EQUAL JUSTICE PROJECT

Miscarriages of Justice: Are We Putting the Wrong People In Our Prisons?

WHO ARE WE?
WHAT DO WE DO?

The Equal Justice Project

Founded in 2005, the Equal Justice Project (EJP) is the brainchild of Auckland Law School students Eesvan Krishnan and Peter Williams. Ten years later, EJP continues to flourish under the leadership and participation of students from the Faculty of Law who share a passion for social justice. Rt. Hon E.W. (Ted) Thomas DCNZM QC, the patron of EJP, has often discussed the importance of inculcating a "pro bono ethic" among law students. If law students appreciate the importance of pro bono services at an early stage in their careers, Sir Ted hopes that we will see a shift toward law as a profession instead of a business.

The goal of the Equal Justice Project is to empower and support communities by addressing issues of equality, access to justice, redress, representation and knowledge. The five different limbs of the EJP – Pro Bono, Community, Education, Outreach and Communications – work together to achieve this goal. As budding members of the legal profession, volunteers contribute their time, creativity, skills and knowledge for the benefit of the wider community.

The Outreach Team

The Outreach team has the mission of increasing awareness of legal issues on campus and in communities. Its portfolios include raising knowledge about EJP within the student body, hosting a range of thought provoking events for students and the community, raising funds for our community partners through creative avenues and presenting written and oral submissions on parliamentary bills. Today's Symposium is simply the latest episode in the busy life of the Outreach team.

That life was no less busy than usual in 2014. A symposium on drug reform was held in April at the Faculty of Law with the panel comprising of Khylee Quince (senior lecturer at the Faculty of Law) and MP Simon O'Connor. The panel expressed a variety of perspectives when addressing controversial issues and concerns.

The team also made a submission on the Buildings (Earthquake-Prone Buildings) Amendment Bill, voicing objections to the proposal to allow circumvention of the usual requirements for disability access when earthquake-proofing buildings. With regards to the Education Amendment Bill (No 2), Outreach submitted in support of having more diverse members on tertiary education councils.

In relation to our community partners, Women's Refuge and Blind Foundation, the team raised close to $500 through bake sales. Moreover, the team has encouraged students to donate clothes and books for Women's Refuge.

In Semester Two, Outreach continued its work with the Auckland Women's Centre; completing further research on Family Law for women going through the Family Court process, and gave a seminar on some of the bias in the system for the Women's Centre to present to MPs.

At the end of August, Outreach held a political candidates forum on sexual offending law reform, at which speakers from 8 of the 10 major political parties were present. Volunteers also wrote a symposium paper in conjunction with the event. Outreach also submitted on the Crimes (Match-fixing) Amendment Bill, which proposed to make match-fixing in sport a crime.

Interested?

If you are interested by what you read in this paper today, follow us on **Facebook** by searching "Equal Justice Project" to see the latest content from our volunteers, visit us at **www.equaljusticeproject.co.nz** to view our archives, or contact us by **emailing** our directors Allanah Colley and Rayhan Langdana at directors@equaljusticeproject.co.nz.

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Paper Prepared for the Equal Justice Project
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1. Introduction

This is a research report conducted to outline the circumstances of the prosecution, conviction, trials, retrials and appeals of Teina Pora, David Bain and Mark Lundy. This report aims to be objective and to present the facts as they stand based on evidence gathered and considered.

Following a statement of the facts of each case, each of the below questions are then addressed in turn; both in regards to each case and with also in regards the lessons to be drawn from reading all three cases together.

- Are there gaps in the prosecution, trial, conviction, and appeal processes in our Criminal Justice System that may lead to a miscarriage of justice?
- If there are gaps, how can we address them to deliver more adequate justice?

2. The Facts of the Cases

Teina Pora Case

Prosecution

Susan Burdett was raped and murdered in her home in March 1992. The eventual prosecution of Pora was substantially based on incriminating statements made by him in a series of interviews.

- 1992: Pora was initially interviewed about Burdett's murder. He made a statement to police that he had seen a bat and a concrete pipe, but was not considered a suspect at this point.[1]
- 18 March 1993: Pora, 17, was arrested on an unrelated charge. During questioning by police he enquired whether they had apprehended anyone for Burdett's murder and informed them that he knew who had committed the crime. He was told about a reward and informed about indemnity against prosecution being available for anybody who was not considered a principal suspect. He was given a form to clarify the information on indemnity, which Pora claimed to understand.[2]
- 18-21 March: Over the next four days police conducted a series of interviews where Pora provided various accounts of the day in question. He initially claimed he went to rob the house with two members of the Mongrel Mob ("Dog" and "Hound"). He first claimed they returned to the car with a baseball bat dripping with blood. His story then changed and he told police he was the look-out for the mob members. He later said he had entered Mrs Burdett's house after hearing screams. He later indicated personal involvement saying he helped to hold the victim down while one of the others raped her. At a later point his Aunt and Uncle were present during interviews where Pora again said he had held the victim down while the two others raped her.[3]
- Crime scene visit: Pora was taken to the scene of the crime and asked to identify Burdett's house. He is described as being confused and disoriented having great difficulty identifying the house when directly outside it.[4]
- Additional evidence: Information was given by Martha McLoughlin who claimed that the week after Mrs Burdett's murder, Pora told her of a bloodstained softball bat he had discarded near a drain in Manakau.[5] Miss Burdett had allegedly died due to fatal injuries inflicted by a bat.

These circumstances must be viewed against the background there was no evidence of the two men ("Dog" and "Hound") having anything to do with the victim's rape and murder as the men later identified both had alibis.

Conviction

In 1994 Pora stood trial for the rape and murder of Susan Burdett.[6] Experts, criminal profilers and journalists commonly agree that the backbone of the prosecution's case was Pora's confession and self-incriminating statements. Proceedings were brought by Pora's counsel, who contended that the confessions made were inadmissible as evidence against him.[7] The grounds for this were breaches of the New Zealand Bill of Rights Act on the basis of a failure to adequately advise Pora of his right to a lawyer as per s 23(1)(b) and failure to bring the appellant to court as soon as possible per s 23(3); and secondly, general unfairness arising from discussion in relation to the involvement of the appellant's relatives.[8] The Court of Appeal ruled the evidence as admissible and allowed it to be put before the jury.[9] Pora was convicted in March 1994 for the rape, murder and aggravated robbery of Susan Burdett and sentenced to life imprisonment.

