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**REPORT FOR THE MINISTER OF JUSTICE  
ON COMPENSATION CLAIM BY DAVID CULLEN BAIN  
BY HON IAN BINNIE QC**

**30 August 2012**

**(supplemented in response to questions raised by the  
Minister at our meeting of 13 September 2012)**

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September 25, 2012

The Hon. Ian Binnie, Q.C., C.C.  
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The Hon. Judith Collins  
Justice Minister  
The Vogel Centre  
19 Aitken Street  
SX 10088  
Wellington, NZ

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**RE: Compensation Claim by David Cullen Bain**

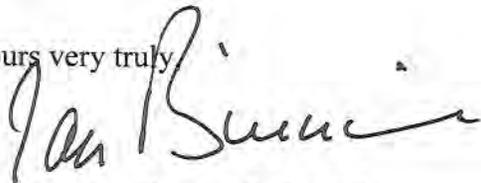
Dear Minister:

At our meeting in Wellington on 13 September you raised questions concerning (i) Mr Michael Guest; (ii) his evidence to Sir Thomas Thorp regarding David Bain and Margaret's glasses; and (iii) the current status of David Bain's solicitor client privilege. I have therefore, amplified what had already been said on these points in my Report. The changes are incorporated in the attached document, particularly at (i) paragraphs 18 and following (Michael Guest), (ii) paragraph 411 and following (the wearing of Margaret's glasses) and, (iii) paragraphs 578 and following (solicitor client privilege), I have expanded the explanation of the decision of the Court of Appeal in *R v Bain* [2008] NZCA 585 which was cited in my 30 August 2012 report and to which I referred at our meeting.

The 30 August 2012 document, together with these additions arising out of our meeting, completes my report in response to the Minister's instructions of 10 November 2011.

I hope this is helpful.

Yours very truly,



The Hon. Ian Binnie, Q.C., C.C.

IB/sa

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August 30, 2012

The Hon. Judith Collins  
Justice Minister  
The Vogel Centre  
19 Aitken Street  
SX 10088  
Wellington, NZ

Dear Minister:

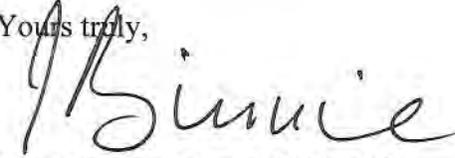
I have the honour of submitting my Report with respect to the claim for compensation by David Cullen Bain. In accordance with the Minister's letter of instruction dated 10 November 2011, the Report is divided into three parts –

In Part One of the Report I summarize the saga of the David Bain case and set out in some detail the arguments for and against David Bain's claim to innocence. As you know, the claim arises out of his conviction on 25 May 1995, of the murder of five members of his family, his successful appeal to the Judicial Committee of the Privy Council in 2007, and his eventual acquittal of all charges by a Christchurch jury on 5 June 2009.

In Part Two of the Report I deal with the scope and relevance of some of the considerations the Cabinet may wish to take into account in the exercise of its "extraordinary circumstances discretion" concerning the payment of compensation to the wrongfully convicted.

In Part Three I recommend that compensation be paid to David Bain in an amount to be fixed by the Cabinet in the exercise of its discretion with respect to ex gratia payments.

I am available to discuss any aspect of this Report at your convenience.

Yours truly,  
  
The Hon. Ian Binnie, Q.C., C.C.

WICB/sa  
Encl.

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## MANDATE AND METHODOLOGY

1. By letter dated 10 November 2011<sup>1</sup> from the Minister of Justice, I was asked to investigate the claim for compensation of David Cullen Bain arising out of his wrongful conviction by a Dunedin jury on 25 May 1995 of the murder of his parents, Robin and Margaret, and his sisters Arawa and Laniet, and his young brother Stephen. All were killed at their home at 65 Every Street, Andersons Bay, Dunedin, in the early hours of 20 June 1994.
2. The convictions were declared to be an “actual [i.e. not a technical] miscarriage of justice” by the Judicial Committee of the Privy Council on 10 May 2007.<sup>2</sup> A new trial was ordered. On 5 June 2009, David Bain was acquitted of all charges. He had spent the better part of 13 years in prison.

### The Minister’s Letter

3. My mandate letter states that the ordinary Cabinet Guidelines respecting compensation for the wrongfully convicted do not apply in this case because David Bain did not receive a free pardon and the Privy Council, in allowing his appeal, did not acquit him or stay further criminal proceedings.
4. Accordingly, David Bain’s claim for compensation falls to be considered *outside* the ordinary Cabinet Guidelines for compensation to the wrongfully convicted. It falls under an “extraordinary circumstances discretion” reserved by Cabinet to consider “claims on a case-by-case basis, where this is in the interests of justice”.<sup>3</sup>

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<sup>1</sup> Found at **tab D** of the Book of Documents that accompanies this report.

<sup>2</sup> The decision is reproduced at **tab A** of the Book of Documents that accompanies this report.

<sup>3</sup> The Minister’s letter states:

#### *Extraordinary circumstances discretion*

1. Compensation may be paid in non-eligible or “outside Guidelines” cases, however, if there are extraordinary circumstances. When the Cabinet Criteria were adopted in 1998, Cabinet agreed that the Crown reserve discretion to consider claims that fall outside the Guidelines “in extraordinary circumstances ... on their individual merits, where this is in the interests of justice.”
2. The question in cases such as Mr Bain’s is, therefore, whether there are extraordinary circumstances, where it is in the interests of justice for the claim to be considered. Cabinet did not determine what matters would constitute “extraordinary circumstances”. Claims of extraordinary circumstances have to be considered on their merits on a case-by-case basis, as does the assessment of the interests of justice.
3. The following paragraphs outline the current articulation of the principles applying to applications that fall outside the Guidelines.

5. The threshold question is whether the prosecution was simply unable to prove David Bain's guilt beyond a reasonable doubt (equivalent to the Scottish verdict of "not proven") or whether, based on the evidence, David Bain can now establish that he is in fact an innocent man. The Minister in his letter states that "innocence on the balance of probabilities is a minimum requirement, consistent with the [requirements in the] Guidelines, for eligible claimants".<sup>4</sup>

6. If I am satisfied of factual innocence, I am to consider whether, taking the whole case on its individual merits, it would be "in the interests of justice" for compensation to be paid<sup>5</sup>. Neither "extraordinary circumstances" nor "the interests of justice" are defined expressions, but the Minister notes that "the test of extraordinary circumstances is inherently open-ended"<sup>6</sup>.

### **The Onus of Proof**

7. The onus is on David Bain to establish his factual innocence as a condition precedent to compensation. If he cannot do so beyond a reasonable doubt he must do so on a balance of probabilities, which simply means that it is more probable than not that he is factually innocent.

8. The difference between "beyond a reasonable doubt" and "on a balance of probabilities" can be highly significant. There are cases such as the O J Simpson prosecution in

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

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

- a. *Unequivocal innocence* – i.e. cases in which it was demonstrable that the claimant was innocent beyond reasonable doubt, for example, due to DNA evidence, strong alibi evidence, etc.; or
- b. *No such offence* – i.e. the claimant had been convicted of an offence that did not exist in law; or
- c. *Serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.

6. The test of "extraordinary circumstances" is inherently open-ended and the list above cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid.

<sup>4</sup> Minister's letter Paragraph 38

<sup>5</sup> Minister's letter paragraphs 39 and 45

<sup>6</sup> Minister's letter paragraph 40

California, where an accused was acquitted in a criminal court but found culpable of murder in subsequent civil proceedings. The position of the Crown Law Office is that David Bain cannot establish factual innocence regardless of whether the standard of proof is beyond a reasonable doubt or on a balance of probabilities.

9. In short, my mandate is to express an opinion about whether or not:

- (i) David Bain is factually innocent of the five killings and, if so,
- (ii) Whether the circumstances of his conviction were so extraordinary as to warrant an *ex gratia* payment of compensation by the New Zealand government.

10. It is important to emphasize, as the Minister's letter makes clear, that my role is to provide a recommendation not a decision. The question of David Bain's compensation rests firmly in the hands of the Cabinet.

### **The Conduct of the Compensation Inquiry**

11. In order to carry out this mandate I have read the relevant transcripts from the 2009 trial and the notes of evidence from the 1995 trial and the significant exhibits therein referred to as well as the submissions of the Crown prosecutor(s) and the defence and the jury instructions of the respective trial judges.

12. I received extensive written submissions in support of David Bain's claim from Mr Joe Karam, prepared with the assistance of Mr Michael Reed, Q.C. and Mr Matthew Karam (David Bain applied for Legal Aid but did not obtain it). Mr John Pike and Ms Annabel Markham of the Crown Law Office responded with a detailed rebuttal, and significant additional and helpful material. From time to time I was contacted directly by members of the public who wished to make points for or against the compensation claim. I referred these communications to Mr Karam and Mr Pike to incorporate or not in their submissions as they saw fit. For a more journalistic approach to the case against compensation for David Bain I familiarized myself with some of the writings of the *Justice for Robin Bain* and similar groups posted on sites such as [davidbain.counterspin.co.nz](http://davidbain.counterspin.co.nz) and [www.scoop.co.nz](http://www.scoop.co.nz).

13. For guidance on particular points of New Zealand law I consulted with Professor Paul Rishworth of the Faculty of Law at the University of Auckland.

14. I have, of course, been attentive to the several judgments of the Court of Appeal and the 2007 Privy Council. In addition, I reviewed a number of reports from the Ministry of Justice, the Joint Report of the Police/Police Complaints Authority (1997), a report from Sir Thomas Thorp dated May 19, 2000 and the additional evidence given to the Court of Appeal in 2002.

15. The diversity of the often conflicting opinions in this case is exceeded only by the confidence with which each conflicting opinion is advanced.

16. Until I was contacted by the Ministry of Justice office for the compensation inquiry, I had never heard of the David Bain case. I had, however, served as associate Deputy Minister of Canada from 1982-1986. In that capacity I was responsible for claims against the Federal Crown from all of the common law provinces, including claims by people who alleged they had been wrongfully convicted. I had also, as a private practitioner acted as one of the counsel for Guy Paul Morin, a person found by the courts in Canada to have been wrongfully convicted.

17. My job is to review this material with fresh eyes. I have certainly not purported to conduct a retrial. It is not within my mandate to do so. There have already been two trials. Not only would a third trial be prohibitively costly and time consuming (in a case that is already over 18 years old) but I think the Cabinet is entitled to assume, for present purposes, that the 130 witnesses whose evidence is recorded at the 2009 trial would respond in 2012 in much the same manner as they did three years ago.

18. Nevertheless, I advised the Crown Law Office and the Bain team that I would be glad to interview any witnesses (whether or not they had testified at the 2009 trial) whom either side thought might be of assistance to the compensation inquiry. Neither side suggested any names. There was in particular, no suggestion by the Crown Law Office that I interview the 1995 defence counsel, Michael Guest or that for this purpose there be a waiver of solicitor client privilege

19. Mr Guest would, it seems, have presented some difficulties as a witness. He was struck off the Law Society roll of barristers and solicitors for professional misconduct on 5 November 2001 because he “acted dishonestly for personal gain” and had “lied to his client.”<sup>7</sup> Michael Guest’s application for reinstatement of his practicing certificate was denied by the New Zealand Law Society as recently as 1 March 2010 because he “knowingly misled the Tribunal” regarding an earlier misappropriation of funds that resulted in Michael Guest’s payment to his former employer (a Tauranga law firm) of \$22,000 “by way of restitution.”<sup>8</sup> As of the date of

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<sup>7</sup> His appeal was dismissed by the High Court in Wellington (Ellis, Gendall and Wild JJ.) on 29 July 2002, see *Guest v Complaints Committee 2001 of the Otago District Law Society* [2004] NZAR 568. The judgment of the Court states in part that:

[3] In a decision delivered on 5 November last the New Zealand Law Practitioners Disciplinary Tribunal found two charges of professional misconduct against the appellant, Mr Michael Guest, proved. The first, sequentially, involved a finding that Mr Guest had lied to his client. The second involved a finding that Mr Guest had charged his client \$25,000 in fees when he had no right to do so. Both were findings that Mr Guest had abused his client’s trust, and acted dishonestly for personal gain.

[4] The Tribunal ordered that Mr Guest’s name be struck off the roll of barristers and solicitors.

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[57] The findings of fact by the Tribunal which we have upheld involve a breach and abuse by Mr Guest of the client’s confidence and trust. What he told her was a lie. It was a lie against the client’s interests and for Mr Guest’s personal gain, in that it enabled him to charge a fee which, but for the lie, he could not have charged.

[58] No solicitor who abuses the fundamental solicitor/client relationship in a calculated and deliberate way for personal gain, and to the potential detriment of the client, can be permitted to continue in practice...

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[59] The abuse of the solicitor/client relationship of confidence and trust was exacerbated by Mr Guest’s deliberate misleading of the arbitrator and of two fellow practitioners, again for Mr Guest’s personal gain. If arbitrators and Courts cannot implicitly rely upon what counsel tell them, then our system of justice will be imperilled. If practitioners cannot rely upon what other practitioners tell them in the course of professional dealings, then the practice of law will break down.

[60] We hold that the Tribunal did not err in ordering that Mr Guest be struck off the roll of barristers and solicitors.

