premise of the conduct –
- 20
- A. Mmm.
- Q. – is that as a recognition that what had been put against you is that you were unemotional in dealing with this emotional situation.
- A. Yes.
- Q. And are – you seem to be telling me that this, apart from a personality type that you describe, that this is incorrect?
- 25
- A. It is incorrect because I was, did have moments of, you know, emotional outbursts but I generally kept them private and, and again there’s evidence of me being, you know, having emotional outbursts, you know, with people as, you know, witnessing it and yet they can still say that and yet better situation where he’s coming to, and you know, interrogate me and, and have a go at me in prison at a time when I didn't trust him so was I going to show him any emotion at all? I was going to be on my guard. I was going to be very careful with what I had to say to him and then I get damned for it.
- 30

Q. Did you consider your Uncle John Boyd to be of a similar –

A. I have no –

Q. – mind?

5 A. No, I had no idea who to trust at that point so I – especially after being confronted by my cousin in November, sorry, in October about my mother's birthday.

Q. This is the incident where she felt there should be some recognition of your mother's birthday?

10 A. Yeah, where she felt there should have been some recognition and quizzed me about whether I had remembered or even – or celebrated. Yet no one had ever, had come in, none of my relatives had actually come in on her birthday to visit me and help me celebrate it, recognise it, or do anything. I'd been left alone that day. But the day after, I get damned for it.

15 Q. Did you receive family visits with any frequency once you had been arrested on the 24th of June prior to the trial?

A. Ah, in the initial months I was, they would come in two to three times a week.

Q. Who's they?

20 A. Ah, various members of my relatives.

Q. Anybody in particular?

A. Oh most frequently was Jan and, and the girls.

Q. Jan Clark?

25 A. And Bob would come in as well but on occasion, some of the others would drop in as well because they were obviously still in town supporting – and working on things.

Q. Okay. Who – just one point I want to cover is one of the issues that looms large on the technical side are these sock prints.

A. Yes.

30 Q. And who made them, you or Robin. And I just want to have clearly on the record, and I think you answered this earlier, but from the time that you left on your paper route and put on the socks that you described until the time the police arrived around 7.30 in the morning, did you change your socks?

A. No I didn't.

Q. Did you change any of your clothing?

A. No I didn't. Ah, sorry, the only thing I did change in my, of my clothing was the take – had taken the red sweatshirt off and put it in the washing,
5 it's the only cha – difference between leaving the house and when, you know, the police arrived.

Q. Right. And we've already been through the fact –

A. And shoes obviously.

Q. Shoes off, yes, and again I think you've been insistent that at no time
10 were you wearing outer garments whether the green, loose-weave v-neck sweater exhibit 98 or the track pants or anything over the clothing you've described as having been found in by the police around 7.30 that morning?

A. That's correct.

15 Q. Now we've been through a lot of material and I just, I want to give you the opportunity of saying anything which you want to say that I haven't covered or that may not be apparent to me from stuff that I've read with respect to your claim to entitlement to compensation?

A. Sorry I wasn't prepared for this, um...

20 Q. Would you – there's no compulsion to make a statement. I just want the – you to be clear that the opportunity is there should you wish to say something.

A. The only thing I can reiterate is that these five members of my family were my life. They were part of who I was. We were extremely close.
25 We all loved each other dearly. The last thing that I could possibly have done is to take their lives. I find it difficult hurting an animal, but to take a person's life, let alone my own family's life is unimaginable and not only have I served 13 years in prison for doing this, I've also served the so-called sentence of being labelled a convicted killer and a murderer
30 and you know, a monster, and being told on a daily basis that I'm a psychopath and I was psychotic and all these various, you know, horrible, you know, psychiatric issues and all this sort of – I've had all of this to deal with and so the pain and the anguish that I have felt has been, you know, from the original mourning has been compounded time

and time and time again. I want to assure you that the last thing I could have done if we strip away all those immaterial aspects of things and all the names I've been called, the last thing that I should be called is a murderer 'cos I did not kill my family.

- 5 A. All right, thank you very much. At this point might open to the Crown Law office to suggest any additional questions they would like me to put.

INTERVIEW ADJOURNS

10 INTERVIEW RESUMES

EXAMINATION CONTINUES: BINNIE J

- 15 Q. I've had a chance to speak with the Crown Law office people and there are really only four points of clarification that they've asked me to deal with. The first is the discussion we had about the arrangement on Sunday June the 19th to collect Arawa and Laniet at the museum cafe and the question generally was the, Arawa's access to the family vehicle. I think was a Toyota, if I'm correct?

A. It was a Toyota stationwagon.

Q. Stationwagon. Did she ordinarily use the vehicle for work purposes?

- 20 A. Ah, well she would use the vehicle if it was available, yes that's correct.

Q. Mmm.

A. I don't know, you know, it could be private things or work commitment.

Q. Mmm.

A. If you know what I mean, not just work.

- 25 Q. Did she have any greater or lesser access to it than any of the other siblings?

A. No. Well, Laniet didn't use it, I don't think she had her licence at the time.

Q. Because she was away from home?

- 30 A. And she was away from home, exactly.

Q. Oh sorry did you say she was not licensed?

A. I don't think she was licensed.

Q. And on this particular day, on June the 19th, did Arawa have the car?

A. Yes.

Q. Did she take it with her to work and then –

A. Yes she did.

5 Q. – brought you all back. All right. Sunday night, we're talking about the same day, the – Arawa was apparently not at the, didn't stay for Sunday night dinner, is that correct?

A. When we got back from the museum cafe and stopped at Laniet's flat. There had been a phone call, I think, a message that Mum had taken
10 while we, before we got back requesting Arawa to go off and do some babysitting so she immediately went downstairs and got changed and to go and they were going to pick her up and take her to their place so that's what happened –

Q. That happens before dinner?

15 A. Yes, it was yes.

Q. And you mention going off with Laniet to the fish and chip shop, so I take it there was no meal that had been prepared for Sunday night?

A. No, there hadn't been.

Q. Was it improvised?

20 A. It was just done – yeah that's right, I mean there was, I can't remember how the discussion went or anything but it was, just that's what we decided to do.

Q. And at that point the Toyota was at home because Arawa had been picked up to go on her babysitting –

25 A. Yes, yes that's correct.

Q. And this I think we've covered but perhaps could confirm it, that dealing with these damaged glasses, the frames and the one, on the right-hand, lens were in your bedroom and you described how they were generally in your mother's room and that you hadn't been using them and the
30 question simply is do you have any explanation as to how those damaged frames and the right lens could have wound up in your room on the Monday morning?

A. No, I have no explanation because I didn't use them.

Q. And you're quite clear that they were not in your room on the Sunday night when you went to sleep?

A. No I can't be clear because I can't – no, I have no memory of seeing them on the chair.

5 Q. Yes.

A. But they're certainly – I had not used them at any time through the weekend so I can't be certain of anything, really.

Q. So you don't know if they were there or they weren't there?

A. No.

10 Q. In the – page 410 of the statements to the police, and this has to do with the laundry issues, you were asked about the sorting the clothing and so on and you were talking about standing between the towel cupboard and the dishwasher. Question, "Would you be directly in front of the metal wash basin?" "Yes, two or three out from it." Question, "Was there anything in the basin?" Answer, "Some wet towels. I think there
15 had been a spill when I was away."

A. Oh okay.

Q. So the – I think you had said earlier that you didn't recall the towels in the basin?

20 A. That's correct. I remember that part of the conversation today but I, I'm – I would have to rely on the evidence I gave then.

Q. As the more –

A. As the more accurate.

25 Q. Right. Thank you those are the questions from the Crown Law office, and Mr Reed, re-examination?

MR REED:

Can I just ask a few questions?

RE-EXAMINATION: MR REED

30 Q. The – first to the laundry we just talked about a moment ago and Justice Binnie asked you a number of questions about the lighting in that laundry?

A. Yes.

- Q. The – one of the police officers gave evidence that when he went into the laundry, he asked for the light to be turned on only to find that it was already on it was so dim. Can I just simply ask you, is that consistent with your memory of how dim it would be when –
- 5 A. Yes, it was very dim.
- Q. Another matter, please, is you were asked about going on the paper round and asked about a particular woman and you said to Justice Binnie that she gave you fruit and that sort of thing.
- A. Yes.
- 10 Q. There was the suggestion at the trial that you had contrived somehow to make a noise or make yourself known at that woman's house as you went past. Can you just explain to Justice Binnie what had happened to that lady and as to why you, why you used to go up to where you did and...
- 15 A. Um, she had a, a quite a large dog. I think it was from – oh I'm sorry if – it's just escaped me but the name, the breed, the breed of dog is the, the typical type, it had the barrel of rum underneath.
- Q. St Bernard?
- A. St Bernard, thank you. That style of dog and she had a gate at the top
- 20 of the stairs leading to her, the front porch of her house and so she had asked because it was a difficult thing for her being relatively older lady coming down through the gate, down those stairs in the dark to the letterbox, it was a very sheltered part of Dunedin but icy and so for all those reasons she asked if I would mind putting the paper up on the
- 25 porch beside the door and she said not to worry about the dog because he would bark but that was fine because it would let her know that I had just arrived and she'd come out and get the paper and for that service she would then give me the fruit once a week.
- Q. (inaudible) so when it is suggested that somehow you contrived this,
- 30 what do you say to that?
- A. I'd have to totally deny that I did contrive anything because that was the arrangement that she and I had made so the suggestion that I tried to be noticed at any stage is, you know, ridiculous.

Q. And in that same context, the Crown claimed – Justice Binnie’s, but from the Crown Law office, that they make this apparent allegation that you might have contrived being at the gate by going backwards and forwards at an earlier time without – was her evidence. What is your reaction to those sort of allegations without any foundation? What do you say to that?

A. Well it goes along with everything that, you know, I’m constantly dealing with and all these, you know – and especially in the lead up to the second trial and being, again, and reading some of the notes, you know, during this investigation and new things keep popping up without any foundation, without, you know, any real proof whatsoever and it angers me, disappoints me and this is the system that I was reliant on to prove – at the start of things to prove me innocent and to find that I wasn’t involved in this situation. I trusted them and was betrayed by them.

Q. Thank you. Now could you please refer to the red tab, page 380 please? Just down to, just past halfway down and there’s a question starts, (inaudible) telling you, last night, this morning, do you see that?

A. Yes.

Q. Now just to get your bearings and then go below that to the answer. Now presumably the answer is you, the question is the police? Yes, now this is – just to get you in context, this is Detective Dunne and this is approximately 11.00 am on the Monday morning and if you look at the statement, it’s very near the start of the questioning. It’s only on the third page.

A. Yes.

Q. Do you see that? Now just focus back again, please, on where I’ve just pointed you to and you see the last line of that answer is, “Can you tell me what has happened?” Do you see that?