Appeal Processes and Decisions

Trial in 1994

In June 1994 the Court of Appeal denied an appeal against the decision to allow the evidence as admissible. Another appeal was made in 1999 based on failure to bring evidence before the jury that the mode in which the acts were committed shared the distinctive mode of Malcolm Rewa's offending and evidence of DNA matching that of Rewa.[10] In 1999 the Court of Appeal set aside the conviction and ordered a re-trial. Significantly, the Court of Appeal considered that the Crown case had been based solely on the appellant's confessions. The Court acknowledged the appellant's immaturity at the time of confession and his noticeable deficiency in literary skills. [11] Recognising false confessions of serious criminal offending as an established possibility, it considered that the convictions should be quashed.[12]

Retrial in 2000

After a retrial in 2000, Pora was re-convicted and sentenced to 13 years imprisonment. In this trial the Crown continued to rely greatly on the confessions Pora had made, paired with new evidence given that highlighted an association between Rewa and Pora, having been seen together on various occasions.[13] No evidence was adduced as to how or why the appellant came to make the statements of confessions as Pora did not provide evidence on this matter in the retrial, which subsequently lead to his re-conviction.[14]

Privy Council Decision

A recent decision in the Privy Council in 2015 quashed Pora's convictions and a retrial was not ordered. New evidence was presented by Dr McGinn and Dr Immelman ascertaining the risk of a miscarriage of justice.[15] The evidence explains why Pora's confessions may have been false and gave rise to questions of whether his convictions could be considered safe.[16] Pora's frequent and contradictory implausible confessions coupled with the recent diagnosis of foetal alcohol syndrome led to the conclusion that reliance on his confessions for conviction amounts to a miscarriage of justice.[17] His convictions were accordingly quashed. With this evidence a

convinced that Pora's confessions were reliable therefore highlighting that it would not be appropriate to order a retrial.[18]

Timeline

- March 23, 1992: Susan Burdett raped and murdered in her South Auckland home.
- March 18, 1993: Pora arrested for interfering with cars and during an interview with police he mentions the Burdett case and that he knew who was responsible. Further interviews take place over the next two days, often for hours at a time.
- March 23, 1993: Pora is charged with murder, rape and aggravated robbery.
- February 1994: Pre-trial application to have the evidence of the interviews dismissed. Application declined.
- June 3, 1994: Court of Appeal upholds the decision to allow the evidence from the police interviews to be put before a jury.[19]
- June 15, 1994: Pora found guilty by a High Court jury of murder, rape and aggravated robbery of Susan Burdett.
- July 1, 1994: Pora sentenced to life imprisonment for murder and concurrent sentences of 12 years for rape and aggravated robbery.
- May 1996: Malcolm Rewa charged with multiple rapes.
- December 7, 1998: Rewa convicted of raping 27 women, including Ms Burdett. A jury could not conclude if he was also responsible for her murder.
- December 24, 1998: Solicitor-General decides not to retry Rewa for the murder of Ms Burdett.
- January 20, 1999: Rewa sentenced to 14 years for the rape of Ms Burdett.
- September 28, 1999: Pora's case goes to the Court of Appeal.
- October 18, 1999: Court of Appeal quashes Pora's convictions after DNA from the serial rapist Malcolm Rewa was linked to Burdett's attack. The Court of Appeal concludes: "We are in no doubt that the case should be considered by another jury."[20]
- December 13, 1999: Pora freed on bail ahead of his retrial.
- March 20, 2000: Pora's second trial begins at the High Court in Auckland.
- April 6, 2000: After a three week trial and a day of deliberations, a jury convicts Pora a second time for the rape, murder and aggravated robbery of Ms Burdett.[21]
- October 12, 2000: Appeal dismissed.
- May 15, 2006 and April 8, 2013: Pora declined parole.
- January 28, 2014: The Privy Council grants Pora leave to appeal against the 2000 Court of Appeal decision.
- March 31, 2014: Pora granted parole.
- November 4, 2014: Pora's appeal heard by the Privy Council in London.
- March 3, 2015: Privy Council quashes convictions.[22]
- March 30, 2015: Privy Council recommends Teina Pora is not retried.[23]
- April 17, 2015: Justice Minister, Amy Adams, confirms that Teina Pora applied for compensation for his wrongful conviction and imprisonment.[24]

Mark Lundy Case

Prosecution

On Tuesday 29 August 2000 Christine and Amber Lundy were murdered in their home in Palmerston North. Christine was found lying naked and bludgeoned on the bed whilst Amber lay dead in the doorway of Christine's bedroom. They were found at around 9am the next day by Christine's brother after Mark Lundy had expressed his concern about being unable to contact his family. Lundy was arrested 6 months later and was found guilty of both murders in April 2002.[25]

The prosecution case was based on the premise that Lundy had murdered his wife and child around 7pm on 29th August 2000. The motive was said to have been financial gain; that he would claim life insurance costs from his wife's death, and that Amber was murdered because she had been witness to the killing of her mother.[26] It was contended by the prosecution that Lundy left the motel he was staying at in Petone sometime after 5:30 pm. He drove the 137km to Palmerston North, murdered his family, cleaned up and drove back to Petone, arriving by 8:28pm.[27] The evidence is considered below:

- Brain tissue: The most cogent piece of evidence supporting the prosecution's case was the presence of what was allegedly Christine Lundy's brain tissue on Lundy's shirt that was seized by police the day after the murders. Although it was widely contested as to whether the shirt became contaminated before or during the testing processes, or whether the matter belonged to an animal instead of a human, this evidence was incredibly powerful and Steve Winter suggests that the Crown case would have crumbled without it.[28]
- Driving time: The Crown contended that Lundy could have made the journey from Petone to Palmerston North and back again. This claim was based on the absence of temporary speed restrictions and road works, Lundy's ability to drive at high speeds, the fact that the car he was driving was large and powerful, and the distance between Petone and Palmerston North.[29]
- Time of Death: Furthermore in relation to the evidence of driving time, the Crown contended that this matched the 7pm time of death established by the Crown's pathologist. Using gastric estimations as to the time of Christine and Amber's last meal, the autopsy finding estimated the deaths between 30 and 60 minutes after eating. The 7pm timeframe also fits with the evidence of Mrs Dance discussed below.[30]
- Petrol Consumption: The fuel consumption of Lundy's car was consistent with the Crown's contention of the three journeys made by Lundy between Petone and Palmerston North. The evidence was inconsistent with Lundy's claim to have travelled one high speed journey from Petone to Palmerston North on the morning after the murder.[31]
- Amber's DNA on Lundy's shirt: DNA testing found evidence of Amber's DNA on Lundy's shirt; the most probable source being her blood.[32]
- Paint Flakes: Bone fragments from Mrs Lundy's skull were found to have fragments of paint adhering to them. There were two colours, both of which matched the paint with which Lundy painted his tools. The Crown contended one colour match would be strange but two colours could be stretching the arm of coincidence too far. The Crown further contended it was a reasonable inference, and the murder weapon (which was never found) was linked in this way to Lundy.[33]