<sup>8</sup> See *Guest v New Zealand Law Society*, decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, dated 14 July 2010, which held that Mr Guest “knowingly misled the Tribunal in both his affidavit and oral evidence at the hearing on his application for restoration” (para 25) with respect to a misappropriation of funds which resulted in his payment to his former employer of \$22,000 “by way of restitution” (para 13). According to the Tribunal:

As we look back at the various steps which the Appellant took, we think it is clear that he was trying to negotiate a path towards restoration which avoided having to refer to the Waihi client matter. He employed a number of approaches to this. One was to plead in the early stages that privilege and confidentiality applied to cloak this event. Then, when some compulsion came upon him to disclose the Tauranga events the Appellant gave selective and minimal disclosure to relieve the pressure that there had been for disclosure. When in the course of the hearing the questions arose in relation to Tauranga the Appellant answered them in a way that was not truthful but which relieved the pressure for further answers. Later when the Waihi client matter became known to the Law Society the Appellant has sought to cloak that with confidentiality and privilege and has sought to argue that questions about Tauranga seemingly answered incorrectly were misunderstood or misheard. We see all of this as being a sorry almost desperate overreaching by the Appellant for restoration to a position where he could practice as a barrister which he saw as within his grasp. This manipulative approach designed to keep the Waihi matter a secret from the Tribunal considering his fitness to be restored to the roll, is itself clearly relevant to whether Mr Guest is a fit and proper person to be granted a practicing certificate. [para 26]

this Report the name of Michael Richard Dexter Guest does not appear on the on-line register maintained by the Law Society of lawyers with current practising certificates.

20. Nevertheless Mr Guest did provide evidence to Sir Thomas Thorp under a limited waiver of privilege by David Bain for the purpose of his petition for the exercise of the Royal Prerogative. In the absence of a volunteered waiver in the compensation inquiry **I have assumed Mr Guest was truthful in everything he said to Sir Thomas Thorp as reported by Sir Thomas Thorp in his Report of May 19, 2000.** In particular, I accept that David Bain has been inconsistent with his statements about whether or not he wore Margaret's glasses (later found at the crime scene) on the weekend prior to the murders.

21. This inconsistency gives rise to issues of both of substance and credibility. As to the substance of the claim, the Court of Appeal's decision of 15 December 2003 subsequent to the Thorp Report concluded that

"The glasses and lens issue has not featured significantly in our analysis of the strength of the case against David. It does not in any way tend to exculpate David." (para 244)

22. For reasons that follow, I agree with that conclusion. Assuming as I do that what Mr Guest told Sir Thomas Thorp is true, it does not "feature significantly" in resolving the substance of the case.

23. As to credibility, there are a number of inconsistencies in David Bain's statements made over the years as will be pointed out. I therefore interviewed David Bain for a full day on 23 July 2012. A transcript of that interview is at **Tab G** of the attached Book of Documents. My comments on his credibility appear below.

24. I also interviewed former Det. Senior Sgt Jim Doyle, a key figure in the 1994 Police investigation<sup>9</sup> (a transcript of the Doyle interview is at **Tab E** of the Book of Documents) and former Det. Sgt Milton Weir, the officer in charge of the crime scene at 65 Every Street (his Transcript is at **Tab F**).

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<sup>9</sup> The Bain investigation was headed by Detective Chief Inspector Peter Robinson, then head of the Dunedin CIB.

25. The disadvantage of not having seen and heard the numerous other witnesses examined and cross-examined is that I am not in a position to assess credibility in the usual way of a trial judge. I am working essentially from the written record. I believe the written record, supplemented by the interviews, is ample to enable me to fulfil my mandate, but as will be seen, there are questions of credibility arising from conflicting accounts from witnesses I did not hear that I am not in a position to resolve. However, in my view it is unnecessary for me to resolve all of these issues and sub-issues for the purpose of making my recommendation. In my view while many nagging questions remain unresolved, **the outcome for my purposes can be determined essentially on the physical evidence as interpreted (largely) by witnesses for the prosecution at the 2009 retrial.**

26. In the Report I have provided footnotes to sources in respect of many of the more controversial issues. This reflects the fact that my job is to recommend not decide. It is hoped that these footnotes will assist those who participate in the actual decision and who may wish to identify, and judge for themselves, the factual basis for my conclusions.

## EXECUTIVE SUMMARY

27. It is my recommendation that David Bain receive compensation for the wrongful 1995 conviction and the consequential 13 years in jail. Although his factual innocence has not been established beyond a reasonable doubt, I conclude that it is more likely than not that David Bain is factually innocent according to the lower civil standard of “balance of probabilities”. Further, having regard to the terms of the Cabinet’s “extraordinary circumstances discretion” set out in the Minister’s letter to me of November 10, 2011, it is my opinion that the egregious errors of the Dunedin Police that led directly to the wrongful conviction make it “in the interest of justice that compensation be paid”.

### Introduction

28. It is accepted that either Robin or David was responsible for these killings and that whoever killed one killed all. Neither David nor his father had any previous record of violence. Both were respectable and respected members of their community. As the Crown prosecutor observed in his closing address to the jury at the 2009 retrial, *“Neither Robin nor David are natural born killers. No one is suggesting that at all. But something went wrong in the house that morning to lead someone to kill. We may never know what it was, what the trigger was for that event”*. While theories abound, no motive was clearly established on the evidence for the tragedy that took the lives of the five family members.

29. At the conclusion of my review of the written materials already referred to, and my interviews with the two retired police officers, I interviewed David Bain under oath for a full day in Auckland on July 23, 2012. A copy of the transcript is in the Book of Documents accompanying this Report at Tab G. With respect to the murder allegation he swore (as might be expected)

The allegation is untrue. I had nothing to do with the deaths of any members of my family.<sup>10</sup>

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<sup>10</sup> David Bain interview, p. 53, ll. 29-31

30. I am very conscious that Robin – unlike David – is not here to speak for himself. Yet I believe the *physical* evidence compels the conclusion that it is more probable than not that Margaret and three of the Bain children were killed by Robin Bain before he turned the gun on himself and committed suicide.

### **Factual Background**

31. The Bain family was somewhat dysfunctional. The house was a shambles. Margaret's interest was in new-age spiritualism. Keeping the house clean was not a family priority. One of the Police officers described the place as "unkempt and a pigsty".<sup>11</sup> Robin's marriage to Margaret had effectively broken down. She had called him a son of Belial – one of the Four Crown Princes of Hell. He did not sleep in the house with his wife and children. When staying at 65 Every Street, he was banished to sleep outside the house in a caravan.

32. The Police had evidence from several independent sources that Robin was committing incest with Laniet. The defence theory is that Laniet likely confronted her parents with this accusation in the weekend before the murders. The Police did not follow up the information (Det. Sr Sgt Doyle said "this was a homicide investigation not an incest investigation")<sup>12</sup> and the prosecution dismissed the incest issue as Laniet's fabrication.

33. The prosecutor's theory was (and is) that David Bain arose in the early hours of June 20 1994 and *for reasons unknown* killed his mother, two sisters and brother. Stephen woke up and fought desperately for his life with much loss of blood. David Bain then left the house to do his paper route, according to the prosecutor, apparently trusting to chance that his father would not come into the house prior to his return, discover the bodies, and call the Police.

34. When David Bain did get back to the house about an hour later, the prosecutor said, he concealed himself in a small alcove off the lounge, where the family computer was located, pulled the curtains and lay in wait for his father. Robin entered the house just before 7 am and, oblivious to David's presence, dropped to his knees in prayer. David then poked his gun

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<sup>11</sup> Statement of Sgt Stapp dated 23 June 1994.

<sup>12</sup> Doyle evidence, 2009 retrial p. 159.

through the gap in the alcove curtain and shot his father – execution style – in the left temple with the gun’s silencer in contact or “near contact” with Robin’s forehead. David Bain then re-arranged the scene to try to make it look like a suicide.

35. In my view, setting aside the more exotic theories of the case, the Crown’s theory is not consistent with the physical evidence collected by the Police on June 20. It is more likely than not that the murders were committed while David Bain was out of the house on his paper route.

### **The Principal Conclusions**

36. The only family survivor is the claimant, David Bain. Apart from his testimony the case is almost wholly circumstantial.

#### **(i) David Bain’s Testimony**

37. My interview with David Bain was the last step in the compensation inquiry prior to preparation of this Report. I found him to be a credible witness. His recollection of the relevant events, while not complete, is consistent with the physical evidence.<sup>13</sup> He had testified at the 1995 trial and a transcript of that evidence was put in the 2009 trial record by the prosecution.<sup>14</sup>

38. Much of the prosecution was based on (to borrow a phrase from the Privy Council) “assertions by David in themselves remarkable if he was the murderer seeking to avert suspicion or baffle proof”.<sup>15</sup> The Privy Council was referring in particular to David Bain’s assertion that he was the only one who (for safety reasons) knew the location of the spare key to the trigger lock of the murder weapon, his Winchester .22 calibre rifle. It made no sense for him to volunteer such a comment to the Police if he were guilty, yet the Police understandably seized on the comment as an admission against interest. Similarly David Bain volunteered the fact that when he entered Laniet’s room after completing his paper route her body emitted a

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<sup>13</sup> John Pike and Annabel Markham from the Crown Law Office were present for my interview with David Bain and were invited to suggest any questions I had overlooked. They did so. David Bain was re-examined by his counsel Michael Reed, QC.

<sup>14</sup> 2009 retrial at p. 2664.

<sup>15</sup> JPC Judgment para 116

“gurgling” sound. The prosecution took this as an admission David Bain was present as Laniet lay dying and *must* have been her killer. This interpretation was on the evidence erroneous. Generally speaking the “incriminating statements” made by David Bain to the Police following the murders turned out to be indicative of someone telling the truth, as will be discussed in the body of the Report.

39. In the various attacks on David Bain’s credibility the explanations consistent with innocence are more plausible I think, than the inculpatory interpretations put forward by the Police (and obviously rejected by the 2009 Christchurch jury that acquitted him.)

40. The contrary theories of 20 June 1994, endorsed by the Crown Law Office I consider less plausible.

41. The initial Police theory was that David Bain had killed all five members of his family during a killing frenzy in the so-called “missing twenty five minutes” between his arrival home around 6:45 am and calling the emergency services at 7.10 am (the “trance theory”). This theory was abandoned by the Police as it was concluded David Bain could not possibly have murdered five people in different parts of the house and performed a botched clean-up within 25 minutes.

42. The second (and continuing) Police theory is that David Bain killed four members of his family in the early hours of 20 June, then left about the usual time to do his newspaper route (5.45 am). He made sure he was seen by customers along the way to have them available as future alibi witnesses, then returned home around 6:45 am to kill Robin (the “four before one after” theory).

43. It strikes me as inherently implausible that David Bain, however incompetent, would kill four people, then take time out to do a paper route in clothes smeared in blood (albeit covered in part by a red sweat shirt), anxious to be seen by customers along the way, leaving the scene of the massacre open to discovery by Robin before his return. Robin was often up and about

the house soon after his alarm went off at 6.32 am.<sup>16</sup> Occasionally Robin was up earlier.<sup>17</sup> He sometimes used a downstairs door to come in from the caravan.<sup>18</sup> This would have led him directly to the scene of the murders. Had Robin done this on the morning of 20 June, he would immediately have discovered the carnage while David was out, and called the Police before David got home.

44. Such a mindless “four before one after” plan attributed to David, a university student, is just not credible in the absence of (i) any expert evidence that David suffered from an abnormality of the mind or (ii) possessed sub-normal intelligence. Neither is the case.

45. The prosecution contended that even if the incest theory were true it would not provide a motive for Robin to kill Arawa or Stephen, and why leave David as the sole survivor? Yet these questions, legitimate in themselves, avoid the larger question: whatever was the motive for David Bain to kill *any* member of his family at all? Despite Police efforts to come up with a plausible motive from 1994 until the eve of David Bain’s eventual acquittal in 2009, no plausible motive ever emerged. In the end the prosecution was obliged to argue that motive was simply irrelevant.

## **(ii) The circumstantial evidence**

46. Elements of the circumstantial evidence that support David Bain’s credibility, in my opinion, include the following:

### **1. The bloodied footprints**

47. The prosecution led evidence that the killer left footprints with a bloodied right sock in parts of the house where, on the prosecution’s theory, Robin Bain would never have gone on the morning of June 20. A Police detective and an ESR expert measured a complete footprint as 280 mm long. The “luminol footprint” evidence was led by the prosecution at the 1995 trial to persuade the jury to eliminate Robin as a suspect. Robin’s foot was 270 mm long. In tests done

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<sup>16</sup> David Bain’s statement to Police p. 392.

<sup>17</sup> See David Bain Statement to Police JCPC record p. 396

<sup>18</sup> David Bain interview p. 383.

by an ESR scientist *after* the 1995 conviction, it was determined that a walking foot would likely make a print longer than itself because of the shift of weight and pressure as a person walks. David Bain's foot was 300 mm. Accordingly, the prints made by the bloodied sock were too small to have been left by David Bain but were about the right size to have been left by Robin.

## **2. David Bain's bloody socks and clean running shoes**

48. When found by the Police David Bain was wearing a t-shirt, rugby shorts and socks. There was some smearing of blood on the bottoms of his socks. There were some blood stains on other parts of his clothing as well but much less than would be expected had the clothing been exposed to the bloody death struggle with Stephen.