A. Yes.

Q. Do you accept that you may have ask, asked that?

A. As a question, yes.

Q. And you see the, the – what is the answer but is put as a question from the police, the police say, “Advised,” showing it’s not actually how you said it but, “Advised him as correct and Mum and Dad dead.” You see?

A. Yes.

Q. Now that seems to be the basis of somehow suggesting that you were incorrectly saying, as you said to the 111 operator, "They're all dead." Do you recall that Detective Dunne did tell you that Mum and Dad were
5 dead? Do you recall that?

A. I'm sorry I don't recall this conversation. I mean I recall being in the room with the detective and being interviewed.

Q. Mmm.

A. But not specific...

10 Q. Which is – if you were told by the police officer your mum and dad are dead, did you kill s – Robin? (inaudible) evidence.

BINNIE J:

I think it's more argument than evidence.

15 **RE-EXAMINATION CONTINUES: MR REED**

Q. That's fine Sir. Now just on the – now this is in the, of the (inaudible). Could I refer you please to page 183 of Mr Karam's submission (inaudible).

20 **BINNIE J:**

Look, go ahead, I'm familiar with this.

MR REED:

Do you mind me just standing here maybe Sir?

25

BINNIE J:

No.

RE-EXAMINATION CONTINUES: MR REED

30 Q. Justice Binnie asked you some questions about Val Boyd and about you hating your father, right?

A. Mmm.

Q. And you answered, "Yes." Just – I want you to read, please, the next paragraph, 6.169, just read that please?

A. I guess continued, "And –"

5 Q. Read it yourself, well actually, read it out because His Honour doesn't have it, so just read it out?

A. "And did he say in the same part of the same conversation, 'If my father has done this, I can never forgive him and that is a terrible burden to carry around for the rest of my life,' Val Boyd answered, 'He did.'"

10 Q. Right. Now that's her quoting you as saying that. Can I just ask you, do you have any recollection of saying that at a time after saying you hated your father? Do you have any recollection of that?

A. Sorry I, I don't have any specific recollection of the, of the conversation.

15 Q. Well, (inaudible) straightforward matter. You were asked about a, a woman whose evidence was excluded at the trial who was going to give evidence that your mother was worried to the extent that she told a Mrs Dunne, I believe –

A. Yes.

20 Q. – she was the inspector's wife in Napier or Hastings, that she was worried that your father had – might get a gun and shoot the family. I simply want to ask you, do you actually remember that there was any Mrs Dunne who was the detective's wife who lived in Napier? Do you remember that?

A. I have, I have no knowledge of her at all really.

25 **BINNIE J:**

I think that's as far as you can go on that.

MR REED:

30 Yes, yes, I (inaudible), I suffer from Mr Karam in my ear, Sir, but I've put up with it for a number of years now. Very distracting. He's a very frustrating lawyer.

RE-EXAMINATION CONTINUES: MR REED

Q. There was some other evidence excluded at the trial from a, a Ms Maxwell, a midwife who had been in Papua New Guinea and was retelling – something had happened between her and Arawa in the swimming pool where Arawa said that she had demonstrated to her about your father as to how she could put her finger in her vagina. Do you have personal, can I ask you, do you remember the friend of Arawa, now Ms Maxwell, a - I don't know what her Christian name is.

10 **BINNIE J:**

I'm not sure that this really arises out of anything. I'm aware of what you're referring to because it's already in the material. Can you –

MR REED:

15 Yes, it's (inaudible)

BINNIE J:

– can you focus the question a little bit?

20 **MR REED:**

Yes.

RE-EXAMINATION CONTINUES: MR REED

Q. Yes, well first of all do you remember such (inaudible), a friend of Arawa?

25 A. No I don't believe so.

Q. You don't? If you don't –

A. Cert – no, there were, there were a lot of friends, you know, we were – had, we all had a lot of friends but I don't remember hers, my younger sister's friends.

30 Q. Justice Binnie asked you as to whether you had ever, even with the benefit of hindsight, had any inkling of any incest or any improper sexual contact between your father and I believe the question was Laniet. Can

I just ask you, thinking back to Papua New Guinea, did you have any such concerns or notice that?

A. No I didn't.

5 Q. Thank you. When was the first time you ever found out that Laniet had been a prostitute?

A. Um, I believe it would have been put to me during the, the Friday when I was arrested.

Q. Did you believe that?

10 A. Well no I didn't believe it at the time because I, I thought it was just – and this was put to me by one of the, the police officers and so I didn't, I thought it was just the scare tactics and shock tactics to try and get me to confess.

15 Q. Well just on, while we're on the question at this point, whether or not there was incest between Laniet and your father, there's been a lot of evidence and witnesses that Laniet was going around town saying there was incest or improper conduct. Did you ever get any inkling from any of those people or hear anything in Dunedin that she was saying these things as distinct from whether it actually happened?

A. No.

20 Q. The newspaper you've been asked questions about, how many days a week was your father away from home?

25 A. Ah, from Monday – he would leave on the Monday morning to go to Taieri Mouth and come back on the Friday – oh sorry, my apologies, he would leave on the Monday morning, go to school, come back on Monday evening for choir practice and then leave again on the Tuesday and then not come back till Friday.

Q. Right. And on the days he wasn't at home, who picked up the newspaper?

A. Um, generally I did.

30 Q. Ah yes, you were asked questions about Mr Buckley. Now Buckley, according to the police, said that there was a particular girl in the street that you were planning, somehow, to rape. Was there ever a girl in that street that you were aware of?

A. Ah, there was no girl.

Q. And are you aware of whether the police investigated it or found there was ever a girl?

A. I am aware that they investigated but I, I have no knowledge they found anybody (inaudible).

5 Q. And are you aware that Mr Karam and the defence team tried to ever find out whether there was a girl who lived there?

A. I believe some research was done but nothing was ever found.

Q. Right. Ah yes, Michael Bain – in January, evidence was given at the second trial by Michael Bain, your uncle?

10 A. Yes.

Q. That when he last saw your father off at Wellington airport to fly back to Dunedin, your father was walking towards the plane but then turned and said to Michael words to the effect, and they're my words, "I've gotta go back and face it all again."

15

BINNIE J:

"That situation," I think his expression was "that situation."

MR REED:

20 Was it? Thank you Sir. My memory wasn't (inaudible).

RE-EXAMINATION CONTINUES: MR REED

Q. "That situation." Do you have any idea what "that situation" he was referring to or what that would be likely to be?

25 A. Absolutely, yeah. He and my mother had constant – I mean there was constant tension in the house because he was certainly uncomfortable. He was certainly, um, I would describe him as being, you know, brow beaten and put down by my mother and the entire situation was a difficult one for him. I can completely understand why he would say something like that.

30 Q. Among the questions that have been put to you today in relation to your behaviour before the deaths and that the (inaudible) of your behaviour was perhaps, in my words, "fearful" or not? A number of witnesses at your trial on your behalf gave evidence that you were a perfectly normal

happy person. Can you just clarify, please, in those few days before, what was your life like? What were you doing? Were you happy, unhappy, depressed? What were you doing? Let's take the week before.

- 5 A. Um, okay the week before, I guess the only feeling of concern that I had, if any, was as discussed with ~~ZITA~~ about ~~ZITA~~ but then things seemed to be going exceptionally well with her, with ~~ZITA~~ because we'd just been to the midwinter ball together, had a lovely evening and things looked extremely promising. Um, I was singing with several choirs, I was – had just finished performing in one of the theatre company performances, the gondoliers and we'd had good reviews I was, had started practices for Oedipus Rex and was getting good comments back from the director of that. Um, so everything in my chosen profession was heading, going forward and looking promising.
- 10 Um, personal life was looking promising, like, and I was carrying on with my sports side as well so nothing seemed to me, to answer the question.

Q. And do you remember Harry Love, the producer –

A. Yes, yes.

- 20 Q. Do you recall his evidence in the trial?

A. Yes I do.

Q. What – were you enjoying that?

A. Was I enjoying his evidence?

- Q. No, sorry, well yes I know you did but – we all did but – were you enjoying the relationship with him and the play?

- 25 A. He was – I found him to be an exceptionally open lecturer. I remember him inviting all classic, classics students up to his house for a barbecue which seemed to me at the time an extraordinary thing to do but he se – he was very progressive I guess, um, style of lecturer and, and liberal in that he would ask for a class representative and I think I volunteered to do that. Um...

- 30 Q. And do you remember, one of your lecturers, Catherine Spencer?

A. Um...

Q. She –

- A. Yes, she's, she was not a lecturer as such. She was in a – technician in a language lab that, to whom I sought I advice.
- Q. Yes. What was your relationship like with her?
- A. Good, fine. I mean I saw her several times for the purposes of doing translation work in language studies for my senior courses.
- 5 Q. Right. And of course, she gave evidence at the trial as to how you were at that time?
- A. Yes.
- Q. Was there anything unusual that you recall during that time with her or anything or?
- 10 A. No, no there was nothing ever unusual, I mean...
- Q. Thank you. You mentioned to Justice Binnie that you've been examined by psychiatrists, psychologists and everybody under the sun?
- A. Yes.
- 15 Q. But has anyone, to your knowledge, from any of those examinations ever suggested you are, to use a layman's term, weird (inaudible) or psychotic or a psychopath?
- A. No. There's never been any hint let alone a direct accusation or anything that...
- 20 Q. And in relation to Dr Brinded, the psychiatrist, can you just, can you have any recollection of how many times he would have spoken to you or interviewed you over those years?
- A. I could estimate the number of times but it was constant and regular, probably every fortnight he would come in to see me over a period of about five to eight years.
- 25 Q. Thank you. Now just two things left, please. Oh, no, sorry three. One easy one. The target that Justice Binnie has referred you to the target with five circles, evidence was given at the trial as to where the target practice took place. Do you remember which farm it was or – he was up there, which farm it was where the target was used?
- 30 A. I think, ah, I don't know, you'll have to forgive me if I'm wrong on this matter but I believe it was Thompson. It was, um...
- Q. You were somewhere up past Taieri Mouth?

A. It was just past the Ta – it was on the way, you go through Taieri Mouth, past the school which is on the right and you carry on up the hill slightly and it was up in that, just into that first plot.

Q. Yes.

5 A. I don't know the – can't describe the –

Q. And the target was what, attached to a tree or something?

A. To a fence post.

Q. A fence post? Okay. Come to the cafe and Arawa picking you up on the, the night you went back, the night (inaudible).

10 A. Yes?

Q. Mr Karam's at it again in my ear so...

BINNIE J:

You should switch Karams.

15

MR REED:

We tried that at the trial (inaudible) you know that didn't work.

RE-EXAMINATION CONTINUES: MR REED

Q. Excuse me. Arawa, you say, had the car?

20 A. Yes.

Q. Yes. And was she planning to come to the cafe to pick anyone up?

A. Ah, yes it'd been discussed the evening, ah, I mean the night before with Mum that she – obviously Mum had been in touch with Laniet and it had been discussed that Arawa was taking the car to the museum cafe.