- The Computer: At 10.56pm, four hours after the murders were supposedly committed, the computer in the Lundy household appeared to have been turned off. The Crown submitted there was evidence that the computer time clock had been manipulated by Lundy so as to make it look like the murders were committed at a later time. Lundy claimed that he was back in Petone by 11.56pm, backed up by evidence of a phone call to an escort service made at this time.[34]
- Evidence of Mrs Dance: Mrs Dance resided in the vicinity of the Lundy home in Palmerston North. On the night in question she left her house at 7:12pm where she saw an unfamiliar car parked on the side of the road which fit the description of Lundy's car. As she left her property she saw a person running towards her in a blond curly wig with a horror-struck expression. The Crown contended that this was Mark Lundy running to his car in a poor disguise after committing the murders.[35]

Conviction

This case was a circumstantial one, with all evidence requiring assessment by the jury. The Court was satisfied with the jury's finding that Lundy could have made the 2 hours 58 minute journey to commit the murders, during which there was no independent evidence that he was in Petone. The jury found that Lundy could have committed the murders and changed the time on the computer before running out to his car at 7:12 pm and being seen by Mrs Dance. The Crown's case was strong with the evidence of DNA and brain tissue on Lundy's shirt, the paint fragments on Mrs Lundy's skull, and other evidence put forward all fitting with the pathologists' estimated time of death. The jury found Mark Lundy guilty and he was sentenced to 17 years imprisonment.

Appeal Processes and Decisions

Court of Appeal

The defence challenged the jury's decision on the basis that it was unreasonable and could not be supported by the evidence. However, the Court ruled that the appellant had to demonstrate that the jury had reasonable doubt in order to set aside the conviction.[36] The verdict was that it was not unreasonable or unable to be supported having regard to the evidence as a whole.[37]

Privy Council

The Privy Council quashed Lundy's conviction in 2013 and ordered a retrial. The Privy Council had to consider a number of key grounds on appeal including challenges to evidence given by the Crown's expert witnesses. With respect to time of death there was now a stream of evidence available from a number of consultants which, if accepted, would invalidate the claimed scientific support for the time of death which was core to the Crown's case. Crown forensic evidence, based on post-mortem examination of the victims' stomach contents, placed their time of death between 7.00pm and 7.15pm on 29 August 2000.[38] This was important because Lundy was unquestionably in Petone, in the Wellington area, and 145 kilometres away from his house, at both 5.30pm and 8.28pm that evening.[39] New evidence from the defence admitted on appeal suggested stomach contents were in fact unreliable as a means of determining time of death.[40] Clear evidence was also submitted by a neuropathologist, Dr Teoh, that it was impossible to identify the material as CNS tissue as the cells had degenerated so badly, and that therefore Lundy should not have been convicted on that evidence.[41] In addition, new evidence was admitted challenging the methodology by which the Crown witnesses, and in particular

Mrs Lundy's CNS tissue.[42] The Privy Council also touched on the issue relating to the computer, holding that it was essential that the Crown provide an explanation for the time of closing the computer. The Crown was unable to provide an explanation, meaning there was a possibility that Mrs Lundy was still alive at 10:52pm, which was completely at odds with the Crown's case.[43] In deciding whether to admit new evidence, the Court found that the appellant's evidence was fresh and credible.[44] There is a public interest in preserving the finality of jury verdicts; yet, when new evidence presents a direct and plausible challenge to a core element of the prosecution, this factor ceases to be of such significance.[45] The Privy Council found the proper test to apply in deciding whether a verdict is unsafe is whether that new evidence might reasonably have led to an acquittal.[46] This was in accordance with the approach taken in *R v Matenga* by the New Zealand Supreme Court.[47] As the new evidence raised substantial questions about the validity of the CNS tissue, time of death of the victims and that of the computer, the Privy Council held that the verdict was unsafe and that the subsequent evidence might have reasonably declined to convict Mark Lundy.[48]

Retrial 2015

Lundy was found guilty at the 2015 retrial and was re-sentenced to life imprisonment. While it was accepted that the matter on Lundy's shirt was CNS tissue, pathologists and forensic experts had differing views on whether it was animal or human, what sex it was from or how it came to be on the shirt. Yet New Zealand ESR forensic biologist Susan Vintiner believed it was very likely the matter came from Mrs Lundy and American diagnostic pathologist Dr Rodney Miller reiterated this. The prosecution changed their argument about the time the crime was committed, stating that Lundy drove from Petone to Palmerston North and killed his family in the early hours of August 30 before driving back to his motel in Petone. This replaced the previous argument that Lundy drove to Palmerston North and killed his family at 7pm. This new claim aligns with the computer evidence and time of death providing for a more convincing case for the prosecution. The defence highlighted that it was impossible for Lundy to have made a return trip on one tank of petrol and have implicated Lundy's brother-in-law for the murders. The Court dismissed the defence's arguments and re-convicted Lundy based on the prosecution's contentions.

Timeline

- August, 2000: The bodies of Christine and Amber Lundy are found in their house in Karamea Crescent, Palmerston North by Christine's brother, Glen Weggery.
- January, 2001: Police say they have a "small" list of suspects.
- February, 2001: Mark Lundy is arrested for the murders. He has been in custody ever since.
- February, 2002: His murder trial begins.
- March, 2002: Lundy is found guilty by the jury and is imprisoned for a minimum term of 17 years.
- August, 2002: An appeal against the convictions is heard. The Court of Appeal judges dismiss this, but agree with the Solicitor-General that Lundy's sentence is too light. The minimum term is raised to 20 years.
- December, 2002: A coroner's inquest concludes that Christine and Amber Lundy died of head injuries inflicted by Mark Lundy.
- November, 2012: Lundy's new legal team headed by London-based New Zealander David Hislop QC,

- ➡ October, 2013: The Privy Council quashes the convictions, and says a re-trial should be held as soon as possible. Lundy is granted bail.
- ➡ March 2015: Lundy re-convicted in re-trial and re-sentenced to life imprisonment

David Bain Case

Prosecution

The fundamental points relied upon by the Crown's case in the prosecution of David Bain are laid out below.[49]

- The Murder Weapon: The rifle and ammunition in all 5 murders were David's and the key to the trigger-lock was hidden in an unusual place.
- Bloodstains: David's bloodied fingerprints were found on the murder weapon and his bloodstained gloves were found in Stephen's room.
- Bloodstained Clothes: Furthermore there was bloodstained clothing, including a green jersey with fibres matching those found under Stephen's fingernails, washed by David. Bain's Gondoliers sweatshirt with blood on the shoulder had also been sponged. Blood found on the top of the washing-machine powder container, porcelain basin and various light-switches must have come from David's touch. Droplets of blood were found on David's socks as well as blood which had caused the luminol observed part sock prints in other parts of the house.
- Computer: The computer had been switched on at 6.44 am, and the jury concluded on all the evidence that this was just after David had returned home from his paper run. If the evidence that he was at the nearby corner at 6:40 am was accepted, it would have taken 2-3 minutes to reach the house.
- Injuries and Glasses: David had fresh injuries to his forehead and knee. There was no explanation for them and the nature of them indicated that it was he who had the fight with Stephen. Glasses (with a missing lens) fitting David's general glass prescription were found on a chair near where David was sitting when the police arrived. Significantly, the left side of the frame was damaged and the missing lens was found in Stephen's room near his body.
- Memory: David's partial recovery of memory might have enabled him to suggest explanations for some of the blood on him, but it did not explain other vital items such as the fingerprints, the clothes or the glasses. His comments such as that his mother's eyes were open when he entered the house, and his remark to his aunt that they were "dying, dying everywhere" tended to confirm that he remembered, in part, being there before the deaths.
- Gurgling Noises: If David heard Laniet make gurgling noises, then she must then have been alive, and consequently he must have been by her bed when the last shot was fired.