49. David Bain says the blood stains were picked up by innocent transfer as he went about the house after completing his paper route, going from room to room looking in vain for signs of life from other family members. The Crown Law Office says:

- (i) The socks became bloody when David killed his mother and siblings before leaving on his paper route. However, when the interior of his running shoes was examined by forensic scientists at the ESR laboratory no blood stains were found on the inside of the Laser running shoes. One would expect such stains to be present if the prosecution theory were correct that he had been running in them with bloody socks for about an hour; and
- (ii) The Crown Law Office says that the relatively small amount of blood on David's clothing, despite the blood-letting in Stephen's room, is accounted for because David "must" have been wearing outer clothing – in particular a loose-weave green V-necked sweater. According to the prosecutor, small amounts of blood seeped through the sweater to the t-shirt. However, there is no evidence that David Bain was wearing the green V-necked sweater on June 20 – or at any other time. The sweater belonged to his father (5'10" tall) and was several sizes too small for David (6'4" tall). David Bain says the track pants found in the wash on June 20 were not his and he denies wearing them. He says the clothes he was

wearing when the Police arrived around 7.20 am are the clothes he put on when he got up to do his paper route and continued to wear until taken to the Police station. There is no compelling reason to disbelieve him.

### **3. Timing and opportunities – David Bain’s paper route**

50. The prosecution’s theory was always based on the proposition that David re-entered the house *after* his paper route but *before* Robin came in from the caravan. The Crown prosecutor in his closing address to the jury in 1995 stressed that it was “*Imp[ortant] – he [David] was back in the house before the computer was switched on*”. David, not Robin, turned on the computer and either immediately or at some later time typed in a fake suicide note, “*sorry, you are the only one who deserved to stay*”.

51. On any view of the case little time elapsed between when the computer was turned on and David Bain arrived home. The Crown Law Office describes this time gap sometimes derisively as David Bain’s three minute alibi. However, this is a mischaracterisation. The issue is not the lapsed time but the sequence. If, as the prosecution evidence establishes, Robin was in the house first, he would have known with considerable confidence how much time it would take David to complete the routine of his morning paper route. Once in the house, on the defence theory, and having done his murderous work and changed his clothes, Robin withdrew into the lounge. The door was closed when David arrived home. David might have surprised Robin by going into the lounge, and perhaps interrupted the suicide, but he didn’t. David Bain removed some of his clothing in his own room and went downstairs. Robin could have shot himself with the silenced gun at any time until David entered the lounge about 7 am. The timing evidence does not give Robin just three minutes. It gives him fifteen or twenty minutes on his own in the lounge.

52. The physical evidence shows on a balance of probabilities that the computer was turned on before David got home. He was seen re-entering the house at about 6.45 am. Robin had already collected the morning newspaper (delivered earlier to the house by another paperboy).

If the *Otago Daily Times* had still been outside when David returned he would have brought it in and, as usual, put it in the hall for Robin to read.

**The likely chronology is as follows:**

<b>5.45 am</b>	David leaves to do his paper route. Robin subsequently enters the house.
<b>6.43 am</b>	The computer “turn-on” time as established by the prosecution’s expert.
<b>6:45 am</b>	David is seen “squeezing” between the gate and the hedge at Every Street by a witness called by the prosecution, Mrs Denise Laney, whose timing was verified by the Police.
<b>6:45 to approximately 7:05 am</b>	David Bain does various tasks in the house, discovers his gun missing from his wardrobe, goes from room to room upstairs and downstairs in search of his mother and siblings, finally opens the door to the lounge and finds his father’s body.
<b>7.10 am</b>	David Bain, said to be traumatized by shock, calls emergency services.

53. It is appreciated that these time frames are vulnerable to many criticisms, as will be discussed. However, they are derived from witnesses for the prosecution. What is important is not the absolute times but the *sequence* of events that shows Robin was already in the house on June 20 before David Bain’s return.

54. The luminol footprints show Robin did not go directly into the lounge and close the door, but was in areas of the house where the bodies were found. If innocent he would have called the Police about the dead bodies. He made no such call. The logical inference from Robin preceding David into the house at some time after 5.45 am is that Robin himself killed the family members while David was out of the house doing his paper route. That is why, as stated, “the 1995 prosecutor, seeking convictions, stressed that it was ***Imp[ortant] – He [David] was back in the house before the computer was switched on***” (emphasis added).

## Evidentiary Factors

55. There are, of course, numerous other factual issues that play both for and against David Bain's assertion of factual innocence. That is why this Report addresses David's factual innocence on "a balance of probabilities" not in terms of "beyond a reasonable doubt". By "numerous" I mean dozens and dozens of issues and sub-issues generated by astute lawyers and their experts over almost 18 years of litigation. It is simply not feasible in this report to chase down each of these points and counterpoints. Nevertheless, the judgments of the Court of Appeal and Privy Council have brought focus to the significant issues, which I address in detail in this report. They include:

- i. Allegations about the psychological profiles of both Robin and David.

*The murders were obviously committed by someone who was deranged – temporarily or permanently. The expert evidence was that David was quite normal. There is no evidence at all in David's case of a "trigger". However, there is evidence that Robin was depressed and stressed by both his marriage breakdown and frustrations at work, and that his anxiety had clearly manifested itself in the weeks before the murders. There was also, of course, evidence to the contrary called by the Crown.*

- ii. The conflicting evidence concerning Robin's alleged incest with Laniet, and Laniet's planned "confrontation" with her parents on the weekend prior to the Monday morning murders.

*The evidence does not permit any clear finding on the issues of incest, disclosure and confrontation, but as the prosecutor said at the 1995 trial, "something went wrong in the house that morning to lead someone to kill". The only "something" that has been seriously suggested (but not in my view proven on the evidence) is a confrontation between Laniet and her parents to name and shame her father.*

- iii. Whether Robin's alleged suicide is consistent with the physical evidence.

*The Crown's position at the 1995 trial was that suicide was incompatible with such factors as the position of Robin's body, the evidence of airborne blood spatter and the sheer mechanics of Robin being able to reach the trigger given the length of the rifle. The Crown Law Office now concedes suicide is possible, but of course argues that it was unlikely. For reasons to be discussed, I believe suicide was the probable cause of Robin's death.*

- iv. Issues surrounding the murder weapon including the storage of the gun, the key to the trigger lock, David's fingerprints on the forestock, Stephen's blood elsewhere on the weapon, and the empty 10 shot magazine found by Police standing on edge beside Robin's body.

*The rifle belonged to David. It is normal that it would have his fingerprints on it. Some of his fingerprints were impressed on the forestock in blood. He says animal blood. The prosecution's own expert, who performed tests of the "fingerprint blood" after the 1995 conviction, acknowledged that no "human DNA" was detected. It is true that David told the Police that only he knew the location of the key to the trigger lock. However, after the murders the Police found both live ammunition and spent cartridges for the 22 rifle in Robin's caravan. The presence of Stephen's fingerprint near the muzzle is as consistent with Robin as it is with David being the killer. Equally, the upright position of the 10 shell magazine no more points to placement by David than it points to placement by Robin.*

- v. Pathology issues including David's claim to have heard Laniet's body "gurgle", Robin's "full" bladder and some minor injuries noted both on David and Robin.

*The evidence at the 2009 trial showed that bodies can produce "gurgling" noises up to at least an hour after death. The urology evidence was that Robin might well not have felt the need to relieve his bladder in the circumstances. The minor*

*injuries noted on Robin and David were insufficient to inculpate or exculpate either of them in my opinion.*

- vi. Blood on the clothing and person of both David and Robin.

*David Bain explains the blood smears on his clothing as “innocent transfer” of blood from the floor, door jambs (and touching Stephen’s body) as he went through the house in search of survivors, and from the innocent transfer of blood stained clothing from the laundry hamper to the washing machine in the dimly lit bathroom before he discovered any of the victims. The smears of what appeared to be blood on Robin’s hands were never tested by the Police, an omission that is bitterly attacked by the Bain Submission. The blood on Robin’s clothing came from his fatal wound. However, as the Privy Council noted, the defence theory necessarily required Robin to have changed his clothing including his socks after the killings and before his suicide. Hence the importance of the “bloodied footprints” issue.*

- vii. Crime scene evidence alleged to link David Bain to the murders including Margaret’s broken glasses and the dislodged lenses, David’s opera gloves found in Stephen’s room, evidence of bloodstains and blood smears in the laundry room including a green towel and the mystery of the washing machine that was *not* running when the Police arrived.

*Nothing connects David Bain to the wearing of the glasses or gloves on the morning of June 20, although how these items came to be located where they were found remains unexplained. There is an on-going conflict in the evidence as to whether he was or was not wearing Margaret’s glasses during the weekend **prior** to the murders, but the question is whether any of the physical evidence connects him to the glasses **at the time of the murders**, or indeed connects the glasses to the murders at all. David Bain acknowledges his handling of clothing with blood stains mixed in with other family clothing in the laundry hamper*

*(innocently) when loading the washing machine after his paper run on 20 June. This was his usual chore. The smears of blood in the laundry are consistent with innocent transfer. As to the length of time required to do a “full cycle” on the washing machine, the evidence is that its timing varied from 45 minutes to an hour, depending on the water pressure at the time the tub is filled, the size of the load and the particular position of the old-style turn-and-push control dial when the machine is started. The prosecution tried to portray the 12 year old Bain washing machine as a proxy for a stop watch. The evidence does not support the idea that the old machine functioned with the necessary regularity and precision to fulfil that purpose, in my opinion.*

56. None of these issues is without difficulty, but in the end I conclude that none of them persuasively undermines the positive proof of factual innocence found in David’s credible explanation of his activities on 20 June, plus Robin’s bloody footprints in the hallway where, on the prosecution theory, he had not been, the lack of any bloodstains on the inside of David’s running shoes, and the circumstantial evidence that Robin preceded David into the house.

#### **The Exercise of the “Extraordinary Circumstances Discretion”**

57. The Minister’s letter to me of 10 November 2011 makes it clear that proof of factual innocence on a balance of probabilities is only a precondition to – but not itself sufficient to warrant – payment of compensation. There must be something more. The Minister’s letter recognizes that the “something more” might include “serious wrongdoing by authorities”, including failure of the authorities to “take proper steps to investigate the possibility of innocence” (para. 5c). I conclude that this ground has been established, although in doing so I do not impute to the Police any criminality or deliberate misconduct. The problem here was the cumulative effect of numerous instances of investigative ineptitude, and the failure of the Dunedin CIB to respect the rules and principles set out in the *Detective Manual*. These issues are discussed in Part Two of this Report.

58. In other words, if proof of criminality or deliberate misconduct on the part of the New Zealand authorities including the Police is required then I cannot recommend that compensation be paid. However, in my view the imposition of such a requirement would take far too narrow a view of the Cabinet's extraordinary circumstances discretion.

59. The evidence establishes that the miscarriage of justice was the direct result of a Police investigation characterized by carelessness and lack of due diligence. This is not a case of one or two isolated errors. There was an *institutional* failure on the part of the Dunedin CIB. Even Det. Sr Sgt James Doyle, one of its directing minds, acknowledged that the efforts to investigate the timing of David Bain's alibi were "*amateurish*".

60. The Police rushed to judgment that David Bain was guilty on the second day after the murders (i.e. on Wednesday 22 June 1994). At that time not enough of the facts were known and much of the forensic evidence was not yet available. David Bain was formally arrested at 1.46 pm on Friday 24 June 1994. An arrest is a watershed moment. The Police publicly commit themselves to proving that whomever they have charged is guilty. Thereafter, their efforts are devoted to building a case for the prosecution rather than making neutral inquiries (for example as to Laniet's allegation of incest against her father), sifting through the evidence with an open mind, and taking the time to think through the possibility of David Bain's innocence.

61. The narrative of this case represents a tragic example of Police "tunnel vision", defined by a Commission of Inquiry into a comparable wrongful conviction<sup>19</sup>

...as a "single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of [other] information received and one's conduct in response to that information".

62. This aspect of my mandate is dealt with in detail in the body of the Report, especially Part Two. A few examples will suffice at this stage.

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<sup>19</sup> Commission of Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998, Vol. 1 at p. 478.

63. The Police authorized the house at 65 Every Street to be burned to the ground less than three weeks after the murders. This might not have been a problem if all of the relevant evidence had already been collected, but this had not been done. The areas of carpet containing the bloodied footprints, for example, went up in smoke with the rest of the house. Thereafter the experts were obliged to place great reliance on the Police photographs taken at the scene. These proved to be disorganized. In the words of Det. Sgt Weir, the officer in charge of the crime scene, the photographs were “a shambles”.

64. The Police failed to obtain from the pathologist, Dr Alex Dempster, prior to the 1995 trial, important photographs of Robin’s body taken at the mortuary, which proved to be of considerable help to the defence at the 2009 retrial.<sup>20</sup>

65. Despite the important question of whether Robin’s arm was long enough to reach the trigger of the rifle to shoot himself, his arm span was not measured.

66. Important elements of the testimony of both Police officers and ESR experts at the 1995 trial were shown on appeal to be misleading (hence the Privy Council’s order for a new trial). The existence of these errors was confirmed at this 2009 retrial, in which David Bain was acquitted.

67. The effort in 1997 to clarify the DNA of the blood constituting David Bain’s fingerprint on the forestock of the rifle was described by the defence expert Dr Arie Guersen of the Victoria Forensic Sciences Centre in Melbourne, *who was sent an unusable contaminated sample by ESR* for DNA testing as “an unspeakable mess”.