25 Ah, Laniet had recently got a job there as well and they were both going to come back home.

Q. So why did you go to the cafe?

A. Ah, just to get a ride home.

Q. Right.

30 A. I mean it was only a matter of half an hour or so between my finishing at the rehearsals and the others going, finishing their shift.

Q. All right and although it's sort of been asked before but was there some devious plan by you to force Laniet to go home that night?

A. No.

Q. Final point, please, the glasses. Your mother's ones. When you placed the newspaper whenever you brought it in, was that put on that sideboard in the hall or where, where was the newspaper usually put?

5 A. Um, it was put – specifically as I can remember, it was put underneath the bust that was on the bookshelf directly on the left of the hallway –

Q. Right.

A. – as you come in the front door.

Q. All right, and is that, is that very near to your room?

10 A. It's right – there's, the book case ends here and my door was right there.

Q. And what distance are we talking about?

A. Oh, it would have been – the, the – it would be the width of the frame around the door.

15 Q. Right.

A. Inches.

Q. Now we know evidence was called at the trial which we'd never known before, that one police officer had actually moved the glasses on the chair. Do you recall that?

20 A. Yes.

Q. Do you know whether your mother ever put her glasses on that same unit where the newspaper was put? Do you know whether she ever did that?

25 A. No. She, um, she had – her eyesight was, as you know, equally affected as mine is now and we both wore our glasses, you know, pretty much full-time.

Q. Right.

A. Um, putting where – I mean she kept her glasses in the case in her drawer and her – didn't just lie them around.

30 Q. Did you use those glasses to kill your family?

A. I did not use the glasses and I did not kill my family.

Q. Thank you very much.

BINNIE J:

Q. Thank you very much Mr Reed, thank you Mr Bain. I much appreciate your coming and co-operating in this inquiry.

A. Well, I hope it's been of some assistance.

5 Q. It's been of great assistance.

INTERVIEW CONCLUDES

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-8435

BETWEEN VINCENT ROSS SIEMER
 Plaintiff

AND CHIEF JUSTICE OF THE NEW
 ZEALAND SUPREME COURT
 First Defendant

AND THE ATTORNEY-GENERAL OF NEW
 ZEALAND
 Second Defendant

Appearances: Plaintiff in person
P Gunn for the Defendants in CIV-2009-404-8435, CIV-2009-404-8438 and CIV-2010-404-0084
A Powell for the Defendants in CIV-2010-404-7025 and CIV-2010-404-7026

Judgment: 31 October 2011

**JUDGMENT OF WOODHOUSE J
(Costs)**

*This judgment was delivered by me on 31 October 2011 at 4:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.*

Registrar/Deputy Registrar

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Parties / Solicitors:
Mr V R Siemer, Gulf Harbour
Mr P Gunn, Crown Law, Wellington
Mr A Powell, Crown Law, Wellington

Cont ...

CIV-2009-404-8438

BETWEEN VINCENT ROSS SIEMER
Plaintiff

AND THE SOLICITOR-GENERAL OF NEW
ZEALAND
Defendant

CIV-2010-404-0084

BETWEEN VINCENT ROSS SIEMER
Plaintiff

AND THE SOLICITOR-GENERAL OF NEW
ZEALAND
Defendant

CIV-2010-404-7025

BETWEEN VINCENT ROSS SIEMER
Plaintiff

AND GRAHAM LAURIE LANG
First Defendant

AND THE ATTORNEY-GENERAL OF NEW
ZEALAND
Second Defendant

CIV-2010-404-7025

BETWEEN VINCENT ROSS SIEMER
Plaintiff

AND MARK LESLIE COOPER
First Defendant

AND THE ATTORNEY-GENERAL OF NEW
ZEALAND
Second Defendant

[1] The defendants seek costs on a 2B basis in respect of their successful applications to strike out the claims. Mr Siemer opposes the application.

[2] Under High Court r 14.1(1) “all matters are at the discretion of the Court if they relate to costs”. This is not an unfettered discretion. It is subject to principles set out in the High Court Rules and the leading judgments on costs. The first stated principle, in r 14.2(a) is that “the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds”.

[3] Mr Siemer advanced two main grounds for opposing the application. The first is that he “has not received any break down of costs from the State defendant”. Mr Siemer said that for that reason he is not able to address the issue “from an informed position”. This would not prevent a decision on the question of costs as a matter of principle. However, there are schedules attached to the defendants’ memorandum setting out the details in respect of the costs items sought. There is nothing in this ground of opposition.

[4] The second ground is that there was “a fundamental and fatal flaw in law” in my substantive judgment and Mr Siemer has appealed. This is not a reason to decline costs.

[5] There will be orders for costs in each of the proceedings, together with disbursements, as sought.

Tab H

THE COURT:

Ladies and gentlemen, as you heard yesterday Mr Cottle – Mr Dean Cottle was an intended defence witness but is not available to be called. The background to that is as follows. An attempt was made to serve a witness summons on him on the 13th of May. He actively evaded service of the summons. I issued a warrant for his arrest last week on the 21st of May, unbeknown to me at that time and only established subsequent to last week, Mr Cottle had flown to Brisbane on the 16th of May. You draw your own conclusions no doubt about that. So that is the background and the reason for his unavailability. I have however ruled it is appropriate you hear his evidence. He made a statement to the police on the 23rd of June 1994 at 11.55 am at the Criminal Investigation Branch office in Dunedin. And he said this.

BRIEF OF EVIDENCE OF DEAN ROBERT COTTLE READ BY CONSENT

Dean Robert Cottle is my full name. I reside at 82A Playfair Street, Dunedin phone 4878342. I am presently unemployed and I am aged 27 years. I am making this statement to Detective Malcolm Inglis about knowing Laniet Bain. I first met Laniet about 10 months ago in a bar in Dunedin. We got talking and got on well. After that meeting we got to know each other and became friends. Laniet would talk to me and sometimes I would take her out for dinner. She did tell me that she had been a prostitute at some stage. When I first started to see her, I would see her maybe three or four times a week. Towards the end of April I was seeing her less and it had been about three or four weeks since I'd last seen her, but in the times we had together she used to tell me things. She was a nice girl and we got on well. About the family, she told me that her father had been having sex with her and this had been happening for years, but he was still doing this as I believed it. She told me that she wouldn't go to bed until 3 am and knew this. She didn't want it coming out what had happened to her, I wasn't to tell anyone. It was one of the reasons for her leaving home. She was also fed up with everything. Her mother was hassling her and they used to sit around and each take turns at talking to God. She first moved into a flat in Kaikorai Valley off Nairn Street. There were no-hopers in there and I told her that she should get out of that address. She moved out of that flat and into the Russell Street address. It could've been the start of March. She used to go up to Alexandra with the family. She also told me that her sister Arawa had been involved in some prostitution. I presumed that she had told her sister what she had been doing. I asked what her sister had thought of that and she had replied, "Not much", as she'd done a couple of jobs herself. I didn't push it any more and let it drop. She was also involved with cannabis but I'm not interested in that. I decided on Friday 17 June to give her a ring and see what she was up to. I phoned the family home as I knew that she was moving out of Russell Street and I thought that she had moved home. I spoke to her mother and she gave me the phone number to get hold of her. I had told her that it was a friend trying to get hold of her. I phoned the number and they answered, "Taieri Beach School." I presumed that it was her father that answered the phone and I was surprised as I didn't think she would be back with her father. He told me that she was in town somewhere and he thought that she would be back at about seven. Later that day I was driving through town and I saw Laniet coming out of a coffee shop, it was in the afternoon. It was the

coffee shop that is on George Street past Frederick Street, heading north on the right-hand side. It has a big noticeboard and is dark with students using it. I stopped and spoke to her on the footpath for about five, 10 minutes. She told me that she was going to make a new start of everything and that her parents had been questioning her about what she was doing. She said that she was going to tell them everything and make a clean start of things. I said that if she wanted to talk, to give me a ring or if she wanted to go out for dinner. She had always been very, very scared of her parents finding out what she was doing. I thought by saying that, she was going to tell her parents about prostitution. That was about all we said. I don't think it would have taken longer than five minutes. I didn't see any friends that she could have been with. She didn't talk much about the rest of the family but it seemed quite normal that she got on with her brothers and sister as well, that she was closer to Arawa. I never met David, I only ever saw him once when I picked her up outside the Trust Bank Theatre in King Edward Street. She said, "That's my brother." She only did those shows to keep everyone happy, she didn't like doing them. Ever since I've known her all she has wanted to do is go back to Papua New Guinea. She really liked it over there. The night she told me about what her father had done to her, she also told me before this that something had happened to her in Papua New Guinea. She didn't say what but I presumed she meant something sexual. After that she started crying and told me about what her father did to her. Just thinking back on it, I'm not sure if it was Friday. I think it was Friday but if you check their phone you will see a call from me. She seemed quite a level-headed girl to me. I've read this statement and it's true and correct, and it's signed D R Cottle.

THE COURT:

Now on the 26th of June 1995 Mr Cottle made an affidavit, that is a sworn statement and in it he said this in relation to the statement that I've just read to you.

FURTHER EVIDENCE OF DEAN ROBERT COTTLE READ BY CONSENT

I wish to add some more detail to the statement. Laniet was clearly agitated on the Friday afternoon before the killings. She told me that she was going home that weekend to tell the family everything about what had been occurring. She also said, 'I'm going to put a stop to everything.' She actually used the term that she was sick of, 'everyone getting up her.' She did not actually refer to the incest with her father

during the Friday conversation. She also told me that the incestuous relationship with her father had commenced in Papua New Guinea.

Tab I

22nd June 1994
1020 hours
Otago University
Computer Studies Centre

1025
55

MARTIN JAMES COX STATES

My full name is Martin James COX. I live at 11 Koremata Street, Green Island. My phone number is 488 3575. I am employed by the University of Otago as a computing adviser. The number here is phone 479 8531.

I am making this statement to Detective ROBINSON of the Dunedin CIB about the examination I made of a Phillips IBM compatible computer at 65 Every Street, Dunedin.

I was requested to assist the police ascertain what time a certain message had been typed on a Phillips IBM compatible computer which was at 65 Every Street, Dunedin.

The message on the computer read "Sorry you are the only one who deserves to stay".

To ascertain the time this message was typed into the computer we firstly saved the message to a file. We called that file Message Doc. We turned the computer off, without closing down the word processor programme. We turned the computer back on. I noticed at this time that the computer's clock was not being set to the correct time.

We went to look at the files for the word processor. Included in those files was a file, MW.TMP. That file was created when the word processor was last started. That was at 1200 am on 01.01.80

This time and date are relative to the computer's internal clock. The file that we saved, Message Doc, was dated 0732am on 020180. That is thirty one hours and thirty two minutes after the word processor was started.

A constable at the house recorded the time we turned the machine off. Presumably the computer (word processor) was started thirty one hours and thirty two minutes prior.