Conviction

Based on this information, the jury found Bain guilty on all five counts of murder. He was sentenced on each charge to concurrent terms of life imprisonment with a minimum non parole period of 16 years. the stains on the shirt contained

Appeal Processes and Decisions

First Appeal

David Bain appealed to the Court of Appeal which dismissed the appeal on 19 December 1995.[50] The principle question on appeal was whether the trial judge was wrong in refusing to admit the evidence of Mr Cottle. Mr Cottle was an associate of Bain's sister, Laniet, and the police were led to interview him when they found one of her cell-phones issued under his name. He provided evidence that Laniet had told him that she was a prostitute and had been having sex with her father, Robin Bain, for the past year. He also said that she had told him of intentions to tell her family "everything" only days before the murders occurred.[51] Bain's defence contended that this evidence was important in that it demonstrated reasons for agitation and irrational behavior on the part of Robin Bain, and more importantly a motive to kill. The Court of Appeal determined that the trial judge was correct in deciding to exclude the evidence, as "admission of such evidence was obviously subject to qualifications relating to unreliability, lack of probative value or remoteness in time."[52] It was held to be hearsay and the appeal was accordingly dismissed.

Second Appeal

In 1998, following wide publicity and a joint review of the case by the New Zealand Police and the Police Complaints Authority, Bain applied to the Governor-General for exercise of the Royal Prerogative of Mercy. The Governor-General exercised his power under s 406(b) of the Crimes Act 1961 and, by an Order in Council on 18 December 2000, referred six questions for consideration by the Court of Appeal. These six questions related to:[53]

1. Whether there was a reasonable possibility that the computer was turned on before 6.44am on the morning of the murders.
2. Whether the glasses lens may have reasonably come to have been in Stephen Bain's room in a way that was unrelated to the murders.
3. Whether the fingerprints made in blood on the gun may have reasonably been made before the murders.
4. Whether the submission made during the Crown's closing statements that "Only one person could have heard Laniet gurgling. That person is the murderer," was wrong or misleading.
5. Whether the Court's opinion on questions 1, 2, 3 and 4 indicated there was credible evidence that, if put before the jury along with other evidence put forward at the trial, may have reasonably led the jury to a different verdict.
6. Whether, with regard to the Court's opinion on question 5, there was a possibility that there had been a miscarriage of justice what would warrant referral to the Court of Appeal under section 406(a) of the Crimes Act 1961.

On 17 December 2002 the Court of Appeal delivered its opinion, concluding that the fresh evidence when viewed collectively gave rise to sufficient possibility of a miscarriage of justice which warranted a full reconsideration of the case by the Court of Appeal.[54]

Third Appeal

On 24 February 2003 the Governor-General referred Bain's case for full reconsideration by the Court of Appeal. The Court of Appeal dismissed the appeal, concluding that there were three key points of evidence which, taken

These points concerned the trigger lock, the fingerprints on the rifle, and the scene in the lounge, with the Court holding that there was ample evidence that supported those three points that would dispel any hesitation in existence had those points stood alone. The Court summarised the points as follows:[56]

- Only David knew of the existence and whereabouts of the key used to unlock the trigger lock.
- The bloodstained condition of the rifle was such that the uncontaminated area associated with the fingerprints on the forearm led to the conclusion that the hand which made the fingerprints was in position contemporaneously with the murders, and that the hand was David's.
- The spare magazine found beside Robin's dead body was found standing upright on its narrow edge. This was unnatural in terms of suicide theory and therefore it must have been placed there by David.

These three points, alongside further incriminating evidence, including the presence of Stephen's blood on Bain's black shorts, luminal sock prints, and the injuries to Bain's head, led to Court of Appeal to find that any reasonable jury would find David Bain guilty.

Privy Council

The Privy Council quashed Bain's convictions in 2007, finding that the nine points put forward by Bain, taken together, led to the conclusion that a substantial miscarriage of justice had occurred.[57]

The nine points are as follows:

- Robin Bain's Mental State - Reliable witnesses said Robin had been depressed and living alone in squalid conditions in a caravan. Journals in his office at the school where he taught were found to contain stories about the mass murder of a family. But many of those facts are highly contentious, and the evidence could well have influenced the jury's assessment of them.
- Motive- At trial there was no plausible motive established as to why David or Robin had committed the murders. Mr Cottle's evidence of an incestuous relationship between Laniet and Robin was rejected as unreliable, but due to fresh evidence the question arose whether Mr Cottle's evidence would have still been rejected had it been known that three other independent witnesses gave evidence to broadly similar effect.
- Luminol Sock Prints – There was significant reason to suggest that forensic scientist Walsh's earlier report was misunderstood and misapplied by the third Court of Appeal. Full luminol sock prints had been accepted at trial as Bain's, although Walsh had contended, and later reiterated, that it was near impossible for the length of Bain's foot to make prints of the size found throughout the crime scene without a substantial part of that print missing.
- The computer switch-on time - Fresh evidence shows that the computer could have been switched on earlier/later than reported and that the switch-on time of 6.44am should not have been presented as a fact. This was largely contentious due to the inaccurate synchronisation and precision of the watch used to determine the switch-on time.
- The time of David's return home- Mrs Laney's identification of David was problematic and her estimation of time was at best approximate. A second interview was conducted by the police before trial that demonstrated these points of concern, but the Crown failed to disclose the second statement in what they called "an unfortunate error". The police had also checked the digital clock relied on in Mrs Laney's identification which was inconsistent with her time estimation. The jury was not informed of this.