68. On 22 December 1996 the forensic evidence that *was* collected by the Police from the house before it was burned, and from the bodies at the mortuary, some of which was used at the 1995 trial, was ordered by Det. Sr Sgt Doyle to be destroyed by 26 January 1996. This was *before* expiry of the time limited for seeking to appeal the convictions to the Judicial Committee of the Privy Council. The defence received no advance notice. Fair trial rights of any accused

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<sup>20</sup> Retrial record p. 1604 ll. 15-20.

require the preservation of such evidence in the event (as ultimately happened) a new trial is ordered. The Police exhibit register 2008 lists about 30 crime scene samples that were destroyed. David Bain's lawyer, unaware of the destruction, gave notice of his appeal on 31 January 1996.

69. I repeat that I do not find intentional wrongdoing, much less criminality, on the part of the authorities. They treated as routine a case that was not routine. The Police conducted themselves with disturbing ineptitude.

70. Compensation would express the government's disapproval of such a cumulative failure by the authorities to "take proper steps to investigate the possibility of innocence". It would be an acceptance of some responsibility by the state for the shame and stigma of a wrongful conviction and thirteen years in prison for crimes which, in my view, David Bain is unlikely to have committed.

### **A Final Word**

71. As my function is not to decide but simply to recommend, it is appropriate to let David Bain speak for himself. At the conclusion of my interview he was asked if there was anything he wished to add. Here is what he said:

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. 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 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.<sup>21</sup>

72. Whatever else can be said about the Bain case, it would be an understatement to affirm, in terms of the Minister's letter to me of 10 November 2011, that it bristles with features which "take the claimant's case outside the ordinary run of cases in which appeals have been allowed" (para. 5). The miscarriage of justice simply compounded the family tragedy.

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<sup>21</sup> Bain interview, 23 July 2012, pp. 105-106.

**PART ONE:**

**IS DAVID BAIN FACTUALLY INNOCENT?**

73. *In this part of the Report I will summarize the saga of the David Bain case and set out in some detail the arguments for and against David Bain's claim to innocence.*

## **CHAPTER I: HISTORY OF THE PROCEEDINGS**

74. David Bain was convicted on 25 May 1995. Since that time the case has been up and down the Court system several times. There is now no doubt that David Bain was wrongfully convicted – the Judicial Committee of the Privy Council – then New Zealand’s highest appellate court – so held.

75. A chronology of important events may be helpful:

- (a) 20 June 1994: the multiple murders in Dunedin.
- (b) 24 June 1994: David Bain arrested and charged with the murder of his family.
- (c) 25 May 1995: Verdict of Dunedin jury convicting David Bain of 5 murders.
- (d) 19 December 1995: Court of Appeal dismisses appeal.
- (e) 29 April 1996: Leave to appeal to the Privy Council was refused.
- (f) 26 November 1997: the joint report of the Police and the Police Complaints Authority dismissing complaints regarding the Police conduct of the 1994 investigation into the Bain murders.
- (g) 15 June 1998: the petition of David Bain is filed with the Governor General and Counsel seeking a pardon based on fresh evidence.
- (h) June 2000: defamation trial in which an Auckland jury held, in dismissing an action by two Dunedin Police officers, Det. Sgt Milton Weir and Det. Anderson, held that the defendant Joe Karam had established sufficient facts to justify as fair comment his allegation that Det. Sgt Weir had committed perjury at David Bain’s 1995 trial.
- (i) 17 December 2002: Governor General referred to the Court of Appeal under section 406(b) of the Crimes Act 1961 the question whether grounds existed for a fresh appeal on the merits. The court responded in the affirmative.

- (j) 15 December 2003: the Court of Appeal concluded pursuant to Section 406(a) of the Crimes Act 1961 that there had been no miscarriage of justice in the Bain conviction and advised the Governor General accordingly.
- (k) 10 May 2007: on appeal to the Judicial Committee of the Privy Council the David Bain convictions were quashed and a retrial was ordered if the Crown were to decide "that a retrial now would be in the public interest".
- (l) 15 May 2007: David Bain was granted bail by Fogarty J of the High Court in Christchurch
- (m) 5 June 2009: The Christchurch jury acquitted David Bain on all counts.

76. As a result of David Bain's petition to the Governor-General a number of questions were referred to the Court of Appeal and heard October 14 to 18, 2002. In addition to the 1995 trial record the Court of Appeal received additional evidence by way of affidavits and testimony. The Court concluded that the questions raised warranted a deeper look at the Bain convictions on the merits. It stated:

*"There is credible and cogent evidence which suggests at least the reasonable possibility that the computer could have been switched on earlier than 6.44 am. There is credible and cogent evidence which suggests at least as a reasonable possibility that David Bain's fingerprints on the rifle could have been put there before the murders. There is credible and cogent evidence which suggests, as a reasonable possibility, that gurgling sounds can be emitted spontaneously from dead bodies. The absoluteness of the Crown's closing submission was, in this respect, wrong or misleading. When all this evidence is viewed collectively, we are of the opinion that it might, along with the other evidence given at David Bain's trial, have reasonably led the jury to return a different verdict.*

...

*Our answer does not imply that had the jury been presented with the further evidence it would necessarily, or even probably, have reached different verdicts. What we are saying is that in our opinion on the*

*material before us, necessarily limited as it was, there is a reasonable possibility the jury may have done so.*<sup>22</sup>

77. The Governor-General subsequently referred all five convictions of David Bain to the Court of Appeal to be considered afresh under S. 406(a) of the *Crimes Act 1961*. In the result the Court of Appeal concluded in its judgment of 15 December 2003 that there had been no miscarriage of justice. It is this judgment that was reversed on appeal by the Privy Council.

78. The Privy Council judgment, issued on 10 May 2007, was based on fresh evidence that had come to light since the 1995 trial, and some of it, (including a clarification from ESR scientist Kevin Walsh concerning the bloodied footprint issue) post-dated the 2003 decision of the Court of Appeal. In setting aside the convictions the Privy Council held that it was “the duty of the Crown to decide whether a retrial now would be in the public interest”.<sup>23</sup> The decision of the Privy Council is **at Tab A** of the volume of documents that accompanies this Report (“Book of Documents”).

79. On 15 May 2007, David Bain was granted bail pending the retrial. He had been jailed since his arrest on June 24, 1994, almost 13 years earlier.

80. What emerged at the 2009 trial, essentially, was a debate among experts over the significance (or the lack of it) of the findings of the 1994 Police investigation of the crime scene at 65 Every Street.

81. The retrial opened on 6 March 2009 and lasted 12 weeks. The jury heard from 130 witnesses. The testimony covers over 3,700 pages of transcript. The prosecution, quite properly, called a number of experts who provided opinions adverse to the prosecution’s case, as well as experts who supported it. The Crown is expected to disclose to the defence and to make available to the court the relevant evidence, whomever it favours. As the Court of Appeal stated in *R v Hall* [1987], NZLR 616 at page 628, “the Crown should act with the utmost candour and fairness making a full, adequate and impartial presentation of the facts”.

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<sup>22</sup> NZCA (2002) JCPC record page para 26 (JCPC record p. 1238)

<sup>23</sup> JCPC Judgment Paragraph 119

82. It is fair to say that the case presented to the 2009 jury, despite being based largely on the 1994 Police investigation, was a totally different case than had been presented to the 1995 jury. The 2009 jury did not reach a different conclusion on the same record; it was presented with a very different and far more extensive factual picture, and the testimony of numerous additional experts of impressive credentials, than had been made available to the jury in 1995.

83. I agree with the Crown Law Office that a retrial was appropriate. There was no DNA evidence that was dispositive of David Bain's innocence. No one else had been (or could be) convicted of the murders. There were many controversial issues that remained outstanding and were properly the subject of consideration by a jury. However, having elected to take the case to a second jury, the prosecution has to face up to the consequences of the 2009 jury's acquittal.

## CHAPTER II: OUTLINE OF THE FACTS

84. At the time of the horrific events described in the evidence, David Bain was a 22-year-old student studying music and classics at the University of Otago. His father, aged 58, was a teacher and the principal of a small primary school at Taieri about 50 kilometres from Dunedin. Robin, together with his wife Margaret, 50, had been a Christian missionary to Papua New Guinea between 1973 and 1988. Marital discord emerged soon after their return to New Zealand. By 1994 their marriage had, to all intents and purposes, broken down. On occasion Margaret referred to Robin as a “son of Belial”, or the devil.<sup>24</sup> Robin slept overnight at Taieri School three nights a week. When he was home he slept in a somewhat derelict caravan on the property. It was not, as might be expected, a happy situation for him. In January 1994, after visiting his mother, he mentioned to his brother Michael his anxiety at having to go back to Dunedin to face “that situation”.<sup>25</sup>

85. David’s sister Arawa, 19, lived at home and was in her second year at a teachers’ training college. She had been a finalist in the Dunedin “Queen of the Heather” contest.<sup>26</sup> Laniet, 18, had essentially moved away from home, living sometimes with her father at the Taieri School, and sometimes at different locations in Dunedin. She was often in receipt of the unemployment benefit, worked occasionally at the Museum Cafe and (apparently unbeknownst to her parents) was a part-time prostitute. She had come home to 65 Every Street for at least part of the weekend of 18 to 19 June. Stephen, 14, was a secondary school student and lived at home.

86. The house at 65 Every Street was located on a steep slope in a Dunedin suburb, Andersons Bay. A surveyor’s plan of its relevant parts is attached at **tab B** of the Book of Documents.

87. For present purposes, it is sufficient to note that the house was on two levels, with the upper floor at the same level as Every Street. The front door opened to the hallway with David

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<sup>24</sup> Bain interview p. 4.

<sup>25</sup> Michael Bain evidence 2009 retrial p. 2438, ll. 20-25.

<sup>26</sup> Evidence of Michael Bain 2009 retrial, p. 2450 l. 28.

Bain's room to the left and a lounge to the right, where the family computer was located in an alcove. Robin was a computer enthusiast. He used it for school projects. The other family members used it less often, mainly for games. A few steps towards the back of the house a stairway led down to the lower level, on which was to be found Arawa's bedroom, as well as a kitchen. Behind the kitchen was a bathroom where the washing machine was located. A door led out to the backyard.

88. On the upper level, continuing past the staircase was Margaret's bedroom on the right, which connected to Stephen's bedroom. On the left was the room where Laniet was sleeping on the night she was killed. The house was dilapidated. The state of housekeeping was poor. The mess complicated the reconstruction of the crimes. For example, were Margaret's spectacles dislodged and broken in the killer's struggle with Stephen, or did the left lens come to be buried at an earlier date amongst the dust and debris of Stephen's room? And if so by whom and under what circumstances?

#### **The Murders in the Early Morning of 20 June 1994**

89. The killer--whether it was David or Robin--arose early in the morning of Monday, 20 June 1994. He put on a green loose weave V-necked sweater. He took from the wardrobe in David's room a .22 calibre Winchester semi-automatic rifle fitted with a silencer. He released the trigger lock with a spare key that was usually kept in a jar on the desk. He took a supply of ammunition from the same wardrobe.

90. It is common ground that David Bain, who was the sole survivor, did his regular paper route for the *Otago Daily Times* in the early morning of June 20. He left the house at about 5.45 am and returned about an hour later within a few minutes (before or after is very much in issue) of the computer being turned on.

91. For reasons unknown, but which in the view of the prosecution were in any event irrelevant<sup>27</sup>, the killer fatally shot in an unknown order, Margaret, the two daughters and

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<sup>27</sup> Crown prosecutor's 2009 closing address paras 54-56.

Stephen. There was a violent struggle with Stephen, who was in part strangled with a T-shirt. Stephen died from three bullets to his head fired at close quarters.

92. The killer's person and clothing (particularly the green V-necked sweater) became heavily stained with blood. Whoever he was, the killer washed up to some extent, leaving marks in the bathroom (which included the washing machine). Blood stained clothing together with other family laundry was put in a laundry hamper, was emptied into the washing machine, and started on a wash cycle. The load included the green V-neck sweater, trousers and some socks. Sometime between roughly 6.40 and 6.46 am (the timing is controversial), the killer went to the lounge on the main floor and switched on the family computer located in an alcove partially concealed by a curtain. Either then or at some later time he typed in the message 'SORRY, YOU ARE THE ONLY ONE WHO DESERVED TO STAY'.

93. Sometime after the initial murders of four family members, Robin was killed in the lounge by a shot to the head with the murder weapon in contact or near contact with his left temple.

94. At about 7.10 am, David called the emergency services to report that his family was dead.<sup>28</sup> When the Police and ambulance personnel arrived shortly after 7.20 am<sup>29</sup>, Robin's body was still warm to the touch. The other bodies were also somewhat warm, but less warm than Robin's.<sup>30</sup>

### **The Prosecution Theory**

95. The initial Police "reconstruction" of events was that David Bain had murdered his family in a trance-like killing spree between his return home from delivering newspapers around 6.43 am and calling the 111 operator at about 7.10 am. Subsequently the Police concluded that the logistics of the "frenzied 25 minutes theory" were not compatible with the evidence at the crime scene. The Police came to believe that only Robin had been killed after

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<sup>28</sup> Evidence of Frances May Edwards, 2009 retrial p. 511, ll. 10-12.