In conclusion we can say that the word processor was started thirty one hours and thirty minutes before we saved the message, and that time was recorded by the constable. So by subtracting that time from the time the message was saved we can establish the time that the word processor was started.

We can say from the time and date of the temporary file that the word processor was started within one minutes of the computer being switched on.

We cannot accurately determine the time that the message was typed, but we can determine the time the computer was switched on and the time the word processor was started. To all intents and purposes they can be regarded as being the same time.

I HAVE READ THIS STATE. IT IS TRUE AND CORRECT

'M J COX'

Statement taken and witnessed by:

'C J ROBINSON'
Detective 7172
22nd June 1994

Tab J

To The Hon Ian Binnie QC

From Paul Rishworth

Date 10 June 2012

The Prosecution's Duty of Disclosure

You asked about the extent of the prosecution's duty of disclosure in a criminal case in 1995, and particularly whether it extended to documents and information in the possession of the ESR but unknown to Police and Crown Prosecutor.

You said that "the Crown takes the position that a lot of the 'fresh' evidence found after the 1995 trial was in ESR records not disclosed to the police thus not disclosed by the Crown — BUT, says the Crown, the defence COULD have asked for disclosure of the experts' notes but, the defence having failed to do so, the Crown had no further obligation in that regard."

My response:

Summary

1 The ESR is an entity distinct from Police and Crown (which I will call the "prosecution").¹ That proposition was explicitly affirmed by the Court of Appeal, in a case about criminal disclosure responsibilities in 2001, based on reasoning that would have applied equally in 1994-95. The Crown's position that you refer to above is correct in that the prosecution's disclosure obligations would not have extended to material that was in the control of a third party such as ESR and which it did not have, and did not know about. The ESR is not a part of the prosecution.

2 Any specific requests by the defence for information believed to be held by ESR would, in the normal course of things, have been passed on to ESR by the prosecution. And ESR would have been expected to supply that information, subject to any proper reasons for not doing so (such as public interest immunity).

3 You also asked a series of specific questions which I set out here in bullet points, with a summary of my response alongside:

¹ For reasons described below at para 65ff, by "prosecution" I mean the police officer or agency handling the prosecution, for whom (in indictable matters) the Crown Solicitor or his or her agent or employee will be acting as counsel. There is no relevant distinction to be made between Crown and police in the disclosure context.

- did the police have a duty to open their files to the Crown prosecutor? **Yes, because there is no relevant distinction in this context between police and Crown; the duty is upon the prosecution**
- did the police have an obligation to demand from ERA (and other experts they consulted) the experts' files? **The reports that they sought and obtained from experts including ESR and which were therefore in their possession and control ought to have been disclosed. Material on experts' files retained by those by experts (such as ESR), and of which the prosecution was unaware, did not have to be disclosed by the prosecution. (in other words the prosecution was not required, for purposes of disclosure, to obtain *all* documents held by ESR)**
- if the police got the files of these experts did the police have to show the experts' files to the Crown? **Yes, again because there is no relevant distinction between police and Crown in disclosure context**
- did the Crown then have a duty to disclose the material obtained from the experts then in its possession to the defence? **Yes, subject only to relevance (and proper reasons for withholding such as public interest immunity)**
- was there any difference in these respects between experts consulted by the police as opposed to those experts actually called as witnesses for the prosecution? **No: all relevant material held by the prosecution ought to have been disclosed including that which was not to be adduced as evidence.**

More detailed advice now follows, according to this outline.

The legal basis of criminal disclosure in 1994-95	2
A. Is ESR a part of "the prosecution" or is it a third party?	8
B. Is there a distinction between Police and Crown for disclosure purposes?	16
C. Must all ESR material in the possession of the prosecution be made available to the defence or only that which is to be given in evidence?	19
Conclusion	20

The legal basis of criminal disclosure in 1994-95

- 4 In 1995 criminal disclosure law was an amalgam of:
- (a) common law principles derived from the right to a fair trial and the derivative right "to make full answer and defence"
 - (b) entitlements of accused persons under enactments

5 Since 1 June 2009 criminal disclosure has been governed by the Criminal Disclosure Act 2008. The 2008 Act was understood to codify existing practices and essentially to restate the common law position. Under the 2008 Act disclosure became a statutory entitlement for accused persons, rather than being driven by the common law. Because the 2008 Act was substantially a codification of then current

practice, it is salient to the present inquiry because it sheds light on pre-existing law. I discuss some of the new Act's provisions at relevant points below.

I now look at each source of disclosure obligations, operating in 1995, in turn.

Statutory provisions for disclosure

6 As to details of the charge itself, s 329(4) of the Crimes Act 1961 required (and still requires) indictments to contain "so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information concerning the act or omission to be proved against him ...").

7 Sections 24 and 25 of the New Zealand Bill of Rights Act 1990 spoke, in general terms, to matters of disclosure:

- 24. Rights of persons charged**—Everyone who is charged with an offence—
- (a) shall be informed promptly and in detail of the nature and cause of the charge; and [...]
 - (d) Shall have the right to adequate time and facilities to prepare a defence; [...]
- 25. Minimum standards of criminal procedure**—Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
- (a) the right to a fair and public hearing by an independent and impartial court; [...]

But these rights were expressed at a level of generality that meant, in fact, that much turned on the common law conception of what was required for a fair trial.

8 The Official Information Act 1982 ("OIA") became relevant to the field of criminal disclosure. In *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (also reported as *Pearce v Thompson* (1988) 3 CRNZ 268) the Court of Appeal affirmed that the concept of "personal information" under the OIA (to which a person was entitled upon request) included witness statements in summary prosecutions. Accordingly, on request, these had to be disclosed. This case therefore assured, for summary matters, the same state of affairs that pertained in indictable matters (that is, those which involved a preliminary hearing) – pre-trial disclosure of proposed prosecution evidence. The OIA could also be invoked in indictable matters.

9 The OIA had not been intended as a criminal disclosure statute. And there could be categories of proposed evidence or other relevant material that were not captured by the phrase "personal information". Expert evidence might well be in that category. So common law principles of disclosure continued to be very important.

Common law disclosure

10 As to common law duties of disclosure, these had been considered in the leading case of *R v Mason* [1976] 2 NZLR 122. Police had interviewed about 4000

people. Defence counsel requested names and addresses and any written statements from persons not being called as witnesses. The Court of Appeal held that police had a duty to disclose names and addresses of those who could give material statements to the defence, but that there was no duty to supply written statements (this was said to be subject to a judicial discretion if fairness and justice demanded a particular statement be supplied).

11 In *R v Wickliffe* [1986] 1 NZLR 4 it was held that when a police job sheet showed a witness may have made an earlier statement in conflict with what was to be given at trial, that information ought to be made available to the defence before trial.

12 Sundry other cases explored aspects of disclosure arising out of the fair trial imperative. In the *Ombudsman* case, as well as dealing with the application of the OIA to criminal disclosure, the Court of Appeal affirmed the common law duties as then understood.

13 Under the common law the test for disclosure revolved around the concept of “materiality”. So, for example, in *R v Price* (unreported 1992) the police had not disclosed a witness statement of a person whose evidence they judged to be immaterial (he had denied all knowledge of the offence and police had no reason to disbelieve him). The Court of Appeal held that this evidence did not have to be disclosed because the information could not reasonably be regarded as relevant and of a nature which “in the reasonable contemplation of its holder [might] be of assistance to the defence”.

14 The author of (then the only) comprehensive text on criminal disclosure, Janet November in *Disclosure in Criminal Cases*, Butterworths, 1999, offers the view that “materiality” was not seen as broadly in New Zealand as it was in the United Kingdom (where the test was not whether evidence was adjudged to advance the accused’s case or weaken the prosecution case, but whether it was “material” in the sense that it might possibly be *of help* to the defence by, say, opening up new lines of inquiry). She reports (para 5.1.3) that disclosure was there required of all evidence held by the prosecution unless it was manifestly irrelevant or there was a public interest reason for non-disclosure.

15 Ms November believed also that the Canadian approach under *R v Stinchcombe* [1991] 3 SCR 326 was wider than that of New Zealand. The Canadian approach was said to require that all relevant information be disclosed in indictable matters with no distinction between exculpatory or inculpatory evidence and including statements from people who provided relevant evidence but whom the Crown does not intend to call.

16 Because the New Zealand understanding was that the *prosecution* judged materiality, there was of course the possibility that the defence would never become aware of a certain item of potential evidence (because the prosecutor’s judgment might mean it would not be disclosed).

17 Speaking to this potential gap, in *R v Hall* [1987] 1 NZLR 616 at 628 the Court of Appeal said that “should the defence wish to pursue a particular inquiry which is made known to the Crown, then in the interests of justice the Crown should assist by supplying any information it has available relevant to that inquiry.”²

18 I note that Ms November, writing as I say in 1999, describes the position generally as follows (p 65):

The judges no longer talk about a rule of practice whereby the prosecution should disclose relevant evidence to the defence, but of “duties” to disclose in the interests of a fair trial, and by the imposition of sanctions for non-disclosure [they] clearly demonstrate that the prosecution has enforceable duties to disclose certain matters before trial. Undoubtedly this is a developing area and categories of disclosure are not closed.

Under the Official Information Act ... the defendant has a right to personal information, and it is certainly arguable that the common law duties to provide other matters listed in this chapter, such as convictions of prosecution witnesses, create a right to that information for the defendant, subject to public interest and other exceptions.

19 A very useful summary of the position in 1994-95 is also to be found in the judgment of the Full Court of the High Court in *Attorney-General v Otahuhu District Court* [2001] 1 NZLR 737, a case discussed more fully below (being the case mentioned already, establishing that ESR is an entity distinct from the “Crown” and hence the prosecution). In the course of its judgment, the Full Court summarized the

² A fuller extract from the judgment: “It would be unreasonable to impose on the Crown an obligation to seek out from the extensive police inquiries facts which ultimately are not relevant to the case against the accused but which might assist some aspect of the defence case which has not been made known to the Crown. However, should the defence wish to pursue a particular inquiry which is made known to the Crown, then in the interests of justice the Crown should assist by supplying any information it has available relevant to that inquiry. The more co-operative the Crown is with reasonable and specific requests from the defence before the trial the less likely will there be problems after the trial when police job sheets are inspected. If any difficulty arises, the circumstances may warrant the Court making an order for the information to be supplied. (See *R v Mason* [1976] 2 NZLR 122.) But a general inquiry by the defence for any information which may be helpful to the defence, as was made in this case, is too vague and requires no more of the Crown than to comply with the well established principles requiring the Crown in certain circumstances to make available to the defence, witnesses or their statements as the case may be. The Crown should also disclose any conflict that may be material between the evidence of a witness and other statements made by the witness and known to the prosecution. Apart from these principles the Crown should act with the utmost candour and fairness making a full, adequate and impartial presentation of the facts. (See *Adams on Criminal Law* (2nd ed) para 3034). We do not consider the Crown in this case to have fallen short in its duty of fairness to the defence nor do we consider that a miscarriage of justice has occurred through the information concerning Ringrose not being available to Mr Williams at the trial when there is still no evidence to shake his alibi or to connect him with the offence or with the alleged theft of the bayonet or hat from the appellant's premises.”

general law as to criminal disclosure. Though decided in late 2000 the position would have been similar in 1994-95. The Court said (my emphasis):

It is apparent from an analysis of the existing New Zealand authorities that disclosure in criminal cases, whether at common law or under the NZBORA is governed by similar considerations:

(a) Disclosure is generally **triggered by a request on behalf of the accused person**.