- The glasses- At trial, optometrist Sanderson was understood to say that the glasses were David's. David had said they were not his but his mother's. David was then cross-examined in a way that (as the third Court of Appeal accepted) impugned his credibility. Upon later being shown a picture of David's mother wearing the glasses, Sanderson realised that he was wrong. His change of opinion was not conveyed to the trial jury.
- The location of the left-hand lens of the glasses- Detective Sgt Weir told the jury that he had found the left-hand lens in a visible and exposed position in which, as is now accepted, he had not seen or found it. The third Court of Appeal accepted that the jury had undoubtedly been misled by the officer's evidence.
- David's bloodied fingerprints on the glasses- The trial proceeded on the assumption that David's fingerprints on the forearm of the rifle were in human blood. It is now known that although blood from other parts of the rifle had been tested before trial and found to be human blood, the fingerprint material had not been tested. When it was tested after the trial it gave no positive reading for human DNA. Thus the blood analysis evidence was consistent with the blood being mammalian in origin, the possible result of possum or rabbit shooting some months before.
- Laniet's gurgling- The trial jury was encouraged to regard David's evidence of Laniet's gurgling as a clear indication of his guilt. The Board felt bound to rule that the Court assumed a decision-making role well outside its function as a reviewing body concerned to assess the impact which the fresh evidence might reasonably have made on the mind of the trial jury.

Based upon the above points, in the opinion of the Privy Council, a reasonable jury could have reached a not guilty verdict and therefore a jury must be provided with the 9 points above. It held that such evidence should be assessed by a fully informed jury rather than an appeal court.[58] It was further held that the appeal should be allowed, convictions quashed and a retrial ordered.[59]

2009 Retrial

On 21 June 2007, a retrial was ordered. On 5 June 2009, a Christchurch jury pronounced David Bain not guilty of the murder of his family. During the case, Bain's defence team focused on the potential guilt of Bain's father Robin and whether Robin could have been responsible for the murders. Bain's defence team provided seven photographs to show that Bain's father Robin could have killed himself with the rifle. They further provided evidence concerning his troubled life and dysfunctional family. He was painted as being at the edge of reason, disorganised, hopeless, ill and frail. After painting the picture that it was in fact Robin who had carried out the murders, the jury, after five hours and 50 minutes of deliberation, found Bain not guilty. He was acquitted of all five charges.

Timeline

- ➡ June 20, 1994: The five Bain family members are discovered dead in their Dunedin home.
- ➡ June 24, 1994: Bain is charged with the murder of all five victims.
- ➡ May 29, 1995: Bain is found guilty of all five murders in the High Court of Dunedin and sentenced to life imprisonment with parole set at 15 years minimum.
- ➡ December 19, 1995: The first appeal case is dismissed.
- ➡ April 29, 1996: Leave to apply to Privy Council is denied.
- ➡ June 15, 1998: Bain applies for the Royal Prerogative of mercy.

- December 18, 2000: Governor-General requests the Court of Appeal to examine some aspects of Bain's application for the prerogative of mercy.
- December 17, 2002: The Court of Appeal concludes that there is sufficient possibility of a miscarriage of justice. They recommend a full reconsideration of the case by the Court of Appeal.
- December 15, 2003: The appeal is dismissed by the Court of Appeal a second time.
- May 10, 2007: Privy Council finds, based on nine main points, that a substantial miscarriage of justice has occurred. His convictions are quashed by the Privy Council, and a retrial ordered.
- May 15, 2007: Bain released on bail.
- June 21, 2007: Solicitor-General makes an order to retry Bain.
- June 5, 2009: Bain acquitted by Christchurch jury on all counts of murder.
- March 25, 2010: Bain makes a claim for compensation for wrongful imprisonment.
- December 12, 2012: Dr Fisher's peer review deems Binnie's commissioned report on Bain's innocence on the balance of probabilities unable to be relied upon by the Cabinet.
- January 30, 2013: Bain initiates proceedings for judicial review of Dr Fisher's report.
- January 22 2015: Judicial Review proceedings are discontinued.
- February 2015: Cabinet beings fresh inquiry into compensation claim.

3. Are there gaps in the prosecution, trial, conviction, and appeal processes in our Criminal Justice System that may lead to a miscarriage of justice?

The Concept of a 'Miscarriage of Justice'

The term 'miscarriage of justice' is synonymous with a wrongful conviction, and is defined to encompass a broad "spectrum of justice-related issues ranging from gratuitous stop and searches to prosecution."[60] In some cases, a wrongful conviction is maintained for several years whilst the innocent person remains detained until the opportunity for retrial emerges. Commonly this outcome emanates from a trial wracked with ambiguities, difficulties and blurred factual scenarios.[61] The essential causes of a miscarriage of justice are varied and can concern issues of fact, investigatory procedure, evidence analysed at trial, representation of the accused and appeal processes.[62]

The report now proceeds to analyse the concept of miscarriages of justice through the lens of the Bain, Lundy and Pora trials before identifying common themes across the three cases.

David Bain Case

The Bain case is an exemplary case wherein a miscarriage of justice occurred due to issues with evidence and process. Whilst Bain was originally convicted on all five counts of murder on 21 June 1995, this outcome was overturned on 5 June 2009. The outcome of Bain's retrial indicates the original guilty verdict was either mistaken or based on incomplete evidence, both of which are indicative of a miscarriage of justice.

Police and Prosecution Process

During investigation, police were said to have failed to adhere to protocol. This relates to failure in preservation and testing of firearm residues, preservation of the carpet, preservation of the skin around Robin Bain's gunshot wound to determine the distance of the fatal shot, and failure to take accurate time-stamped images of the crime scene.[63] During the initial investigation, the police denied the pathologist entry to the home for three hours, compromising body temperature and wound examination as a result. Further, during the investigation of the computer, the time was estimated using an inaccurate and unsynchronised watch.[64] This led to ambiguities in determining the switch-on time, and raised concerns about other evidence such as eyewitness identifications by Mrs Laney.[65] It is also noted that certain evidence was prematurely destroyed through burning down the house. This led to considerable complications during the retrial process, as it was believed that evidence significant to the question of Bain's innocence was destroyed in the fire. The prosecution withheld other key evidence. This raises contentious issues about the role that police play in a prosecution process fraught with inadequacies, the factors influencing police decisions, and the extent to which this contributes to an unjust outcome at trial.

Trial and Conviction Process

The original trial ignored the question of Robin Bain's mental health, which was crucial in determining an alternative motive. There was speculation as to evidential issues surrounding the murder weapon, blood-stained clothing found at the premises, and computer access by Bain. Several of these concerns may have been linked to a failure on behalf of the prosecution to inform the jury of certain fresh evidence, such as second statements put forward by both the optometrist who identified the glasses, and the woman who claimed to have seen Bain on the morning in question.[66]

Appeal Process

The need for Joe Karam's involvement to get the case to the Privy Council points to barriers of access to the appeal processes. Access to lawyers and legal aid is a disproportionate burden on the appellant, particularly when compared to the resources available to the Crown.[67] The Privy Council found on 21 June 2007 that a reasonable jury could have concluded Bain was not guilty on the burden of proof and ordered a retrial. The Privy Council noted that the case was best re-heard by a new and fully informed jury, rather than the appeal courts who had determined his fate thus far.[68] Hon. Justice Grant Hammond states that appeal courts are "solely creatures of statute" and that where there is a narrow basis for an appeal, possibilities of a miscarriage of justice increase.[69] A Christchurch jury acquitted Bain of all five counts of murder on 5 June 2009.