<sup>29</sup> Police operations log (20.6.94) PCA doc 10024

<sup>30</sup> Craig Wombwell's evidence, 2009 retrial p. 363.

the paper route. The others had been murdered beforehand (the “four before one after” theory).

96. The revised theory was that at about 5.00 am or earlier on the morning of Monday, 20 June 1994, David Bain got up and dressed in a T-shirt and black shorts, over which he wore track pants and the green loose weave V-necked sweater and possibly a black skivvy. He took from the wardrobe in his room his .22 calibre Winchester self-loading rifle and released the trigger lock with the spare key. He took a supply of ammunition from the same wardrobe. Only David Bain knew where these things were kept.

97. David Bain is near sighted. His regular glasses were broken and had been left in a shop for repair a few days earlier. On the morning of June 20, he wore an old pair of his mother’s glasses, which gave him 90% of normal vision (as compared with 75% normal vision without glasses.)<sup>31</sup> In the struggle with Stephen, the frames were knocked off his head and the lenses were dislodged. The left lens was later found by Det. Sgt Weir in Stephen’s bedroom. The Police found the broken frames and the right lens in David Bain’s bedroom.

98. According to the prosecution, Robin slept through the murders out of earshot in the caravan elsewhere on the property.

99. In the course of the initial batch of four killings, the Police say David Bain’s person and clothing became heavily stained with blood. Prior to leaving the house to do his paper route, he washed his hands – possibly showered - changed his outer clothes, leaving unintended blood stains in the bathroom/laundry room. He put his blood-soiled clothing in the washing machine with other family laundry, and started it on a full cycle.<sup>32</sup>

100. David Bain then took steps to contrive an alibi to exculpate himself and shift the blame to his father. At about 5.45 am he left the house and completed his paper route more quickly than usual, making sure that he was seen by various people so that they would later be available to corroborate his physical absence from the house in the early hours of Monday

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<sup>31</sup> Evidence of Dr Sanderson, JCPC record page 1103 (evidence before NZCA 2002).

<sup>32</sup> See Crown Law Office submission paras 326-328.

morning. His departure left the bloody crime scene open for an hour or so. He told the Police his father generally surfaced “between twenty to and ten past seven.”<sup>33</sup> He thus risked (on the Crown’s theory) the chance that Robin would come into the house a bit early by the downstairs door,<sup>34</sup> discover the bodies and raise an emergency alarm with the Police prior to David’s return. In fact, the Crown Law Office accepts that Robin had collected the newspaper from the letterbox and brought it “inside the house” (para 208), indicating Robin had entered the house before David got home, but not raised any alarm.

101. According to the prosecution, as David entered the house, he made a right turn into the lounge on the main floor and switched on the family computer at about 6.44 am. Either then or at some later time he typed in the self-serving “suicide” message “SORRY, YOU ARE THE ONLY ONE WHO DESERVED TO STAY”. Its purpose was to give the false appearance of a murder/suicide. The Police considered use of the past tense (“deserved”) rather than the present tense (“deserves”) shows it is unlikely the message was typed by Robin.

102. David Bain then took advantage of his father’s morning “ritual” which was to leave the caravan around 7.00 am to come into the lounge to pray. David, it was alleged, waited with his .22 rifle in the computer alcove adjacent the lounge and, as his father was on his knees deep in prayer,<sup>35</sup> shot him in the head at close range.<sup>36</sup> He then rearranged the scene to make it look like a suicide, and after an unexplained interval, eventually rang the emergency services at about 7.10 am to report the killings, pretending to be in a state of great distress.

103. Initially he was treated as a victim of the family murder/suicide. Only later, after further Police investigation, did the Police conclude that he should be charged as the killer.

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<sup>33</sup> Statement to Police JCPC record p. 392.

<sup>34</sup> In his first statement to the Police, David Bain stated that his father sometimes used the downstairs garden door and at other times the upstairs front door, as the mood took him.

<sup>35</sup> At the 1995 trial the Crown’s view was that Robin had been on his knees in prayer, but this theory was somewhat modified in 2009 because of the evidence of blood spatter from his head wound.

<sup>36</sup> Crown Law Office Submission para 177

## The Defence Theory

104. The Bain submission is that what appear to be a series of inexplicable killings are explained by the fact – unknown at the time to David – of a sexual relationship between his father and his younger sister Laniet. After working for a time as a prostitute, Laniet had decided to go home on the weekend of June 18-19 to disclose to the family her prostitution and the incest. Her intention was to make a clean break with the past and start afresh. This evidence of incest (strongly disputed by the prosecution) forms the essential background to the murders, the Bain Submission says, and provides “the trigger” referred to by the prosecutor in his closing jury address in 2009. Robin, it is clear, was more experienced in the use of firearms than David Bain.

105. David Bain says he knew nothing at the time of incest or Laniet’s plan. He has a clear recollection of the week-end, he says, up until the moment he discovered his dead mother on Monday morning. Thereafter his memory was largely obliterated by shock, then recovered partially under therapy while in prison, but is still patchy.

106. David Bain’s recollection is that he got up at his usual time of 5.30 am, put on his Laser running shoes, shorts, and a red sweatshirt, grabbed his yellow *Otago Daily Times* bag and set off on his newspaper round with his dog Casey at about 5.45 am. He ran much of the route, as was his custom (his sporting activities included distance running). He checked his watch at the foot of Every Street towards the end of his run. It showed 6.40 am (although the Police never checked his watch’s accuracy.) He then walked up the hill to his home, which he estimated to the Police would have taken two to three minutes but which he now says would have taken longer.<sup>37</sup>

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<sup>37</sup> Bain interview p. 33, ll. 2-18:

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?

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?

107. David Bain told the Police at the initial interview after the murders that when he got home Robin had already collected the newspaper. This meant Robin was already inside the house.

108. On entering the house he noticed that his mother's light was on but turned left into his own room, which was dark and cold on a typical Dunedin winter morning. He did not switch on the light in his own room even though sunrise would not occur for a least another hour.<sup>38</sup> The door to the lounge (where Robin's body was later found) was closed.

109. David Bain says he put his newspaper bag in its place and, without noticing anything amiss in the dark, took off his shoes and Walkman and descended the stairs to the lower level to the washing machine area. In this part of the lower level the lighting is very poor<sup>39</sup> (at a later point a Police officer entering the laundry area looked about to turn on the light only to find it was already on.) There David scrubbed his hands to clean off the ink stains from the newsprint.<sup>40</sup>

110. One of David's regular chores was to deal with the family laundry. Accordingly, after scrubbing his hands<sup>41</sup> he proceeded, as was his usual morning routine, to organise the wash by sorting out the coloured clothes and jerseys (including his red sweatshirt just worn on the paper route) from the light coloured clothing, he put a load into the machine, that included the "green" rough knit jersey, a black skivvy... a couple of pairs of socks...". He couldn't remember whose socks<sup>42</sup> they were but it seems to me they could have included the socks that made the

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- 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 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, um, having to encourage her to keep going 'cos she wanted to stop and rest. So it wasn't accurate.

<sup>38</sup> Retrial page 3686

<sup>39</sup> Bain interview p. 39, ll. 20-25.

<sup>40</sup> Bain interview p. 36, ll. 1-5.

<sup>41</sup> Bain interview p. 38, ll. 20-30.

<sup>42</sup> David Bain statement to Police, p. 409, ll. 3-20

- Q. What can you remember.
- A. A green rough knit jersey.
- Q. Whose is that.
- A. Arawa's. A black skivvy
- Q. Whose is that.

bloodied footprints. He then started the machine on a “full cycle”.<sup>43</sup> He did not notice any blood stains on the clothing he put into the wash.<sup>44</sup>

111. David Bain then returned upstairs to his room, put on the light for the first time and saw cartridges and the trigger lock on the floor. He went immediately to his mother’s room, and found her dead. He went into the adjoining bedroom where Stephen slept, touched him to determine if he was dead, crossed the hall into the room Laniet was sleeping in<sup>45</sup>, and found her dead as well. He went downstairs and checked Arawa’s bedroom for signs of life. There were none. He went back upstairs and entered the lounge where he found his father’s body lying lifeless on the floor.<sup>46</sup> Although when first talking to the Police, he had been at a loss to recall this entire sequence of events (he recalled seeing only the bodies of his mother and father), his memory later recovered in part while undergoing therapy to deal with what was diagnosed as post-traumatic stress disorder. It was after therapy that he recalled touching Stephen’s lifeless body. In Laniet’s room he heard her body make a gurgling noise. He does not recall how long this search around the house continued. He recalls only the sequence.<sup>47</sup> Reduced to a state of shock and acute distress by the destruction of his entire family he called the emergency services.

112. David Bain testified that he had not used the Winchester .22 since January or February 1994.<sup>48</sup>

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A Mine. A couple of pairs of socks, don’t know that colour.  
Q Whose.  
A I can’t remember, I think I put in a green striped business shirt of Dad’s. I’m not sure but I think a pair of dark trousers. I’m not sure whose.  
Q Towels.  
A Oh yes, my black towel and a multi-coloured beach towel.  
(emphasis added)

<sup>43</sup> Bain interview p. 40, ll. 5-7.

<sup>44</sup> Bain interview p. 42, ll. 10-13.

<sup>45</sup> 2009 Retrial p. 2673.

<sup>46</sup> Bain interview p. 70, l. 5 to p. 71, l. 10.

<sup>47</sup> Bain interview p. 73, ll. 3-7.

<sup>48</sup> Bain interview p. 13, l. 5.

### CHAPTER III: THE MISCARRIAGE OF JUSTICE

113. A finding of an actual miscarriage of justice is devastating to any legal system. As the Privy Council noted,

“A fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a fair trial.”<sup>49</sup>

114. First and foremost, of course, the 2009 jury acquittal confirmed that David Bain spent 13 years in prison as a result of what the Privy Council had earlier declared to be a miscarriage of justice.

115. I have no mandate to retry the case or to go behind the 2009 acquittal. This is as it should be. The 2009 jury had the advantage of seeing and hearing the witnesses and concluded, unanimously, that the Crown had failed to prove David Bain’s guilt beyond a reasonable doubt. In a jury trial it is the jurors not the trial judge who are the sole judge of the facts. The verdict was the collective judgment of a group of ordinary New Zealanders and must be taken as final and conclusive.<sup>50</sup> I make this obvious point because the Crown Law Office clearly remains of the view that the 2009 jury verdict was wrong.

116. There are of course arguments for and against the use of juries in serious criminal cases. However, until and unless New Zealand decides that a trial by judge alone in murder cases is preferable public policy, jury verdicts are entitled to full faith and credit but only, of course, for what they actually decide, namely whether or not the prosecution has established guilt beyond a reasonable doubt.

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<sup>49</sup> Paragraph 115

<sup>50</sup> At least two of the jurors of the 2009 have since expressed opinions respectively for and against the verdict. The individual views of jurors voiced after the verdict and after being exposed to the public and media reaction which is sometimes fiercely hostile, are not of legal significance. The whole basis of the jury system is to obtain the *collective* judgment of its members, which was delivered on 5 June 2009, unanimously. As Panckhurst J told the 2009 jury: “it has been found over the years that if 12 people chosen at random from the community are brought together, as you have been, that you are ideally placed, *using your collective wisdom* to reach verdicts in a case such as this.” (para 11)

### **David Bain's Claim for Compensation**

117. David Bain's claim for compensation for wrongful conviction and subsequent 13 years of imprisonment was put forward by letter dated 25 March 2010 supported by an affidavit sworn by David Bain on 10 December 2009. These documents are found in the Book of Documents **at tab C**. David Bain applied for Legal Aid for help in pursuing his claim but did not obtain it. I am advised that Legal Aid indicated he would be required to establish the merits of his claim as a condition precedent to funding. He decided that it was faster and more efficient simply to make his case to the Minister without waiting for the Legal Aid machinery to deliver an answer.<sup>51</sup>

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<sup>51</sup> As indicated earlier, David Bain's written submissions to the compensation inquiry were prepared by Mr Joe Karam, who first became involved in the case in 1995 and has written a number of controversial books on the topic. Mr Michael Reed QC, who represented David Bain before the Privy Council and at the 2009 retrial represented David Bain during the two days when I heard evidence from Detective Senior Sergeant James Doyle and Detective Sergeant Milton Weir, the two retired Police officers who were closely involved in the 1994 murder investigation, and from David Bain himself. Mr Reed wrote a letter to me dated 25 May 2012 endorsing the written submissions made by Mr Karam.

#### CHAPTER IV: MY INTERVIEW WITH DAVID BAIN

118. Following my analysis of the transcripts and exhibits in relation to the physical evidence I interviewed David Bain under oath for a full day in Auckland on Monday, 23 July 2012 with the participation of John Pike and Annabel Markham of the Crown Law Office and Mr Michael Reed QC representing Mr Bain. Mr Joe Karam and his son Matthew Karam were present. As mentioned, the transcript of the interview is attached at **Tab G**.

119. I found David Bain to be a credible witness. There are important gaps in his memory of the events of 20 June 1994 for the period **after** his discovery of the body of his mother, although his recollection of events prior to that discovery appears to be good. According to the psychiatric evidence the shock of finding his mother dead was profound and would have had a powerful effect on his short term memory.<sup>52</sup>

120. What he does recall is compatible with the physical evidence, properly interpreted. There are, as with most witnesses, some inconsistencies (such as ownership of the green V-necked sweater – Robin or Arawa, and the controversy over whether he did nor did not wear Margaret’s glasses during the weekend-end of 18/19 June.). However, as the prosecutor rightly told the 2009 jury in his opening address, “the law recognises that people are human, and they might make mistakes about one particular aspect but they’re correct about others” (p. 11).