(b) Disclosure of **irrelevant** material is not required.

(c) The decision as to relevance is a matter for the police or their counsel, but is reviewable by the Courts on a pre-trial application.

(d) There may be good reason for withholding documents including, by analogy, the grounds set out in ss 6 and 9 of the Official Information Act.

(e) Whether there is good reason to withhold is also reviewable in the Courts on pre-trial applications.

20 That Court then discussed *R v Stinchcombe* which it recognized “reversed the onus by requiring the prosecution to justify non-disclosure” (para [42]). It commented that no final view was required as to whether New Zealand law was or should be the same, but said:

However, we agree [with counsel] that the *Stinchcombe* approach has merit and may well, in any event, reflect the general practice in this country, bearing in mind the signal impact which the advent of the OIA has had on criminal discovery. Amongst other things, the *Stinchcombe* approach would overcome the difficulty which an accused person has in knowing what material the police or the Crown may have in their possession or power relating to matters at issue. However the precise scope of the duty would need careful attention to ensure that the disclosure obligation did not impose an unnecessary or unduly burdensome responsibility on the police or Crown. It should also be noted that *Stinchcombe* did not address the issue of documents in the hands of third parties.

21 While the Court in the *Otahuhu District Court* case speaks of disclosure generally being triggered by a defence request, it seems that practice would often have been to make disclosure without request. I note that the “Prosecution Manual”, published by Law in Order Ltd as a service to prosecuting agencies in New Zealand, and available to them by on-line subscription, said (in 2006, and hence prior to the Criminal Disclosure Act 2008):

It is good policy that disclosure in a criminal prosecution is made even if a request for disclosure has not been received from the defence.

22 It is worth noting that under the Criminal Disclosure Act 2008 (once it came into force in 2009) the prosecution’s disclosure obligations are as follows: under s 12(1) there are *initial* disclosure obligations triggered by the laying of charges, with provision under s 12(2) for defence requests of further information at that stage;

then in s 13 there are further disclosure obligations (on a not guilty plea in a summary case, or on the election of trial by jury when such election is possible, or on the laying of an indictment); and s 14 then permits requests by the defence for disclosure of *additional* information (to be identified with as much particularity as possible). The specific content of the obligations in ss 12 and 13 are set out in those sections.

In short, the current statutory regime comprises a set of standard entitlements plus the opportunity for specific requests for information (these then to be complied with so long as the request is judged relevant and no grounds for withholding apply).

23 The 1995 practice would have been essentially similar, and this is affirmed by the November book, written in 1999.

24 The November book usefully sets out the various categories of information that Police might have to disclose under the law as at 1999 (which would have been the same in 1995). I set these categories out below, adding commentary only where it is helpful to do so – for example, by pointing to areas of uncertainty or vagueness about the rule or practice. For present purposes it is the categories of expert evidence, and the related category of evidence in the hands of third parties, that are relevant.

25 The categories discussed by November are:

- **Job sheets** (though noting that in one case a failure to disclose the whole job sheet made no material difference to the fairness of a trial)
- **Briefs of evidence**
- **Summaries of facts** prepared for presentation to court in summary cases (in anticipation of guilty pleas and sentencing)
- **Unused names and addresses of interviewees.** Here it is noted that there was (at the time of writing) doubt about whether the *statements* of “unused” witnesses must be disclosed. The leading case of *R v Mason* required only that names and addresses be disclosed, while noting that in “truly exceptional cases” a refusal to hand over statements might result in unfairness to the defence and perhaps a miscarriage of justice. The author then notes that in the United Kingdom and Canada (under *R v Stinchcombe*) “all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as witnesses”.
- **Exculpatory unused statements.** Here the author records United Kingdom authority (Lord Denning and Danckwerts LJ in *Dallison v Caffery* [1965] 1 QB 348) to the effect that if an interviewed witness can give exculpatory evidence then the Crown should call that witness or make his statement available to the defence. November notes that this argument was put to the New Zealand Court of Appeal in the *Mason* case but that the Court agreed with Moller J at first instance that a statement must be supplied only in “truly exceptional cases”. November opines that an exculpatory statement ought to

be seen as a truly exceptional case requiring disclosure. In the result, she says: “The law in New Zealand is thus not completely clear” (p 70 at para 6.2.2)

- **Previous inconsistent statements of prosecution witness**
- **Convictions of prosecution witnesses relevant to credibility**
- **Other significant matters that may affect credibility of prosecution witnesses**
- **Inducements or immunity given to witnesses**
- **Expert evidence in the possession of the prosecution**

26 This last category is, of course, germane to your question. For present purposes, these questions then arise:

- A. is ESR embraced within the term “the prosecution”? Or is it, instead, a “third party” in the context of criminal disclosure, to which a separate regime applies? (And it is the position in 1994-95 that is relevant.)
- B. Is there a distinction between Crown and police or are both embraced within the term “prosecution”?
- C. Must all ESR material in the possession of the prosecution be made available to the defence or only that which is to be given in evidence?

In the balance of this memorandum I address these 3 questions in turn.

A. Is ESR a part of “the prosecution” or is it a third party?

27 In 1994-95 ESR would have been (and in 2012 would still be) regarded as an entity separate from the prosecution, and hence as a third party for disclosure purposes. The prosecution’s disclosure obligations therefore did not extend to documents held by it, only to those documents held by the prosecution. That said, if requests had been made by the defence for certain documents that ESR held or was believed to have held, then the expectation would have been that the prosecution would have conveyed those requests and that ESR would have complied with them subject to any applicable reasons not to do so such as public interest immunity. More detail on these points now follows.

28 That ESR was an entity distinct from the prosecution was affirmed in various ways in 1994-95. The Crown Research Institutes Act 1992 established the framework for “CRIs”, of which Environmental Research and Science (“ERS”) was and remains one. Each CRI was incorporated under general companies legislation, with Government ministers holding its shares, and with a board of directors appointed by Cabinet charged with making operational decisions (and holding office under (now) the Companies Act 1993 and Crown Entities Act 2004). CRIs are accountable under a statement of corporate intent that they must deliver every year (s 16) and report against (s 17). They are amenable to receiving specific written directions from shareholding ministers but in other respects autonomous (s 12). They are charged

with (inter alia) research for the “benefit of New Zealand” and exhibiting a “sense of social responsibility” (s 5).

29 The initial CRIs were successors to the older “Department of Scientific and Industrial Research”.

30 As to ESR’s involvement (and former DSIR’s involvement) in forensic science for prosecutions, this was the subject of some specific provisions included in the New Zealand Law Society’s “*Rules of Professional Conduct*” for barristers and solicitors. In the Rules operative in 1994-95, Appendix II set out what it described as a “procedure”:

Defence Access to Examinations by the Institute of Environmental Health and Forensic Sciences (‘The Institute’) (formerly the DSIR)

31 The procedure is described as a “Police instruction by the Commissioner of Police and agreed to by the NZ Law Society”. It was noted that the procedure was not binding in individual cases (obviously a necessary point to make given that it could not itself qualify as “law”). But this procedure was, I believe, evidence of the practice and of the understanding of the common law by practitioners of the time. In summary the eight paragraphs making up the agreed procedure were these (my emphasis):

1. Defence requests for details of ESR reports, or for discussions with analysts, or for samples, were to be made through the prosecution
2. **Prosecution to advise defence (on request) of general findings of analysis by ESR; prosecution to supply copies of written reports or certificates when such exist**
3. If defence wish to ascertain the techniques used by analysts they may make written requests through a prosecutor and the answer will be supplied through the prosecutor
4. Where an ESR test favours the defendant the prosecutor was to forward without delay **even if no request is made by defence**
5. Where defence request a sample for private analysis, such shall be supplied if available.
6. Defence not permitted as of right to test the actual police exhibit e.g. a blood-stained shirt. Permission for defence experts to be present while the ESR examines such items may be granted.
7. Defence may request ESR perform a particular test and such shall be carried out unless good reasons exist for refusal.
8. Queries by police or analysts as to interpretation of the instructions or guidance as to situations not covered were to be referred to the Police Commissioner (Legal Section) or the Director of the Institute.

32 A premise of these procedures was that ESR is a distinct entity from the prosecution, albeit that defence requests to ESR should generally be channeled through the prosecution. Another premise was that disclosure hinged on a defence

request, albeit that point 4 made it clear that evidence received by the prosecution that favoured the defence should be turned over without request.

The Criminal Law Reform Committee Report of 1986

33 Further confirmation of the understanding of the law in that period can be seen from the report of the NZ Criminal Law Reform Committee's³ report for the Minister of Justice on Criminal Discovery in 1986. This report dated from before the *Ombudsman* case had brought the OIA into the field. It discussed the whole field of criminal disclosure, urging legislation to make it more certain.

34 Under the heading "expert evidence" the Committee recorded the then status quo – that the Law Society Rules of Professional Conduct required prosecutors to disclose expert evidence prepared for a case by the DSIR (as I said, the DSIR was, in 1986, the predecessor to what is now ESR). The Law Reform Committee urged that a similar approach be taken to all expert evidence, not just ESR evidence. The premise of this part of the Committee's report, and indeed of the instructions in the Law Society's Code of Ethics, *was that the expert evidence be in the possession of Police* if it were to attract the disclosure obligation. Neither the Committee Report nor the Law Society's Rules were speaking to the case of material held not by Police but only by ESR, and of which Police did not know. The Criminal Law Reform Committee said this (my emphasis):

139 In the first category [this was a reference to scientific and technical reports] we support mandatory disclosure of final reports **supplied to the prosecution** by persons who are to be called to give "expert evidence". If requested the prosecutor should supply a sufficient description of the method used by the witness to enable another person to preform an independent investigation.

140 A similar procedure should be used in respect of reports prepared by persons whom the prosecution does not propose to call. We considered whether it might be sufficient for such reports to be supplied only on request. A difficulty with that proposition, as was demonstrated in the *Thomas* case [a well-known New Zealand miscarriage of justice case], is that the defence may be completely unaware that a person has been approached and had furnished critical information **to the prosecution**. Given the critical importance of scientific evidence in some trials, we favour automatic disclosure.

35 The salient point here is that this Report is speaking of expert evidence available to the prosecution. That, they recommend, ought all to be disclosed automatically. We see these recommendations bearing fruit in the 2008 legislation and no doubt in practice before then.