Addressing the Gaps

After the Bain case, new testing procedures were proposed by University of Auckland Associate Professor Scott Optican to address the issues of "mistaken eyewitness identifications, wrongful confessions, and perjured jailhouse informant testimony".[70] Optican argues that there is actually very little in the way of safeguards against these distortions in the current system. In particular, he proposes videotaping of all police-initiated, custodial interrogations, greater legal controls on the use of jailhouse informants, improved procedures for the handling and assessment of eyewitness testimony, and reforms to the discovery process. [71] The Bain case illustrates the need for greater accountability for the police in the process of gathering and storing evidence. This encompasses both physical evidence and witness testimonies. It is crucial that police conduct thorough investigations which ensure full accuracy of evidence that is produced at trial. In this instance it is also obvious that they must also endeavour to protect that evidence should it be needed twenty years later.

Mark Lundy Case

The Privy Council considered that Mark Lundy had not been given a fair trial, largely with concerns as to the Crown's expert witnesses and their conflicting or under-developed evidence. [72] Mark Lundy was re-convicted in 2015 for the murders of both his wife and daughter, but this case still raises concerns as to the shaky grounds upon which he was originally convicted.

Police and Prosecution Process

The prosecution was often expected to fill gaps where there was a lack of evidence. The prosecution formulated a questionable timeline of events for the murders. The narrow timeframe in which they suggested Lundy had to commit the murders created controversy over whether it was actually possible to drive from Palmerston North and

Petone in that time.[73] This timeframe was changed on appeal, and the case against Lundy was strengthened as a result, but there were suggestions that perhaps pressure to present a case at the original trial led to making assumptions or guesses where evidence was lacking.

Trial and Conviction Process

The Lundy case raised doubts around the suitability of a jury in handling complicated information that requires expert knowledge. The evidential value of expert testimonies may be in danger of being given too much weight, which can be seen in the subsequent acknowledgement of new-found evidence which rendered original evidence unreliable.[74] The prosecution's original timeline was based on expert evidence regarding the human digestive system and the contents of the victims' stomachs. However, this assumption was challenged by other experts, such as Dr Martin Sage, who said that stomach digestion is an inaccurate way of determining time of death.[75] Similarly, multiple experts offered conflicting opinions on the brain tissue found on Lundy's polo shirt. Experts could not agree whether it was due to contamination in the factory that handled the DNA, or whether the shirt itself was contaminated and the brain tissue was that of an animal or other being.[76]

Appeal Process

Mark Lundy wanted to appeal to the Board after the Court of Appeal decision but was initially unable to do so due to lack of legal aid. He looked to persuade counsel to act pro bono and sought help for funding an appeal. David Hislop QC agreed to act as counsel for Mark Lundy on a pro bono basis at the appeal. Once the trial was finished, the media reported that the cost of the second trial had exceeded $2 million dollars, with the legal aid retrial billed at $1.3 million and set to rise further.[77] Justice Winkelmann discusses the idea that justice services have become more and more a product to be "marketised."[78] She speaks about access to justice as the critical underpinning of the rule of law in society. Although her speech was concerned with the widening unmet needs for civil cases, her commentary provides insight into a steady decline in funding by the Executive and the increase in unrepresented litigants. This difficulty in accessing justice is displayed in the Lundy case, wherein it took 10 years to bring forward an appeal. Long delays in bringing appeals forward is concerning due to the impact this could have on scientific evidence and witness statements. This delay presents an issue in the justice system, where the difficulty in affording legal services is proving detrimental to accessing justice. It highlights the potential for civil litigation becoming a luxury service for those who can afford the fees, rather than a necessity to the functioning of justice in society.

Addressing the Gaps

The Lundy case demonstrates that there may be a need to review access to legal aid and whether it may be creating an unnecessary disadvantage to defence teams. The process of receiving legal aid is long and difficult, which in Lundy's case created difficulties in seeking counsel. In addition, legal aid may provide hindrance in the processes leading up to the case as legal aid must be sought at each step of the way in order to keep up with the Crown's witnesses.

This case had a heavy focus on elements such as CNS tissue, petrol consumption, and food digestion which posed several scientific questions. It may be beg the question of whether fair-minded layman juries are capable of making informed decisions where the content put forward is heavily scientific. New evidence arose following the

that challenged the Crown's expert witnesses and suggested that the information used in the trial was contestable, and therefore should not have been relied upon so heavily.

Teina Pora Case

The recent decision by the Privy Council to quash Pora's convictions for the rape and murder of Susan Burdett has raised questions which particularly concern confessional evidence and police conduct.

Police and Prosecution Process

Justice Grant Hammond suggests that one of the factors that may lead to a miscarriage of justice is unreliable confessions, gained by police pressure or as a result of an impaired metal state.[79] There were multiple indications that Pora's confession was false, such as his inability to identify the scene of the crime, or accurately describe the victim's physical appearance. However, the police did not conduct further investigations into the truthfulness of the confession.

Additionally, police interviewed Pora for four days without a lawyer present. The Court in 1994 found that Pora had been adequately advised of his right to consult a lawyer in compliance with s 23(1)(b) of the New Zealand Bill of Rights Act, and that he chose not to.[80] Nonetheless, if a lawyer had been present from the outset, the confession may not have been made to police and the subsequent charges and convictions may not have ensued. Additionally, research suggests that individuals with low levels of intelligence or those who lack an expected level of maturity cannot fully comprehend the significance of their legal rights, which raises issues as to whether these offenders should be able to validly waive these rights.[81]

Trial and Conviction Process

The prosecution was allowed to rely heavily on the confessional evidence in police interviews to make their case against Pora. In New Zealand, confessional evidence is a powerful instrument utilised by the prosecution. Elias CJ observed in *Television New Zealand Ltd v Rogers*, "apparently reliable confessional evidence has led to significant miscarriages of justice".[82] In New Zealand, a jury is entitled to convict on confession alone, even if the defendant retracts the confession or asserts it is false.[83] "Any court must therefore be astute to examine the reliability of a seemingly straightforward confession of guilt where that comes under later challenge."[84] The inability to investigate and detect false confessions presents a significant barrier to justice. A false confession risk is especially high for vulnerable suspects, such as those with cognitive impairments. These suspects already face multiple disadvantages in the face of the prosecution and trial process.[85]

In determining whether the confession was reliable or not, the court in 1994 focused largely on the accuracy of procedures followed by police.[86] The Court was not so concerned with the characteristics of the offender, such as his level of intelligence and memory, which are known to affect the likelihood of a confession being false.[87] "Any pertinent characteristics of the defendant including any mental disability to which the defendant is subject" could affect the reliability of the statement.[88]

Appeal Process

The fact that Pora's accounts were "strewn with inconsistencies" and incoherency, the confession was not given weight until the case reached the Privy Council.[89] Therefore, the courts arguably need to place greater attention on the individual characteristics of the accused.