121. The Crown Law Office, in my opinion, makes too much of David Bain’s problems of precise recollection of the unexpected and complex events of 20 June 1994. Even Cst Geoff Wyllie, who arrived early at the scene, and who was not distracted by being surrounded with dead family members, noted an error of his own recollection in his report:

I can’t remember going into the bathroom or the washhouse, but Sergeant Stapp has since told me we did. I just can’t remember going in there.<sup>53</sup>

122. Defence experts at the 2009 trial testified that David Bain suffered post-traumatic stress disorder (PTSD) which frequently causes partial memory loss of the traumatic events that

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<sup>52</sup> Dr Brinded evidence, 2009 retrial p. 3097, ll. 15-25.

<sup>53</sup> Statement of Cst. Geoff Wyllie, 22<sup>nd</sup> June 1994, at p. 3

induced it. The Crown Law Office does not dispute this diagnosis but points out, correctly, that PTSD is suffered by perpetrators as well as victims.

123. David Bain admitted candidly that his memory in some instances could be coloured by all that he has learned in the intervening trials and appeals. He faced up to the fact that his partial “recovered memory” came during sessions with Dr Paul Mullen subsequent to the 1994 deposition hearings in the criminal proceedings.<sup>54</sup> Whatever temptation existed for him to shape his “recovered memory” to meet the case presented by the prosecution is off-set, in my opinion, by his refusal even at this stage to gild the lily in presenting his version of events to advance his own interests.

124. I think it is of significance that he said the whole idea that his father could murder the family was just not compatible with the father he knew prior to the tragedy. David Bain testified:

...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, [is] 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.<sup>55</sup> (emphasis added)

125. According to David Bain, while the whole family suffered from the tensions between the parents, outside the home Robin continued to participate in David's choral and theatrical activities. They sang together in the Dunedin Male Choir. They participated in outdoor activities and “when he [Robin] was outside of the house he sort of became his old self.”<sup>56</sup>

126. In other words, despite the accepted view that the killer was either his father or himself, David Bain went out of his way in my interview with him not to speak ill of Robin.

127. When I requested he elaborate on any physical contact with Stephen's body to throw some light on the presence of smears of Stephen's blood on David Bain's clothing he said he

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<sup>54</sup> Bain interview p. 66 l. 17 to p. 67 l. 5.

<sup>55</sup> Bain interview p. 8, ll. 5-13.

<sup>56</sup> Bain interview p. 5.

could not recall anything except touching Stephen's shoulder even though a more self-serving answer (e.g. "my pants brushed against Stephen's body") could not have been contradicted by any other witness and might have advanced his personal interests.<sup>57</sup>

128. When re-examined by Mr Reed QC, David Bain declined on at least three occasions to give the helpful answers Mr Reed (I thought) was looking for. 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. David Bain did not do this. Instead, he responded that on the points put to him he had nothing to add to what he had already said.

129. I believe he is telling the truth as best as he can recall with respect to the sequence of activities in the house between the time he arrived home (around 6.45 am) and the time he called the 111 emergency number (7.10 am). There are no other eye witnesses, of course as everyone else who was in the house is dead. He may be in error on some of the details but I find him credible on the important issues.

130. If David Bain's recollection of going from room to room in search of family members before going back upstairs to the lounge and finding his father's body is accepted, and I do accept it, then the force of the prosecution's argument about the improbabilities of the timing of a suicide is much diminished, in my opinion. Robin could have gone into the lounge and closed the door within a few minutes before David Bain's arrival home, turned on the computer and thereafter done whatever he had to do, including typing in the computer message, then take his own life immediately thereafter or any time until a few minutes after 7 am with the silencer-fitted gun. Of course if this was done after David re-entered the house he risked David coming into the room. Who knows how his mind was working at that stage. On checking Robin's body around 7.30 am<sup>58</sup> the ambulance para-medical Craig Wombwell,<sup>59</sup> with 21 years' experience gave a "guesstimate" that Robin "had only died within the last hour."<sup>60</sup>

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<sup>57</sup> Bain interview p. 65, l. 17 to p. 66, l. 7.

<sup>58</sup> 2009 retrial p. 360 l. 21.

<sup>59</sup> Cst. Wyllie statement, 22<sup>nd</sup> June 1994, at p. 4.

<sup>60</sup> 2009 retrial p. 363.

## CHAPTER V: PSYCHOLOGY AND MOTIVE ISSUES

131. The issues of motive and psychological profiling are, I believe, of very limited help in this case in determining factual innocence. Nevertheless, a good deal of energy was expended, and controversies raised, by the attempt of each side to portray either Robin or David as quite capable of murder.

132. **I recommend that the “factual innocence” issue be determined by the physical evidence at the crime scene, essentially as analysed by the prosecution’s own expert witnesses.** However, as my function is to recommend, not decide, I will set out the basis of the contending “psychological profiles” together with my comments.

### Psychological Profiling

133. The whole issue of “psychological profiling” stems from the approach taken by the prosecution at the 1995 trial. Lacking any evidence of a credible motive for David Bain to kill his family, the prosecution led evidence of what the Crown Law Office claims was David Bain’s “odd and disturbing” behaviour before and after the killings.<sup>61</sup> He was painted as isolated and somewhat weird. Perhaps he was. He had lived an isolated existence with his family in Papua New Guinea for 18 of his 22 years. The initial Police theory (a 25 minute killing spree after David Bain completed his paper route) suggested someone totally but temporarily deranged. The second Police theory (“four before one after”) required a calm calculating “psychopath”. Yet what sort of calculating killer leaves the murder scene open to all the world for an hour while he goes off to do his paper route? Robin’s alarm clock was set for 6.32 am, but Robin was not obliged to remain in his caravan until 7 am.

134. David Bain said Robin’s pattern was to rise anytime between twenty to and ten after seven.<sup>62</sup> We know from the Police that Robin’s clock radio was still playing when they entered the caravan, suggesting perhaps that Robin had already left *before* it came on at 6.32 am on 20 June, as the defence suggested. In any event, my only point here is that the Police “four before

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<sup>61</sup> Crown Law Office Submission para 19

<sup>62</sup> David Bain statement to Police JCPC p. 392.

one after” theory not only requires David Bain to be what used to be termed a psychopath but immensely *incompetent*.

135. David Bain contends that his own mental state and personality, as attested to by professional and personal witnesses, rule him out as someone capable of the execution of members of his family as the prosecution alleged. He has been exhaustively assessed by five separate experts, two on instructions from the Crown, before and since the first trial, and has been determined to be normal.<sup>63</sup> Dr Michael Jose Brinded, the Christchurch psychotherapist examined David Bain in prison prior to the 1995 trial<sup>64</sup> when the police “trance” theory obliged defence counsel to explore an insanity defence. Dr Brinded testified that David Bain did not suffer from any mental abnormality as follows:

- A. Yes I had the two lengthy interviews with him in July and in August. [1994]
- Q. And as a result of those attendances, you formed some views. Can you tell us what those views were?
- A. Yes, um, David Bain was extremely distressed at times in both interviews and at times was quite difficult to interview. But the overall conclusions that I drew following the two interviews was that I felt that David in terms of his history, showed no previous signs of mental disorder. He showed no signs of personality disorder, most particularly at the time of the alleged offending I could find nothing to suggest that leading up to that David was suffering from mental illness and in that regard I instructed or advised his counsel that I did not believe that an insanity defence would be available. With respect to his condition on the times I saw him, I felt that he was suffering from what would be diagnosed as an acute stress reaction which over time developed into, not surprisingly, a post-traumatic stress disorder.<sup>65</sup>

136. The Bain submission on the other hand argues that Robin Bain was a fragile, frustrated and mentally unstable man. Its position is that when confronted by his daughter Laniet on the weekend before the murders with an accusation of incest, and dreading the public shaming that would inevitably follow, Robin could no longer cope. Destabilized, he embarked on the destruction of his family except David, who was out of the house. The Crown Law Office

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<sup>63</sup> Bain Submission DBS paragraphs 7.114-7.129 and section 26

<sup>64</sup> Retrial pp. 3099-3100

<sup>65</sup> Dr Brinded evidence 2009 retrial, p. 3097 ll. 10-25.

disputes the existence of any evidential basis for the “familicide” theory, and reiterates that it is David who had a demonstrated history of bizarre and disturbed behaviour. Moreover, argues the Crown Law Office, why did David “deserve to stay”? Why did the others “deserve to die”? There is no doubt the “suicide note” is strangely worded.

137. There can hardly be any doubt that the murders were not the work of someone in their right mind. Both Robin and David were respectable and respected members of the Dunedin community, but one or other of these men had an internal mental time bomb. As the prosecution said, “we may never know what it was” that provoked the murders. The underlying psychology is certainly not an issue that can be resolved by me on the written record.

#### **Robin Bain’s Mental Stability and the “Familicide” Theory**

138. Mr Joe Karam, on behalf of David Bain, has developed the argument that Robin fits the profile of men convicted of familicide (i.e. the murder of one’s own family) whereas David’s mental state and personality, as attested to by professional and personal witnesses, rule him out as someone capable of such a thing.

139. Robin’s mental state is one of the issues that persuaded the Privy Council to order a retrial. Reference was made by the Law Lords to some of the fresh evidence filed before the Court of Appeal from witnesses thought to be not at all hostile towards Robin. The following is an abbreviation of the description in the Privy Council Judgment:

- (a) Mr Kevin Mackenzie, at the time principal of a primary school near Taieri and President of the Taieri Principals’ Association, judged in early 1994 that Robin was deeply depressed. On 23 June 1994, after the killings, Mr Mackenzie visited Robin’s school. He found the classroom and office dishevelled, disorganised and untidy; piles of unopened mail were on Robin’s desk. Mr Mackenzie was particularly disturbed by the writing and publication in the school newsletter of certain brutal and sadistic stories written by pupils at the Taieri School, one of them involving the serial murder of members of a family. Mr Mackenzie did not

regard these as stories normal children would write unless motivated to do so. He regarded Robin's decision as principal to publish them as "unbelievable" and saw them as "the clearest possible evidence that Robin Bain had lost touch with reality due to his mental state".

- (b) Mr Cyril Wilden, a former teacher and a registered psychologist, visited the Taieri School from time-to-time. He considered Robin to be seriously depressed, disorganised and struggling to cope. When he learned of the killings he immediately assumed that Robin's mental state had deteriorated to the point where he was no longer able to cope and that he had taken the lives of his family and then his own life.
- (c) Ms Maryanne Pease, is also a former teacher and a registered psychologist. She regarded the publication of the children's stories, as a matter of grave concern, causing her to believe that Robin was "quite seriously disturbed".

140. On the other hand the prosecution at the 2009 retrial called a number of witnesses who praised Robin's professional work and denied he was "clinically" depressed. The Crown Law Office submission accepts "that there is evidence of obvious dysfunction within the family, and that this would have taken a toll on Robin Bain (as illustrated by his comment to his brother when boarding the aircraft for home in January 1994 about "*that situation*").<sup>66</sup> However, it argues that even if Robin did fit a general psychological profile (which it denies) of depression and instability it cannot be inferred that he is guilty of these crimes. Studies of men convicted of familicide may be useful for after the fact analysis of the phenomenon but cannot be used as a diagnostic tool to attribute guilt to someone like Robin who was never convicted.

141. The evidence discloses that Robin was a troubled man whose wife was gradually easing him out of the family circle much against his will. She was moving ahead with plans to build a new home. He had to sleep in a caravan. She likened him to the Devil. The school of which he was Principal had received an unfavourable report from the Educational Review Office in

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<sup>66</sup> Crown Law Office submission, para 106

October 1993, although a more recent ERO report in February 1994 showed some improvement. He had every reason to be angry and frustrated.

142. Yet David Bain, when I interviewed him in Auckland on July 23, 2012, said that even with the benefit of hindsight, he cannot see in his father's conduct prior to June 20 anything that would have caused him to anticipate someone capable of the killings.

143. At the 2009 retrial no expert witness took the stand even to advance the "familicide" proposition let alone be cross-examined on the subject. I do not know what the jury made of the dozen or so witnesses at the 2009 retrial who gave conflicting evidence about Robin's mental stability. They may or may not have found the allegation persuasive. In the absence of a costly retrial (even one limited to this issue) I cannot make the necessary findings of credibility even to get the "familicide" issue off the ground. Mr Karam's theory may be valid but it falls short of the required standard of proof.

#### **The Prosecution's Psychological Profile of David Bain**

144. It appears that from an early stage the Police concluded that David was an off-beat character capable of strange and bizarre conduct.