³ The Criminal Law Reform Committee was a forerunner to what is now the New Zealand Law Commission, our law reform body. In 1986 there were three or four specialist "subject area" committees that served this reform function, and the Criminal Law Reform Committee was one.

36 Similarly, Janet November's book spoke of a duty to disclose "expert evidence *in the possession of the prosecution*" (p 79). She suggests, in light of the Criminal Law Reform Committee's recommendation and the United Kingdom case of *R v Ward* [1993] 2 All ER 577 (EWCA Crim) (discussed below, in which criticism was made of government scientists for withholding exculpatory material) that the pragmatic approach ought to be to disclose all prosecution expert evidence to the defence. But this is not in context any suggestion that the prosecution must disclose *that which they do not have*. Nor that ESR was to be regarded as embraced by the term "prosecution".

37 Indeed, there was no suggestion in 1994-95 that there was an obligation on the prosecution to locate and gain access to matter in hands of third parties of which it was not aware (and about which it had not been asked). The common and consistent understanding seems to have been that the obligation was on the prosecution to disclose that which was in *its* possession (which may well include expert reports), but not to approach third parties to gather further information to disclose. And, further, that ESR was a third party.

38 Finally I note that in 1990 the New Zealand Law Commission produced a report entitled *Criminal Procedure Part 1: Disclosure and Committal*. (The NZ Law Commission was created in 1987 and assumed the functions that had been formerly carried out by the various "subject matter" law reform committees, of which the Criminal Law Reform Committee mentioned above was one.) In para 46 the NZLC said (my emphasis):

The police operate under some self-imposed disclosure obligations. For example, the Commissioner of Police has issued an instruction, agreed to by the New Zealand Law Society, setting out a procedure for defence access to expert evidence **obtained from** the Department of Scientific and Industrial Research. In addition a considerable amount of disclosure has always taken place on an informal basis. This is of course dependent upon the existence of a good working relationship between individual prosecutors and defence counsel.

39 In setting out its broad proposals, the NZLC set out (at para 78) a list of examples of the types of material to be disclosed. It included (my emphasis):

In terms of a system involving full disclosure, any statement of expert opinion **obtained by the prosecution** and not restricted as at present to opinion or advice of the DSIR

40 In the next paragraph the NZLC referred, in passing, to "the need for the investigative arm to pass on conscientiously all relevant information to the prosecutor [which] will be crucial to the success of a disclosure regime: but that obligation also cannot be appropriately laid down by legislative decree. This, too, is a matter of internal regulation."⁴

⁴ The reference to "this, too" is because the same paragraph also recorded that there should be no statutory obligation to pass on "unrecorded information which had been received by some

41 These references to practice in the 1980s and 1990s are all consistent with what ultimately came about in the 2008 Act. That is, the prosecution bears a duty to provide information in its possession, including that which is not to be adduced as evidence. The Criminal Disclosure Act 2008 was understood to codify the procedure that had evolved by then and not seen to make major changes, save of course that it makes disclosure a matter of statutory *entitlement* and not simply an imperative driven by the common law right to a fair trial, or rights to request “personal information” under the OIA. As to *what* is disclosed, relevantly for the present inquiry, the 2008 Act says (in s 13(3)) (my emphasis):

(g) a copy of any information **supplied to the prosecutor** in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses.

(h) A copy of any relevant information **supplied to the prosecutor** by a person or persons whom the prosecutor considered calling to give evidence as an expert witness or witnesses, but elected not to do so.

42 Again, this makes it clear that the prosecution’s obligation is to disclose information that it possesses, and does not extend to information in the hands of third parties of which it has no knowledge.

Judicial affirmation that ESR is a third party and not part of the prosecution

43 The premise of the Police Instructions, and of both the law reform institutions (1986 and 1990) is that ESR (and before it DSIR) was an entity separate from the prosecution. This was explicitly affirmed in a 2001 Court of Appeal case to which I now turn.

44 There were actually two cases on the point in 2000-2001. The first, *Police v Keogh* [2000] 1 NZLR 736 took a contrary view – holding that ESR *could* be identified with the prosecution for disclosure purposes. The second case, *Attorney-General v Otahuhu District Court* [2001] 1 NZLR 373 which went to the Court of Appeal ([2001] 3 NZLR 740), disagreed. It affirmed the position outlined above: that ESR is distinct. (In the first case, the point had not been critical for the judge’s decision in any event.)

45 Both cases involved a defence request to the prosecution that ESR make available, pre-trial, a copy of the manufacturer’s manual for the evidential breath-testing device that ESR used in analyzing samples of breath for impaired-driving offences. The application was made in the context of the prosecution – that is, against the *police*, rather than by way of an originating application. Police passed the request to ESR.

individual during an investigation or prior to trial” There might, said the NZLC, be oversight or carelessness, or pressure of work or even impropriety which might wrongly result in the absence of a record of information which ought to have been processed and filed. But the NZLC said this was not a matter to be controlled by legislation but by explicit administrative regulation.

46 Police (and ESR) resisted disclosure in each case, claiming (at the urging of the device's manufacturer) that the manual contained trade secrets and confidential information and that the manufacturer might elect to withdraw the manual, and hence make the devices unusable, if its information could not be protected.

47 The first case was *Police v Keogh* [2000] 1 NZLR 736. One step in the prosecution's argument against the defence application was that ESR was a separate entity and hence a "third party" for the purposes of police disclosure rules.

48 Chambers J in the High Court rejected the submission that ESR and the prosecution were distinct. He relied in part on a United Kingdom "miscarriage of justice" case, *R v Ward* [1993] 1 WLR 619, in which it was held that "government scientists" had breached their disclosure obligations. (Their failings to disclose material advantageous to the defence resulted in the convictions of Ms Ward being set aside.) Chambers J held that, in New Zealand, ESR were also, in effect, "government scientists" and could not be regarded as separate from the Crown and hence police for disclosure purposes. His reasons were that shares in a CRI such as ESR were held by Ministers of the Crown; that these shares could not lawfully be sold to another person; and that CRIs had a statutory duty to undertake research for the benefit of New Zealand and to exhibit a sense of "social responsibility". Therefore, he held, the ESR could not for disclosure purposes be treated as distinct from the police.

49 That ruling was technically *obiter* in light of his operative conclusion that the evidence (that is, the manual) was not truly relevant to the defence case, because the offence alleged turned on a blood test and not a breath test.

50 The same point then arose in the second case, which was about a breath test: *Attorney-General v Otahuhu District Court* [2001] 1 NZLR 737. A Full Court (that is, two High Court judges) was convened because it was being asked to depart from some of the reasoning of Chambers J, and because the decision would affect many future cases.

51 The Full Court differed from Chambers J on the point now of interest. It held that ESR was an entity distinct from the Police. Its reasons were these. First, like Chambers J, the Full Court recognised that:

- ESR is a Crown Research Institute (CRI) formed under the Crown Research Institutes Act 1992
- It is a limited liability company with shares held by the Minister of Finance and the Minister on charge of CRIs
- It must exhibit a sense of social responsibility
- The Crown has an ultimate control over a CRI in that the Prime Minister is empowered to give written directions to it, after consultation with the Ministers
- ESR has a close relationship with Police in that under the Land Transport Act it is an approved laboratory for blood testing and breath testing.

52 Even so, said the Full Court:

- ESR is a legal entity distinct from the Police “and traditionally has striven to uphold its independence and impartiality”.

53 Said the Court ([22]):

In that respect, we accept that the ESR must remain and be seen to be independent of the police in the best traditions of scientific objectivity. We also accept that documents held by the ESR are not strictly within the “power” or “control” of the police in their prosecutorial role. To borrow from the established principles in civil procedure, the police are not lawfully entitled to demand production of the manual without the consent of some other person: *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 at 635. In this case, at least the consent of Lion/CMI as the owners of the documents and possibly the consent of an appropriate senior officer of the ESR as well.

54 As to the *Ward* case on which Chambers J had partly relied, the Full Court said that it raised different issues (failure of scientists to disclose results of certain tests “specifically in relation to the prosecution in issue”). Said the Court: “There could be no quarrel at all with that proposition but it does not raise in any direct way the issue we have to consider” (at [23]).

55 I take the Full Court’s point there to be that, if similar facts to *Ward* arose in New Zealand, the same conclusion might well be reached in that culpable failings of the ESR (to disclose material casting doubts on the evidence that its employees in fact gave) might well have consequences for a conviction. To say that scientific experts bear duties relevant to fair trials is not to say that there is no distinction between ESR and police for disclosure purposes.

56 Having decided that ESR is a distinct entity to which Police disclosure obligations did not directly apply, the Court made these more general points about ESR’s duties to comply with prosecution requests. These observations are germane to our present inquiry because they emphasise that if defence requests are made for material believed to be held by ESR, then it would be normal to expect compliance (as indeed was the assumption in the NZLS Code of Conduct mentioned above). The Full Court said (emphasis added):

[27] Having made these observations [as to the ESR being distinct from the prosecution], we do not consider that the ESR is entitled to stand aloof as if it were a private entity. **We would expect that in the ordinary course a request by the police for relevant documents or evidence held by the ESR would be met without question as a matter of comity and convenience.** To do otherwise would be to act in conflict with the ESR’s statutory responsibility to exhibit a sense of social responsibility and would be contrary to the public interest. However there will be cases, of which this is one, where the ESR is entitled to object to the disclosure of documents where proper grounds exist and to have their objection determined by a Court of competent jurisdiction.

[28] **In summary we consider that the police and the ESR are not synonymous for the purposes of prosecution disclosure.** The ESR is one step removed from the police and, strictly speaking, the document in question is not under the possession or control of the police. **Nevertheless, in ordinary circumstances, the ESR would be**

expected to comply with disclosure requests made by the police and, of course, ESR scientists assume the responsibilities made clear in cases such as *Ward*. In proper cases, ESR is entitled to object to disclosure and to have the objection determined by a Judge.

57 The Full Court went on to hold that ESR, though a third party, *could* be compelled to produce the manual prior to the trial (with suitable confidentiality protections).

58 On further appeal to a five-member Court of Appeal (reported [2001] 3 NZLR 740) that ultimate outcome of the case was reversed, but the ruling on ESR being distinct from the prosecution was affirmed. The operative rulings in the Court of Appeal were these:

59 At para 32:

We are satisfied the Full Court was correct in its conclusions and, essentially, for the reasons they gave The Crown research institutes were set up under legislation as separate entities. Whether ESR is an agent of executive government is not the present issue. Rather it is whether the Police as prosecutor have an enforceable right to obtain the manual from ESR for inspection ahead of the hearing. Clearly they do not have that right and there is no basis for concluding that at the request of the police the shareholding ministers could and would give a specific direction to ESR to produce the manual to the police which ESR could and would obey.