When Pora's convictions were quashed in 1999, the court noted that false confessions were an established possibility.[90] Factors relevant to this include indications of the defendant's general immaturity and inability to read, which were known by police before the confession was made. Pora was also diagnosed with foetal alcohol syndrome, which further established reasons why his confession may have been unreliable. Pora's conviction was quashed by the Privy Council in 2015 and a retrial was not ordered.

Addressing the Gaps

There may be cases in which, even with a comprehensive explanation, there remains a risk that rights are not sufficiently understood so that any purported waiver will be ineffective. Police officers should be alert to this, and in such cases the wise approach is to arrange for the suspect to be seen by a lawyer.[91] This would allow suspects, who do not understand their rights but claim to for any reason, the ability to be represented and advised by someone who fully understands the suspect's rights and can give frank advice about the rationality of such a waiver.[92] The late diagnosis of foetal alcohol syndrome had a pivotal effect on Pora's case. It suggested that with his mental state, it was highly unlikely that he could have understood the consequences of waiving his right to a lawyer and his confessional evidence. This clearly demonstrates the need to consider the full context of the defendant when determining whether confessions and other evidence are reliable.

Following the Pora case, New Zealand politicians spoke out about the opportunity for an independent criminal case review commission. Labour MP Jacinda Ardern articulated concerns about the independence of the current process where the Governor-General must apply to the Minister of Justice in exercising the Royal Prerogative of Mercy: "It's hardly an independent process if you are actually making an application to a political individual to make a decision around a miscarriage of justice."[93]

4. Common Themes Across the Three Cases

Police and Prosecution Process

All three cases demonstrate a common theme of police failing to adhere to proper protocol during the investigation and evidence collection processes.

Police Failure to Conduct Investigations Adequately

In all three cases, police arguably failed to act with due diligence in conducting investigations. For example, in *Bain*, the failure of Police to take accurate photographs of the scene and to ensure accuracy in their time-lines put the defence at a disadvantage before the trial had begun.[94]

The gaps in evidence that may result from such investigative failures have roll-on effects in the subsequent trial processes. It ultimately leads to ambiguous or inadequate information being presented to the jury as incontrovertible fact; risking the jury being provided with misleading information.[95]

Police Failure to Procure and Preserve Evidence

Police are obliged to ensure all evidence remains intact and accessible for the duration of the trial process. In all three cases, police failed to preserve key evidence crucial to the defence case for this period. Arguably, this reveals bias on the part of the police in undertaking investigations; failing to discharge their basic responsibilities to both sides of the case equally. This raises the question of whether the failures are a result of the police acting on preconceived notions of guilt, or, perhaps, are a manifestation of other systemic issues within the police system.

Police 'Tunnel Vision'

In both *Bain* and *Pora*, psychological evidence was a strategic prosecution tool. The police lacked any evidence of a credible motive on the part of David Bain to kill his family.[96] In the lead up to the first trial, although police knew of claims regarding Robin Bain's mental instability, they did not conduct further investigations into this claim. Instead, police collected evidence of David Bain's "odd and disturbing behaviour" before and after the murder with the objective of attempting to present the evidence as an indicator of guilt.[97]

In *Pora*, although there were signs of the defendant having made a false confession, police did not attempt to investigate the factors influencing the confession; such as Pora's mental state.[98] As a result, his foetal alcohol syndrome was not diagnosed until the time of the 2015 appeal to the Privy Council. This behaviour, which might be taken to suggest a desire to ensure Pora's conviction, occurred despite police having initially ruled Pora out as a suspect as there was no supporting DNA evidence.[99] Furthermore, a senior police psychologist had concluded that there was a link between previous rapes committed by Malcolm Rewa and the Burdett murder. Indeed, police had a strong suspicion that the murder was the work of a serial rapist. However, Pora was sent to trial before DNA test results for Rewa had been concluded in order to fully explore this possibility. As a result, the jury convicted Pora without hearing this crucial piece of evidence available to them.[100]

Both the Bain and Pora cases raise the question of police 'tunnel vision', and whether police attempted to justify an initial assumption of guilt with the selective use of such psychological evidence; even in the absence of apparent indica of credible alternative hypothesises.

Trial and Conviction Processes

Incomplete, Contested, or Weak Evidence Presented to the Jury

In *Bain*, contested and ambiguous evidence was presented as fact to the jury by the Crown. For example, the first trial proceeded on the assumption that the bloody fingerprints discovered on the murder weapon were David Bain's fingerprints captured in human blood. However, it was discovered after the trial that the rifle gave no positive reading for human DNA.

Furthermore, a 111 call made by Bain on the morning of the crime including the words "I shot that (the) prick" was played to the jury in the original trial.[101] Despite the fact that none of the experts giving testimony were prepared to confirm the phrase was more than an "accidental arrangement of sound resulting from an exhalation of breath", it was presented to the jury as fact that those words were uttered; and this was used as evidence against Bain.[102] The presentation of such contested or ambiguous evidence to a jury risks the jury discarding expert evidence and coming to their own conclusions. Subsequently, the Supreme Court did not accept that this was a question of fact that should have been put to the jury; and found the manner in which the prosecution framed the indistinct and inaudible sounds risked speculation.[103] The Court's rebuke that juries should be reminded of the limitations of certainty in regards to forensic evidence; and strongly advised to proceed with caution in relying on such evidence in deciding whether to convict.

In *Lundy*, the Privy Council considered that Lundy had not been given a fair trial. This largely hinged on the conflicting or under-developed evidence of the Crown's expert witnesses.[104] In both this and the *Bain* case, the presentation of such contested or ambiguous evidence to a jury may present the risk of the jury discarding expert evidence and coming to their own conclusions, or favouring one line of expert evidence over another based on non-objective factors.

In *Pora*, the key evidence that Malcolm Rewa suffered from erectile dysfunction was withheld from the second jury, who convicted Pora at his retrial in 2000. This evidence is key to Pora's defence; as it indicates that it was unlikely that Rewa took Pora along with him in the rape of Susan Burdett. The Court of Appeal upheld the conviction later that year and Pora served another 13 years in prison before the Privy Council heard his case.