145. The Crown Law Office catalogue of allegedly odd and disturbing incidents include:

- a) On 11 June David Bain attended a concert with his friend [ ... ], and is said to have "*zoned out*" and was "*unresponsive for a period*". [This seems to be designed to suggest he may have committed the murders in some sort of trance with no memory of it.] The Crown adds, somewhat darkly, "*Whether the "zoning out" was genuine, or whether it was part of the applicant's plan, will never be known.*" (para 138.2)
- b) In the middle of a choir practice a couple of weeks prior to the murders he was observed *sitting and rocking himself*.<sup>67</sup>

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<sup>67</sup> Referring to retrial evidence pages 2124-5

- c) David Bain had an intense three hour conversation with his friend [ ... ] on 14 June. In it he spoke about his family, his embarrassment at discovering that [ ... ], his budding romantic interest, already had a boyfriend. David told her “*anybody I’ve ever loved I’ve ended up hurting*”, and confided that his private face was very different to his public face.
- d) He spoke of Laniet seeing “*black auras*” and said he experienced trances and *déjà vu*.
- e) David Bain told [ ... ] that he had a premonition that “*something horrible*” was going to happen,<sup>68</sup> although she says she understood this at the time to be a reference to something bad happening to [ ... ], not to his own family.
- f) David Bain told Police he resented Robin Bain’s attempts to “*rule the roost*”.<sup>69</sup>

146. I do not think this sort of anecdotal evidence dredged up after the event has any significant probative value. It may have served the prosecutor’s purpose to put it before the jury but no expert witness at trial attributed any importance to it. It cannot seriously be regarded as suspicious to “zone out” at a concert or experience “*déjà vu*”.

147. At one point the prosecution made much of the fact that a gunnery target in David’s room had five circles – one each, it was suggested, for each of the five victims. However, it turned out the target was drawn up by Robin when he helped David to “sight” the new Winchester .22 when purchased in 1993.<sup>70</sup>

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<sup>68</sup> Retrial page 2351

<sup>69</sup> JCPC Police interviews page 384

<sup>70</sup> Bain interview p. 11, ll. 14-24.

- 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?  
A. Dad drew it up.  
Q. And was it drawn up for the purpose of sighting?  
A. That’s correct, yeah.

148. Ultimately the prosecution pushed this line of speculation too far in the opinion of the Court of Appeal, when it sought to adduce the evidence of Mark Buckley, a school acquaintance of David Bain. Mark Buckley was willing to testify that around 1990 David Bain told him that he was sexually interested in a particular female jogger and that he could commit a sexual offence against her and use his paper round to get away with it. This evidence was excluded by the Court of Appeal.<sup>71</sup> The Police spent time and energy before the 2009 trial trying to identify the “mystery female” without success. There is no evidence such a person ever existed. In any event, David stated in my interview with him that he and Mark Buckley had once been friends but had experienced a very bitter and acrimonious falling out while still in school. He testified that Mr Buckley’s story was complete fiction.<sup>72</sup>

149. Dr Brinded’s evidence that David Bain had no predisposition to murder, while of interest so far as it goes, cannot be taken as stand alone proof that he did not commit the murders.

150. The Crown Law Office says “the Government does not suggest that anything useful may emerge from comparative psychological profiles. But the point may be made that the available evidence is not all “one way”.<sup>73</sup> This is true but the gravity of the allegations against Robin is a good deal greater than anything suggested about David.

#### **Evidence of David Bain’s Post-Offence Conduct**

151. Evidence of the behaviour of a suspect after an offence has been committed may, of course, be probative of guilt. In this regard the Crown Law Office relies on a number of incidents:

- a) On 22 June, two days after the killings, [ ... ] went to visit David at his request. During a walk along the beach she asked him if the killings were the

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<sup>71</sup> Crown Law Office Submission paragraph 138.12

<sup>72</sup> Bain interview p. 98 to p. 99.

<sup>73</sup> Paragraph 138

“something horrible”<sup>74</sup> that he had earlier referred to. David said “yes” and fell to his knees in apparent anguish.<sup>75</sup> This carried on for several minutes.

- b) On 21 June, the day after the killings, [ ... ] visited David Bain at his request. He told her the Police might want to speak with her, reminded her of his “zoning out” at the concert, and said that “something similar” may have happened to him on 20 June. [This fed the “murders in a trance” theory.]
- c) On the evening of Tuesday, 21 June, David Bain, in the presence of his relatives, clenched his hands and spoke about “black hands” taking his family away, and seeing “everyone dying, dying everywhere”.<sup>76</sup> The Crown Law Office thinks the use of the present tense “dying” may suggest David Bain was present at their deaths but at p. 2581 Janis Clark testified:

Q. Did you ask him anything at this stage?

A. Yes I said, “David did you see them dying?” and David stopped what he was saying and he said, “No”, he said, “I only saw mum and dad and they were already dead.”

- d) On the Tuesday and Wednesday after the murders David Bain made very detailed plans for the funerals (to the extent of specifying the lingerie Arawa would be dressed in). He wanted a pop song “Who wants to live forever?” by Queen to be played for Laniet.<sup>77</sup> The relatives considered this to be inappropriate.
- e) David Bain wanted to hold a posthumous birthday party for Arawa on the Sunday after the murders. The relatives considered this to be inappropriate as well.
- f) David Bain told his Aunt Janis Clark not to wear black to the funeral because “we see death as a celebration”. She did not think this remark was appropriate.

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<sup>74</sup> David Bain testified he meant “something was going to happen that would pull [ ... ] and I apart”: Bain interview p. 79, l.8.

<sup>75</sup> Retrial pages 2360, 2366 and 2376

<sup>76</sup> Retrial pages 2571 and 2580

<sup>77</sup> Retrial page 2475

- g) In talking to [ ... ] after the killings David Bain said *“if it’s my father I cannot forgive him, and if it was me ...”* whereupon [ ... ] interrupted him and told him he could never have done it.<sup>78</sup>
- h) David’s uncle Michael Bain testified that when some of the family visited David in prison on June 28 David was asked directly if he committed the murders and he said words to the effect of: *“I’ve told my side of it to the Police and I’ll stick to it”*.<sup>79</sup> (The prosecution regarded the absence of a strong denial as betraying a guilty mind.)
- i) There was evidence from some of the ambulance staff who attended to David Bain at 65 Every Street to the effect that he faked some sort of fit.<sup>80</sup> (The defence, supported by expert testimony, says he merely fainted.) I will deal with this episode in greater detail below.

152. It will be noted that many of the more “bizarre” comments attributed to David Bain came from his relatives particularly Janis Clark (Margaret’s younger sister) and Michael Bain (Robin’s younger brother). As David sees it, his aunts and uncles (with whom he had had little contact since the family returned to New Zealand from Papua New Guinea in 1988) quickly ranged themselves on the side of the Police once charges were laid. He described the fractured relationship as follows:

... at some point during the first few weeks, um, [the aunts and uncles] 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, um, by my lawyer by the, um, ah, 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.<sup>81</sup>

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<sup>78</sup> Retrial page 2336

<sup>79</sup> Retrial page 2444

<sup>80</sup> Retrial page 380

<sup>81</sup> Bain interview p. 91, ll. 22-30.

153. It was the family and the Police – not the prison authorities - who prevented David from attending the funeral of his family on Saturday June 25 (the day after David’s arrest).<sup>82</sup>

154. Some objective support for David Bain’s suspicion was found in Michael Bain’s diary, which was brought out in the cross-examination of Michael Bain at the 2009 trial. After recording notes of his conversation with David in jail Michael Bain adds: “*I rang that information through to [Det. Sr Sgt] Jim Doyle*”.<sup>83</sup>

155. As of October 1994, David Bain was refusing even to see Michael Bain at the prison where he was being held pending the trial. In view of the fact that David Bain rightly or wrongly suspected his family of gathering evidence for the Police it is not surprising (at least to me) that in response to Uncle Michael’s question David would simply decline to get involved and make the excuse that he had already discussed the entire matter with the Police and there was nothing more to say to the Police via Uncle Michael.

156. David Bain denies the confessional comments attributed to him by his aunts and uncles. I make no finding of credibility for or against the uncles and aunts. It cannot have been easy for Michael Bain, for example, even to acknowledge the possibility that his older brother had murdered four members of his family then committed suicide. For the aunts and uncles, on the

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<sup>82</sup> Bain interview p. 93, ll. 20-30.

<sup>83</sup> Cross-examination of Michael Bain, retrial pp. 2463-2464:

- Q. You’ve mentioned also that David when you went down first I think for the depositions, or whenever, he wouldn’t see you on two occasions?
- A. That’s right, there were two consecutive days, yes.
- Q. That arose because he had begun to distrust you hadn’t he?
- A. I don’t know.
- Q. Well you see we have your diary notes of where you were liaising with the Police a lot weren’t you?
- A. Well I had to yes.
- Q. 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?
- A. No that’s not correct.
- Q. Well we have it in your diary here you see, “Visit David he had two other visitors. Asked David about his pet being put down by the council after complaint by a postie. I mentioned the gruesome play”, something, “He commented it was only a Greek tragedy”, then, **I rang that information through to Jim Doyle**, is the next entry?
- A. Okay.
- Q. Well you see you were asking questions of your nephew and promptly ringing the Police weren’t you?
- A. **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 I had with him.

(Emphasis added)

other hand, David was something of an unknown quantity. He had spent most of his life in Papua New Guinea and had seen little of them after his return. They may well have spoken as best they could from recall of events many years previously. However, I believe the comments they attribute to David have to be read in light of the adversarial position he believes they had staked out in the crisis that had devastated the family.

157. As to the comment to [ ... ] and [ ... ] the context is important.

For example, the apparently significant comment to [ ... ] that “if it’s my father I cannot forgive him, and if it was me ...” was made in the context of reporting to her a conversation with Det. Sgt Dunne in which the detective put to David the “three” options under Police consideration – the killer was a stranger, Robin or David. *David was told he might have killed family members in some sort of trance even if he had no recollection of it.* He was having as much difficulty as others in reconciling his idea of his father with the killings. I do not accept that the attempts of a 22 year old to come to terms with the unthinkable in a rambling conversation with a girlfriend amounts to compelling evidence of consciousness of guilt.

158. I accept that in the days following June 20, David Bain said some strange things, but in light of the diagnosis of the psychologists that following the shootings, he suffered post-traumatic stress disorder, I would not be inclined to place much weight on them. So far as my mandate is concerned, I consider this sort of evidence to be neither exculpatory nor inculpatory. I think what we have is evidence of a few incidents plucked out of context and, after the fact, made to appear more significant than they were.

159. Although **the issue of motive** is related to the “psychological profiling” already discussed, its focus is more immediate and specific, and responds to the insight of the Crown prosecutor in his closing address to the 2009 jury, “*we may never know what it was, what the trigger was for that event*”. Evidence of motive is linked to identification of the “trigger”.<sup>84</sup> The alleged “trigger” – Laniet’s threatened exposure of incest – does not require Robin to be in a state of clinical depression.

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<sup>84</sup> Crown Law Office Submission page 3

160. It is of course not necessary for the prosecution to prove “motive”. In *Woods v Brown* (1907) 26 NZLR 1311 at 1315 Denniston J said:

It is a dangerous doctrine to lay down that the mere proof of a motive, even in the absence of any apparent motive in any other persons who could have committed the act, is to be held to conclusive proof of guilt.

161. Guilt turns on proof of the *actus reus* and *mens rea* – in plain English this means that the criminal act was done, and done intentionally. However, facts suggesting motive may be relevant as evidence tending to prove that the act was done by a particular person, and done with a guilty mind. As the New Zealand edition of *Cross on Evidence* (online loose-leaf edition LexisNexis) says at paragraph [EVA7.6] under the heading “Motive or Plan”:

Facts which supply a motive for a particular act, such as the impending discovery by the deceased of [the accused’s fraud] ... are among the items of circumstantial evidence which are most often admitted [into evidence]. Further examples are afforded by more or less any murder trial at which proof is given of facts supplying a motive for revenge, financial or amatory gain, or the removal of someone who was in a position to disclose unpleasant information concerning the accused. (Emphasis added)

162. In *R v Ball* [1911] AC 47 the House of Lords held that a murder prosecution might properly involve proof of previous acts or words as evidence to show not only that the accused “entertained feelings of enmity toward the deceased... but of the fact that he killed him”. (Emphasis added) [*Ball* was in fact an incest case, but the principle being expounded was a general one.] See also Simester and Brookbanks *Principles of Criminal Law* (Thomson Brookers, 3<sup>rd</sup> edition, 2007) at page 97.

### **The Allegation of Incest Against Robin Bain**

163. There was evidence that Robin was about to be confronted with the threat of being named and shamed by his daughter Laniet. She had claimed to a number of friends and acquaintances that Robin had sexually abused her in an incestuous relationship. There is evidence that Laniet had mentioned that she was going home that weekend to “tell them

everything and make a clean start of things”.<sup>85</sup> The threat of a revelation of incest against a religious man and former missionary, it is said, would be enough to motivate an anguished Robin to kill, particularly if there were, as alleged, frailties in his mental health.

164. On 24 June 1994, the Police had a statement from Dean Cottle, a casual friend of Laniet’s. At that stage the Police had no reason to believe he was the reluctant witness he turned out to be. His statement read in part:

*“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 that she had been a prostitute at some stage ... 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 ... I decided on Friday, 17 June to give her a ring and see what she was up to ... Later that day I was driving through town and I saw Laniet coming out of a coffee shop, it was in the afternoon ... 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”. [Retrial pages 3683-5; the full statement is attached at tab H in the Book of Documents] (emphasis added)*

165. The allegation by Dean Cottle of incest and the “threat” of disclosure came to the attention of the Police on 24 June 1994, i.e. prior to the arrest of David Bain. Elements of Dean Cottle’s statement were confirmed by [ ... ],<sup>86</sup> a shopkeeper acquaintance of Laniet, and Leanne McNaught a former flatmate and fellow sex worker who says she spoke to Laniet the Thursday before the murders. Ms McNaught testified:

- Q. *What in particular did she tell you on that occasion?*  
A. *That she was working in the café museum, that she’d given up work as a sex worker and that she was going home that weekend to blow the whistle on her being a sex worker.*  
Q. *Anything else, was she going to disclose?*  
A. *And that she’d been having an incestuous relationship with her father.*  
Q. *When had she previously told you about that?*  
A. *When we were living in Russell Street together.*

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<sup>85</sup> Statement of Dean Cottle, 23 June 1994 (retrial page 3684 lines 5-10).