Further points made by the Court of Appeal included these:

- There was a clear distinction between disclosure by the *prosecution*, on one hand, and accessing material *in the hands of persons not party to the proceeding*, on the other.
- In any event, in this case the manual was simply not relevant to the charge. That was the operative reason for reversal.

60 In conclusion, *Attorney-General v Otahuhu District Court* clearly establishes that ESR is distinct from the prosecution. The appeal having been allowed, the Court of Appeal noted in concluding remarks that the whole proceeding had been misconceived: the defendant had sought discovery as against the *prosecution*, rather than ESR. The Court of Appeal indicated that if the defendant still wished to pursue its application for the manual to be discovered, it could invoke the "s 20 procedure" under the Summary Offences Act [i.e. a summons to a third party to attend the hearing and produce a document].

61 It might be said that, at least for the brief period between *Keogh* in the High Court in November 1999 and the contrary *Otahuhu District Court* decision by the Full Court (November 2000) affirmed by the Court of Appeal (June 2001), the law was that ESR and prosecution were not distinct (such that a request to police for disclosure embraced a request to ESR).

62 Whether or not that is so, it is clear enough that before *Keogh* (and hence in 1994-95) the understanding was certainly that ESR scientists were seen as distinct

from the prosecution. As November said in her 1999 text (para 6.7.3) “There is no obligation on the prosecution to locate and gain access to matter in hands of third parties for the benefit of the defence.” While she then went on to cite the *Ward* case and the fact that the failings of “government scientists” there led to a conviction being set aside, the *Ward* case is (as the judges in the *Otahuhu District Court* case explain) actually making a different point: that once it is established that the Crown witnesses gave misleading evidence affecting the safety of the verdict, the conviction cannot stand. So the *Ward* case does not alter the veracity of November’s sentence, quoted above, relating to pre-trial disclosure obligations of the prosecution. Indeed, as she then says, in concluding her para 6.7.3:

However, where the expert evidence is not in the possession of the prosecution generally there is no right of disclosure.

63 For all these reasons I believe there is no doubt that in 1994-95 the “prosecution” did not embrace the ESR and hence the prosecution’s disclosure obligations were to disclose relevant material in its possession (and not to obtain from ESR all material held by ESR even that of which it was unaware). It also seems clear enough that had requests been made by the defence for information then the prosecution could have, and one expects would have, passed those on to ESR, which in turn would have been expected to supply the information.

64 I turn now to the second of the 3 relevant questions.

B. Is there a distinction between Police and Crown for disclosure purposes?

65 You asked whether Police must “open their files to the Crown for disclosure purposes”. The answer is that in New Zealand there is no relevant distinction between Police and Crown when considering disclosure obligations. This is because the party that must make disclosure is the “prosecution”, and all material susceptible to disclosure will be held by it. The matter is covered in the Prosecution Guidelines put in place by Crown Law. Under the heading of “Disclosure”, these Guidelines affirm that duties of disclosure rest with “the prosecutor”, who is the person in charge of the files relating to the criminal prosecution. In indictable matters the Crown Solicitor as counsel (or his or her employee) will have custody of the file but the Guidelines are explicit that the person in charge remains *the person designated by NZ Police* (or other agency which is prosecuting). The Crown Solicitor is not considered the prosecutor. A request made to the Crown Solicitor for disclosure is effectively a request made of the prosecutor. The Crown Solicitor must ensure that the prosecution’s disclosure duties are fulfilled.⁵

⁵ Here is a relevant part of the Guidelines:

15. DISCLOSURE

15.1 Proper disclosure is seen as central to preventing wrongful convictions. Under the Criminal Disclosure Act 2008, a “prosecutor” is the person in charge of the file or files relating to a criminal prosecution. Where the proceeding is on indictment a Crown Solicitor or his or her employees will have custody of the trial file but the person in charge of the files is the person designated by the NZ

66 There is, therefore, no relevant distinction between police and Crown when it comes to disclosure obligations in a particular case. Rather, the salient point is that the prosecution is handled by the Officer in Charge of the file. Disclosure obligations attach to the prosecution. The Crown Solicitor must ensure that the disclosure obligations are fulfilled.

67 The question then becomes whether the term “prosecution” embraces the ESR, which performs forensic services for litigation. This is what I have considered in the previous section of my memorandum, concluding that ESR is and was in 1994-95 distinct from the prosecution. Here I note, in addition, that the Prosecution Guidelines (put in place by Crown Law to govern all prosecutions in New Zealand) require (at 15.4) that “the Crown Solicitor and the enforcement agencies shall ensure that the Crown Solicitor has access to all relevant information relating to the charges in the possession of the enforcement agencies.” The term “enforcement agencies” is defined in the Guidelines to include “Government agencies and the New Zealand Police”. The term “Government agencies” is in turn defined to mean “Crown Entities as defined in the Crown Entities Act 2004 *who have the ability to commence and conduct summary prosecutions.*” While ESR is a Crown entity (as a result of the Crown Research Institutes Act 1992 which deems it so), it is *not* one that has ability to commence and conduct summary prosecutions. Nothing in the CRI Act 1992 suggests that it could do this: the purpose of CRIs is research.

68 So this affirms the position already set out: that ESR is not be regarded as a part of the “prosecution”. While relevant material generated by ESR and held by the prosecution needed to be disclosed, it is not the case that the prosecution’s disclosure obligations fell directly on ESR.

69 I add that ESR expert witnesses, like all experts, will have their own professional obligations that bear on the fair trial rights of an accused (and which, if breached, may have consequences for a conviction). The English *Ward* case can be seen as an instance of that. So, too, was *R v Maguire* [1992] 2 ALL ER 433 (EWCA Crim) where the Court put the point more fully:

Police (or other prosecuting agency) as the Officer in Charge of the file. A Crown Solicitor or his or her employees should not be considered the prosecutor for the purposes of the Act. In any prosecution conducted by a Crown Solicitor other than on indictment that person as well as the informant is relevantly a “prosecutor” in terms of the Act.

15.2 The Act prescribes a comprehensive regime for disclosure by prosecutors to a defendant. Notwithstanding a Crown Solicitor not having charge of the file or files he or she in a trial on indictment must ensure that the person in control of the relevant files is aware of and has complied with the obligations imposed by the Criminal Disclosure Act 2008.

15.3 This obligation will not be carried into effect merely by seeking assurances from enforcement agencies that the trial file given to the Crown Solicitor contains all necessary disclosure material and that any other material disclosed represents complete disclosure.

15.4 For the purpose of disclosure, the Crown Solicitor and the enforcement agencies shall ensure that the Crown Solicitor has access to all relevant information relating to the charges in the possession of the enforcement agencies.

We are of the opinion that a forensic scientist who is an adviser to the prosecuting authority is under a duty to disclose material of which he knows and which may have “some bearing on the offence charged and the surrounding circumstances of the case”. The disclosure will be to the authority which retains him and which in turn must (subject to sensitivity) disclose the information to the defence. We hold that there is such a duty because we can see no cause to distinguish between members of the prosecuting authority and those advising it in the capacity of a forensic scientist. Such a distinction could involve difficult and contested inquiries as to where knowledge stopped but, most importantly, would be entirely counter to the desirability of ameliorating the disparity of scientific resources as between the Crown and the subject. Accordingly we hold that there can be a material irregularity in the course of a trial when the forensic scientists advising the prosecution has not disclosed material of the type to which we have referred.

67 In New Zealand the Full Court of the High Court in the *Otahuhu District Court* case made the following salient point about *Ward* (upon which Chambers J in *Police v Keogh* had relied for his conclusion that ESR formed part of the Crown for prosecution disclosure purposes):

... the judge [that is, Chambers J in *Police v Keogh*, with whom they were disagreeing] relied primarily on *R v Ward* [1993] 2 All ER 577 (CA) which is regarded as authority for the proposition that the prosecution must disclose to the defence all relevant scientific material, including that held by government forensic scientists. However we see *Ward* as raising different issues from the present. It was concerned primarily with the failure of government scientists to disclose the results of certain tests which had been carried out by them specifically in relation to the prosecution in issue. The failure to disclose this material, which was highly advantageous to the defence, was held to have been in breach of duty. *There could be no quarrel with that proposition but it does not raise in any direct way the issue we have to consider* [which was whether, in a breath alcohol prosecution, ESR should be compelled to produce the manual for the testing device].

68 The point is that scientists’ disclosure failings (in what they make available to the prosecution and hence to the defence) may well force the conclusion that there was not a fair trial, but that that is a separate issue from the prosecution’s disclosure obligations.

69 In New Zealand the obligations of expert witnesses in litigation are explicitly set out in the High Court Rules at Schedule 4. These are addressed to civil trials, but it has been held in New Zealand cases that the requirements should be applied also to criminal trials and that they are “well established at common law” (*R v Ah Chong*, HC Auckland, CRI 2004-004-0101735, 15 August 2006, Courtney J). In the criminal case *R v Carter* (2005) 22 CRNZ 476 the High Court essayed a set of principles that it said were uncontroversial and applied in all cases where expert evidence is called. Three principles salient to the present point are:

(e) if an expert witness believes that his or her evidence might be incomplete without some qualification, the qualification must be stated;

(f) an expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise; and

(g) the expert is not an advocate for any party.

70 So, to repeat, the failings of expert witnesses may well have implications for the safety of convictions. But this is a separate point from the prosecution's disclosure obligations. If, as in *Ward*, the prosecution disclosed the relevant material in its possession, but scientists had withheld information casting doubt on their own evidence, then the convictions may be liable to be set aside for the latter reason but not for *prosecution* disclosure failures as such. In *Ward* the Court of Appeal notes at 624g that (my emphasis) "the results of the experiments should have been disclosed to *the prosecution*, the defence, and to the court". In that sense, the case affirms the distinction between expert scientist and prosecution, while also making it clear that scientists bear their own obligations.

C. Must all ESR material in the possession of the prosecution be made available to the defence or only that which is to be given in evidence?

67 The applicable standard in 1994-95 appears from the "instruction" in the NZLS Code of Professional Conduct, also reflected in the Prosecution Manual cited at para 21 above. That is, the prosecution had a duty to disclose all relevant material in its possession. This would include but not be limited to that which was to be adduced in evidence.

68 "Relevant material" meant that which is relevant to either the defence or prosecution. It included that which could reasonably be used by the defence in meeting the prosecution's case.

69 The Prosecution Manual urged erring on the side of caution and disclosing in cases of doubt about relevance.

70 For their part, the NZLS Instructions on the specific subject of ESR reports said "if the Institute has provided a written report of a certificate, a copy will be supplied".

71 The only limitation is one of relevance, this of necessity being judged by the prosecution in the first instance but amenable to pre-trial determination if contested (see the Full Court in *Attorney-General v Otahuhu District Court* at [40], cited above at para 19).