Juries' Ability to Assess Complex and Contested Expert Evidence

The presentation of complex scientific evidence, such as in the *Lundy* cases, raises the question of juries' ability to objectively assess this type of evidence. This is particularly important in relation to evidence that relies on novel and developing forensic science theories and methods, which often produce inconclusive results and, in many cases, are later called into question following developments in the field.

This issue also needs to be analysed in the context of the Crown's superior ability to pay and call for expert witnesses compared to the defence.[105] In this situation, there may be an inherent risk that the jury may accord the evidentiary value of certain expert testimonies more weight than others.

Jury Bias

A common problem in high-profile cases is the significant level of media scrutiny and reporting before the matter proceeds to trial. This increases the possibility of jury bias. For example, from the beginning of *Lundy*, the media engaged in speculation surrounding Lundy's possible role in the killings that may have resulted in some in some members of the jury being influenced by public opinion at large, and therefore convicting him on the basis of preconceived ideas of his guilt rather than evidence before the Court. Most notably, his weeping and collapsing at the funeral of his wife and daughter was popularly derided as a performance due to its melodramatic nature, with attitudes such as those contained in the remark "remember him at the funeral? All that over the top distress and collapsing bullshit masked by dark glasses... How vile and despicable... big fat filthy bastard"[106] gaining significant currency at the time; suggesting public suspicion, verging on predetermination, as to Lundy's guilt.

Indeed, according to Bennett, jurors often suffer from implicit biases that are "unstated, unrecognised and operate outside the conscious awareness"[107] that will not be caught by pre-trial screening; potentially resulting in jurors in high-profile cases being subject to preconceptions that bias them towards a particular outcome.

Fallibility of Eyewitness Identifications

Eyewitness identifications are a crucial part of criminal trials, and are accorded significant weight by the jury.[108] Eyewitness identifications were a key part of the prosecution's case in all three of these cases. However, research has demonstrated that eyewitness examinations are "systemically fallible"; and may therefore serve to obstruct rather than further the objectives of fairness and securing a safe conviction that underpin the rules of evidence.[109] As noted by Justice Binnie, it is always tempting for a witness on re-examination to add self-serving details knowing that opposing counsel are no longer at liberty to cross-examine; potentially leading to the putting of extraneous evidence to the jury capable of endangering the safety of any conviction.[110]

Appeal Processes

Crown's Disproportionate Resources Compared to the Defence

There is a significant disparity in resources between the Crown and the Defence - especially following the recent decrease in legal aid funding - and restrictions on the process associated with such funding means a significant amount of defence time is taken up by seeking funding rather than on the legal work.[111] The expenses associated with appealing a conviction therefore present a significant obstacle to justice insofar as both parties do not have an equal ability to bear the costs of the appeal, or to employ resources in contesting the process.

As the Privy Council noted, Lundy wanted to appeal to the Board immediately after the Court of Appeal decision, but was unable to do so due to lack of legal aid and inability to fund an appeal.[112] That *Bain*, *Lundy*, and *Pora* were successfully brought to appeal due to campaigning by champions such as Joe Karam, Geoff Levic, Tim McKinnel

own time and resources in the case. In turn, this may result in the overturning of unsafe convictions hinging on public sentiment and media exposure. This state of affairs is encapsulated by Nigel Hampton QC when he remarks that the current system must rely heavily on "white knights" willing to work for little payment, with those falsely convicted depending on assistance from lawyers, private detectives, scientists or journalists to clear their names[113]

Recently Justice Winkelmann suggested justice services have increasingly become a product to be "marketised."[114] Although these remarkable comments were made in the context of the widening unmet need for access to the justice system in civil cases, her words resonate with the steady decrease in legal aid funding available to criminal defendants, and draw attention to the broader implications of the relationship between imposing fiscal constraints on supporting defendants and the accessibility of reliable justice and, by extension, the fairness of our Courts. and David Hislop QC indicates that the opportunity of pursuing appeal may rely on others being willing to invest their

5. If there are gaps, how can we address them to deliver more adequate justice?

Establish an Independent Criminal Review Commission

It has been proposed that establishing an Independent Criminal Review Commission as an alternative to the current use of the Royal Prerogative of Mercy may reduce the number of innocent individuals in our prisons.[115]

This recommendation is based on the model provided by the United Kingdom's Criminal Case Review Commission (the 'CCRC'). The CCRC has the power to send, or refer, a case back to an appeal court if it considers that there is a real possibility the court will quash the conviction or reduce the sentence in that case. Typically, courts at an appellate level focus on matters of law and regard only errors in law as grounds for appeal. An independent commission would instead make inquiries into cases where there is a possibility that the court has made a wrong finding on the matter of factual evidence.[116] There are several potential advantages to constituting an independent review body such as the CCRC:

- Such a body would create greater oversight and accountability for the judicial process through reviewing allegations of bias and misjudgement in criminal cases; promoting public confidence in the reliability of the justice process, and therefore respect for judicial outcomes.
- Such a body may aid in allowing convicted persons who do not have the resources to make an appeal to enjoy equal access to justice compared to better resourced prisoners - particularly in the case of prisoners whose cases do not attract the sympathy that elicited private funding, such as in the *Bain* and *Pora* cases - but whose convictions are equally unsafe.
- Such a body may well, in cases such as *Bain* where there is significant incomplete, inconclusive, or otherwise questionable evidence, be able to undertake a more thorough and impartial investigation than the police, prosecution, or defence.
- Such a body may well aid in ensuring that, in cases where the high-profile nature of a matter may have resulted in implicit biases in jury decision-making, by allowing for a body of individuals better possessed of the ability to consider the facts of the case impartiality to have oversight of the matter. However, this must be considered in light of James P Brady's admonishment that "[t]he conclusion is not that jury trials should be avoided or minimised, since judges are apt to be even more predisposed against dissidents".[117] This suggests it will also be important to also take care at trial to emphasise that jurors disregard extraneous influences.
- Such a body may well also allow for the streamlining of the appeals process by allowing for the efficient collection of relevant evidence in advance of the commencement of proceedings.

New Zealand's appeal process is criticised as being too narrow in focus, and places excessive emphasis on technical procedures rather than the substantive merits of the competing cases. Many believe that the implementation of such a commission should therefore be just one part of a broader holistic approach to reducing wrongful convictions by interrogating our approach to reviewing the safety of convictions.[118]

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Endnotes

Section Two: The Facts of the Cases (pp 4-14)

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3 At 8-11.
4 At 9.
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45 At [128].
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47 *R v Matenga* [2009] 3 NZLR 145.
48 At [151].
49 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [13].
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56 At [165].
57 *Bain v R*, above n 49, at [119].
58 At [118].
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Section Three: Are there gaps in the prosecution, trial, conviction, and appeal processes in our Criminal Justice System that may lead to a miscarriage of justice? (pp 15-19)

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