72 To the extent that the defence cannot contest that of which they have no knowledge because it is not known to the prosecution either, or because the prosecution has considered it irrelevant, the answer appears to be that appropriate defence request could prompt discovery of the material (and the opportunity to contest the question of relevance if the prosecution wished to maintain that

objection to disclosure). November cites the English case of *R v McCarthy*, EWCA (Crim), The Times, 21 October 1993, where Stuart-Smith LJ said:

There will clearly be cases where disclosures of the general outline of the material will be sufficient to put the defence on inquiry as to the possible lies of defence; if they want more, because the defence knows and perhaps the Crown do not, the importance of the information, this they can ask for.

Conclusion

73 For these reasons the answer to the questions you asked are, in my opinion, these:

- ESR was in 1994-95 an entity distinct from the prosecution. It was, for disclosure purposes, a third party. The disclosure obligations placed on the prosecution did not extend so as to embrace all material held by ESR. Defence requests for material believed to be held by ESR could have been made to the prosecution and the practice was that such requests would be complied with (subject to specific reasons justifying non-compliance such as public interest immunity).
- **did the police have a duty to open their files to the Crown prosecutor?** Yes, because there is no relevant distinction in this context between police and Crown; the duty is upon the prosecution
- **did the police have an obligation to demand from ERA (and other experts they consulted) the experts' files?** The reports that they sought and *obtained* from experts including ESR and which were therefore in their possession and control ought to have been disclosed; material on experts' files held by experts (such as ESR) and of which the prosecution were unaware did not have to be disclosed by the prosecution
- **if the police got the files of these experts did the police have to show the experts' files to the Crown?** Yes, again because there is no relevant distinction between police and Crown in disclosure context
- **did the Crown then have a duty to disclose the material obtained from the experts then in its possession to the defence?** Yes, subject to relevance
- **was there any difference in these respects between experts consulted by the police as opposed to those experts actually called as witnesses for the prosecution?** No: all relevant material held by the prosecution ought to have been disclosed including that which was not to be adduced as evidence.

75 You made available to me para 84 of the Bain submission. The passage from *Adams on Criminal Law* it cites is accurate as far as it goes. But it does not negate the point that you record the Crown as making: which is that "a lot of the 'fresh' evidence found after the 1995 trial was in ESR records not disclosed to the police thus not disclosed by the Crown — BUT, says the Crown, the defence COULD have asked for disclosure of the experts' notes but, the defence having failed to do so, the Crown had no further obligation in that regard."

Appendix

Criminal Disclosure Act 2008 extracts.

Disclosure by prosecutor

12 Initial disclosure (1) At the commencement of criminal proceedings, or as soon as practicable after that time, and in any event not later than the applicable date, the prosecutor must disclose the following information to the defendant:

- (a) a summary that is sufficient to fairly inform the defendant of the facts on which it is alleged that an offence has been committed and the facts alleged against the defendant; and
- (b) a summary of the defendant's right to apply for further information under subsection (2) before entering a plea; and
- (c) the maximum penalty, and the minimum penalty (if one is provided for), for the offence; and
- (d) a list of the defendant's previous convictions that are known to the prosecutor; and
- (e) a list of any previous offences proved to have been committed by the defendant and of a kind to which [section 284\(1\)\(g\)](#) of the Children, Young Persons, and Their Families Act 1989 applies, that are known to the prosecutor.

(2) At any time after criminal proceedings are commenced or, in the case of a child or young person who appears in a Youth Court in relation to the commission or possible commission of an offence, at any time after that person's first appearance in the Youth Court, the prosecutor must, if requested by the defendant in writing, as soon as is reasonably practicable disclose the following information to the defendant:

- (a) the names of any witnesses whom the prosecutor intends to call at the hearing or trial; and
- (b) a list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial; and
- (c) a copy of all records of interviews with the defendant; and
- (d) a copy of all records of interviews of prosecution witnesses by a law enforcement officer that contain relevant information; and
- (e) a copy of job sheets and other notes of evidence completed or taken by a law enforcement officer that contain relevant information; and
- (f) a copy of any records of evidence produced by a testing device that contain relevant information; and
- (g) a copy of any diagrams and photographs made or taken by a law enforcement officer that contain relevant information and are intended to be introduced as evidence as part of the case for the prosecution; and
- (h) a video copy of any video interview with the defendant; and
- (i) a copy of relevant records concerning compliance with the [New Zealand Bill of Rights Act 1990](#); and
- (j) a copy of any statement made by, or record of an interview with, a co-defendant in any case where the defendants are to be proceeded against together for the same offence; and
- (k) a list of any information described in paragraphs (a) to (j) that the prosecutor refuses under [section 15](#), [16](#), [17](#), or [18](#) to disclose to the defendant, together with—
 - (i) the reason for the refusal; and
 - (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by [section 16](#), [17](#), or [18](#) and (in the case of the interests protected by [section 18](#)) there is no overriding public interest.

(3) This section does not apply to a defendant who is charged with a minor offence as defined in [section 20A\(12\)](#) of the Summary Proceedings Act 1957 or with an infringement offence as defined in [section 2\(1\)](#) of that Act.

13 Full disclosure (1) The prosecutor must disclose to the defendant the information described in subsection (2) as soon as is reasonably practicable after a defendant has—

- (a) pleaded not guilty to an offence proceeded against summarily; or
 - (b) elected trial by jury under [section 66](#) of the Summary Proceedings Act 1957; or
 - (c) if the information has been laid indictably, made his or her first appearance in Court in relation to the offence.
- (2) The information referred to in subsection (1) is—
- (a) any relevant information, including, without limitation, the information (*standard information*) described in subsection (3); and
 - (b) a list of any relevant information that the prosecutor refuses under [section 15](#), [16](#), [17](#), or [18](#) to disclose to the defendant together with—
 - (i) the reason for the refusal; and
 - (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by [section 16](#), [17](#), or [18](#) and (in the case of the interests protected by [section 18](#)) there is no overriding public interest.
- (3) The standard information referred to in subsection (2)(a) is—
- (a) a copy of any statement made by a prosecution witness; and
 - (b) a copy of any brief of evidence that has been prepared in relation to a prosecution witness; and
 - (c) the name and, if disclosure is authorised under [section 17](#), the address of any person interviewed by the prosecutor who gave relevant information and whom the prosecutor does not intend to call as a witness; and—
 - (i) any written account of the interview, whether signed or unsigned, and any other record of the interview; and
 - (ii) any statement made to the prosecutor by the person; and
 - (d) any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness; and
 - (e) a list of all exhibits that the prosecutor proposes to have introduced as evidence as part of the case for the prosecution; and
 - (f) a list of all relevant exhibits in the possession of the prosecutor that the prosecutor does not propose to have introduced as evidence; and
 - (g) a copy of any information supplied to the prosecutor in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses; and
 - (h) a copy of any relevant information supplied to the prosecutor by a person or persons whom the prosecutor considered calling to give evidence as an expert witness or witnesses, but elected not to do so.
- (4) The obligation to disclose information to the defendant under this section as soon as is reasonably practicable is subject to any order made under [section 30](#) or [32](#).
- (5) If information referred to in subsection (2) comes into the possession or control of the prosecutor, or is prepared in recorded form, after the prosecutor has disclosed information in accordance with subsection (1) and before the hearing or trial is completed, the prosecutor must disclose the information to the defendant as soon as is reasonably practicable.
- (6) The entitlement of a defendant to information under this section continues while the criminal proceedings are in progress (including any appeal against conviction) and during the period from the conviction until the expiry of the time for lodging an appeal against conviction.

14 Additional disclosure

- (1) At any time after the duty to make full disclosure has arisen under [section 13](#), the defendant may request that the prosecutor disclose any particular information, identified by the defendant with as much particularity as possible.
- (2) The prosecutor must disclose information requested by the defendant under subsection (1) unless—
- (a) the information is not relevant; or
 - (b) the information may be withheld under [section 15](#), [16](#), [17](#), or [18](#); or
 - (c) the request appears to be frivolous or vexatious.

- (3) If a request under subsection (1) is declined by the prosecutor under subsection (2), the prosecutor must, as soon as is reasonably practicable after making the decision to decline the request, inform the defendant of that decision, together with—
- (a) the reason for the decision; and
 - (b) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by [section 15](#), [16](#), [17](#), or [18](#) and (in the case of the interests protected by [section 18](#)) there is no overriding public interest.
- (4) Nothing in this section limits the duty to disclose information under [section 13](#).

15 Prosecutor not required to record information or to obtain information for sole purpose of disclosure

- (1) Nothing in this Act requires a prosecutor to disclose information if, at the time a disclosure obligation would, but for this section, arise or at the time a request for disclosure is made, as the case may be,—
- (a) the prosecutor is not in possession or control of that information; or
 - (b) the prosecutor does not hold the information in recorded form.
- (2) Nothing in this section limits [section 13\(5\)](#).

16 Reasons for withholding information

- (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
- (a) disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
 - (b) disclosure of the information is likely to endanger the safety of any person; or
 - (c) the information is—
 - (i) material that is prepared by or for the prosecutor to assist the conduct of the hearing or trial; or
 - (ii) a communication dealing with matters relating to the conduct of the prosecution and is between—
 - (A) the prosecutor and another person employed by the same person or agency that employs the prosecutor; or
 - (B) the prosecutor and any adviser to the prosecutor; or
 - (iii) analytical or evaluative material prepared, in connection with an investigation that led to the defendant being charged, by a person employed by a person or agency for another person employed by that person or agency or for the prosecutor; or
 - (d) the information is subject to [sections 108](#) and [109](#) of the Evidence Act 2006 (which relates to information about undercover police officers); or
 - (e) the information is subject to a pre-trial witness anonymity order under [section 110](#) of the Evidence Act 2006 or a witness anonymity order under [section 112](#) of the Evidence Act 2006; or
 - (f) the information is subject to [section 16](#) of the Victims Rights Act 2002 (which relates to information about witnesses' addresses); or
 - (g) the disclosure of the information would be likely to prejudice—
 - (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (ii) the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation; or
 - (h) disclosure of the information would be likely to facilitate the commission of another offence; or
 - (i) disclosure of the information would constitute contempt of Court or contempt of the House of Representatives; or
 - (j) the information could be withheld under any privilege applicable under the rules of evidence; or
 - (k) disclosure of the information would be contrary to the provisions of any other enactment; or
 - (l) the information is publicly available and it is reasonably practicable for the defendant to obtain the information from another source; or
 - (m) the information has previously been made available to the defendant; or

(n) the information does not exist or cannot be found; or

(o) the information—

(i) reflects on the credibility of a witness who is not to be called by the prosecutor to give evidence but who may be called by the defendant to give evidence; and

(ii) is not for any other reason relevant.

(2) If part only of the information may be withheld, the prosecutor must make the remainder of the information available if it is possible to protect the withheld information by deletion, summary, or otherwise.

(3) If the prosecutor becomes aware that there has ceased to be any justification for withholding all or part of any information that has been withheld under this Act, the prosecutor must, if the criminal proceedings have not yet been completed, disclose that information to the defendant as soon as reasonably practicable.