<sup>86</sup> Retrial p. 3014 ll. 20-21.

- Q. *What did she say about that incestuous relationship?*  
A. *Just that she'd been having sex with her father.*  
Q. *Do you know whether that was just a one off or whether it had been going on for any time, did she say?*  
A. *She never really specified.*  
Q. *Were you in fact interviewed by the Police, and a statement taken by the Police from you?*  
A. *Yes I was.*<sup>87</sup> (emphasis added)

166. The Police were aware of the fact Laniet was prostituting herself “reasonably early in the piece”.<sup>88</sup>

167. The Crown Law Office summarizes the Bain argument on this point succinctly at para 136:

- 136.1 Robin Bain was exhibiting signs of serious depression.  
136.2 He showed anger and his work was disorganized and unprepared.  
136.3 He was failing in his job.  
136.4 A final separation from his wife “was imminent”.  
136.5 The incest issue was about to erupt.

168. I agree with the Crown Law Office that it is not at all clear such a confrontation ever occurred. On the Sunday evening before the murders, David Bain and Laniet went to fetch fish and chips and Laniet seemed to David to be “agitated.”<sup>89</sup> After David went to bed before the others he heard “raised voices” in another room at 65 Every Street. The voices were louder than the normal television noise. It would clearly be in David Bain’s interest to claim that he could identify the voices of Laniet and his parents but he states, on the contrary, that he cannot say *whose* voices were raised, or what they were arguing about.<sup>90</sup> All he will say is “*I’m not able to make any inferences whatsoever other than this is what I experienced.*”<sup>91</sup>

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<sup>87</sup> Retrial p. 3129

<sup>88</sup> Evidence of Det. Sgt Doyle page 161 lines 25-30, page 165 lines 10-15, page 162 lines 20-30, page 162 lines 28-35; Kallum Croudin page 2765 lines 10-20

<sup>89</sup> Bain interview p. 20 l. 16.

<sup>90</sup> Bain interview p. 21 ll. 25-30.

<sup>91</sup> Bain interview p. 22 ll. 15-18.

169. Immediately thereafter he heard the family Toyota leave the driveway. It was subsequently confirmed that Margaret had, for reasons never explained, driven off to a banking machine to make some money transfers at 11.26 pm on the Sunday night.<sup>92</sup> The transfers do not seem to be particularly large or significant.

170. David Bain himself says that apart from the unexplained incident of “raised voices” he noticed nothing out of the ordinary during that weekend. There was no big confrontation, just the “old tension when Robin was at home”.<sup>93</sup>

171. The Crown Law Office disputes the factual basis of the “incest” argument. There is no reliable evidence, it says, of an imminent threat of exposure. In any event it says Laniet was a liar.<sup>94</sup> The prosecution at the 2009 trial accused Laniet of “obvious deliberate lies”.<sup>95</sup>

172. Even if I were to assume (which I don’t) that Robin’s psychological weaknesses were fully demonstrated and fit the “familicide” profile, it cannot be concluded that because Robin was predisposed to suffer some kind of psychological breakdown he did in fact do so when confronted (if he was confronted) with an incest allegation from his youngest daughter, and that this caused him to murder his wife and three of his children.

173. Nevertheless, in what is essentially a circumstantial case, it is noteworthy that the Police chose to exclude the one suspect (Robin) who was alleged to have a plausible if challenged motive, and pursue for 15 years the other suspect (David) for whom they had found no motive whatsoever. On the issue of Laniet’s incest allegation I conclude there is smoke but I cannot find that the record establishes the existence of any fire. The Bain team has not met the standard of proof to establish that a confrontation over incest was “the trigger”.

### **David Bain’s Motive to Kill**

174. If the allegations of incest against Robin are difficult to establish, and repugnant to believe, the “trigger” alleged against David is feeble.

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<sup>92</sup> Bain interview p. 20, l. 16.

<sup>93</sup> Bain interview, p. 21, l. 6, p. 23, ll. 7-8

<sup>94</sup> Crown submission page 26 and following

<sup>95</sup> Prosecutor’s closing address p. 8.

175. In the course of questioning by Police David Bain volunteered that on the Sunday night he had had an argument with Robin over whether the family chainsaw should go with Robin to the Taieri School to cut firewood or to stay at 65 Every Street to enable David to finish some cleaning up. It appears this was a frequent dispute between them.<sup>96</sup> In the absence of some evidence that David Bain suffers from what was described as a psychopathic instability, the suggestion that what happened on 20 June was triggered by a minor and long running argument about use of a chainsaw trivializes a tragedy.

176. Was there, then, the prospect of financial gain from his parents' death? The estate, when gathered in by his uncles, was something around \$600,000.<sup>97</sup> There is no suggestion in the evidence that money was of any significance to David Bain and much to suggest that his family relationships were of central importance.

177. The Crown Law Office throws out the theory that perhaps David not Laniet called the family to gather on the Sunday night (see its submission at para 199) but David Bain explained at length the arrangement made by Margaret and Arawa to collect Laniet from work and there is no reason to doubt his explanation.<sup>98</sup>

178. In summary, these tragic murders were committed by one of two men, neither of whom is an obvious candidate for violence of any kind, much less murder on this horrific scale. In my view it would be unwise to base any conclusion on the "psychological evidence," which is fraught with contradiction and difficulty.

179. I therefore proceed on the basis that David Bain's assertion of factual innocence ought to be determined on the physical evidence collected at the crime scene.

## **CHAPTER VI: A SYNOPSIS OF THE FORENSIC EVIDENCE**

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<sup>96</sup> Bain interview p. 16 ll. 1-8.

<sup>97</sup> Bain interview p. 97 ll. 15-30.

<sup>98</sup> Bain interview p. 18 ll 5 to p. 19 l. 12, p. 106 July 23, 2012

180. The Court of Appeal described the Bain prosecution as a *“classic circumstantial case. Individual points matter a lot but what matters most and ultimately is the effect of all the various pieces of evidence viewed as a whole.”* (para. 173)

181. In the course of his opening remarks to the 2009 jury Mr Justice Panckhurst likened a circumstantial case to a rope made up of many strands. While each strand may not be strong enough to bear the load placed upon it, the strands taken together gather strength from each other. The jury’s task was to view as a whole the evidence to determine guilt or innocence.

182. My job is to take the rope apart. I have to look at the strands – or issues – one by one to determine if the rope is as strong as the Crown Law Office says it is, or whether the strands properly analyzed, and viewed with the benefit of hindsight, establish David Bain’s factual innocence.

183. During the last 17 years of argument, the parties have steadily expanded the field of conflict so that there are not only numerous issues, but proliferating issues within issues. It is true, as the Crown Law Office points out, that anything that tends to prove David Bain’s factual innocence will necessarily tend to prove Robin’s guilt, while anything probative of Robin’s guilt, will tend to exonerate David.<sup>99</sup> I must also keep in mind as stated earlier, that Robin is not here to defend himself.

184. The issues do not neatly segregate themselves into watertight compartments. A conclusion on some issues will inevitably impact on the view I take of other issues. Nevertheless, certain aspects of the case have emerged over the years as being of paramount importance.

185. The Court of Appeal found there to be<sup>100</sup> three points in the evidence *“of such cogency that taken together, in the context of all the evidence, any reasonable jury must in our view have seen the case against David as proved beyond reasonable doubt”*.<sup>101</sup> Those three points

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<sup>99</sup> Crown Law Office Submission paragraphs 9 and 10

<sup>100</sup> Paragraph 164

<sup>101</sup> Paragraph 163

concerned the key to the trigger lock, David Bain's fingerprints "in blood" on the rifle and the spare 10 shot magazine found on its edge beside Robin's dead body.

186. Building on the analytical foundation laid down by the Court of Appeal and the Privy Council I will consider the main issues raised by the physical evidence in the following sequence:

**1. Primary issues: there are ten issues on which in my opinion the Bain Submission must succeed or lose the claim**

**(a) The "Luminol foot prints" issue.**

187. This is a key issue for David Bain. The Court of Appeal made the flat statement that "*there is no evidence positively implicating Robin Bain on any tenable basis*". (para. 168) The Bain Submission is that the bloodied sock prints constitute such a "positive" link.

188. At the 2009 trial the prosecutor again told the jury in his closing address "*there isn't actually the slightest shred of forensic evidence linking Robin Bain with any single murder in this case*" (p. 2) yet David Bain was acquitted.

189. During the Police investigation of 65 Every Street, ESR<sup>102</sup> Scientist Peter Hentschel and Det. Sgt Weir discovered, using a chemical called Luminol, six footprints left by a bloodied sock in the hallways.<sup>103</sup> (The exact location is shown on the Plan of Survey at Tab B.) David Bain asserts that the evidence of the ESR experts, Mr Walsh and Mr Hentschel, corroborated by defence experts, establishes that the prints were made by Robin and exclude David. The Crown Law Office disputes the Bain interpretation of the expert evidence, and points out that Robin was wearing clean socks when his body was discovered by the Police. However, a couple of

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<sup>102</sup> ESR stands for Environment Science and Research Ltd, a New Zealand Government-owned but independent provider of expert forensic investigation and testing.

<sup>103</sup> Mr Hentschel's deposition dated 5 December 1994 stated in part:

Luminol, a chemical that reacts with blood to emit a faint luminescent glow can detect traces of blood which are not visible ... by using Luminol I located two prints with stockinged feet on the floor in the master bedroom (Room E). The prints were made by a right foot and were leading away from the door way of Room F towards the hall. In the hall and another bedroom, Room C, I located two further prints made by a right stockinged foot. The first print was pointing down the hall in the direction of the front door; the other was by the door leading to Room C. Between the door of Room C and the stairs I found two further prints. The one close to the door of Room C was pointing in a direction away from the room and down the hall towards the front door. The other print, a partial one at the top of the stairs, had a shape which suggested to me its direction was leading down the stairs. The length of the best footprints is about 280 millimetres.

pairs of socks, an odd sock, and the green V-necked sweater were found by the Police in the washer and hung out to dry on the clothes line. The Police/Police Complaints Authority Joint Report specifically notes David's statement that he had put some socks in the wash on 20 June (para 293).

190. I think there is a limit on the importance to be attached to what the Police did **not** find. The Police officer said 65 Every Street was a pigsty. If Robin had committed the murders he must have been desperately discombobulated. Afterwards, if he went to the trouble of changing his clothes, as on the defence theory he must have done, he was engaged in some unknown and unknowable act of deception. The change of clothing is only one of the mysteries about what he was up to.

***(b) The Crown says the angle and nature of the gunshot wound to Robin's head show that it is highly unlikely he could have committed suicide. Therefore he must have been killed by David***

191. The Crown Law Office says that the position of Robin's body in the lounge, the blood spatters from the fatal shot, the nature of Robin's head wound and other crime scene evidence discredit the possibility that Robin pulled the trigger to end his own life. If Robin did not kill himself he was necessarily murdered by David. David Bain relies on evidence of the Crown's own pathologist, Dr Alex Dempster, as well as his own experts, to refute this.

***(c) The presence of David's fingerprints in blood on the murder weapon.***

192. The Crown Law Office asserts that David's fingerprints were pressed in his victims' blood [likely Stephen's] on the forestock of the murder weapon. No fingerprint positively identifiable as Robin's were located on it. David Bain says his prints were not in human blood, and were likely the result of the shooting of rabbits earlier in the year. The New Zealand Court of Appeal in its 15 December 2003 Judgment held, and I agree, that this issue – if decided against David Bain – would be “practically conclusive” of his guilt.

**(d) The Shielding issue.**

193. Allied to the issue of the rifle fingerprints is the prosecution's argument that the gun was found to be covered in the airborne blood spatter of the victims *except* where it was shielded by the hand that made the fingerprints – David Bain's. The Bain team denies that the gun was "covered" in blood. David Bain says the prints predated the murders by several months.

**(e) The key to the trigger lock of David's gun – the murder weapon – was stored in an unusual place where David Bain had put it. No one else knew its whereabouts.**

194. The Crown Law Office relies on the fact David Bain told the Police no one else knew of the location of the key. Without the key the murder weapon would not have been usable. The Court of Appeal<sup>104</sup> attached particular importance to this issue. The Bain submission is that at the trial David simply didn't know others knew of his "secret". The Police found about twenty spent rounds of .22 calibre in Robin's caravan, together with at least one live bullet, and in Stephen's room as well. David had no knowledge of their use of his gun.

**(f) The Crown Law Office contends, and the Court of Appeal agreed, that it is practically conclusive of David Bain's guilt that the empty 10 shot magazine for the murder weapon was found standing upright on its narrow edge almost touching Robin's outstretched dead hand, a position in which it was unlikely to have randomly fallen as Robin's body collapsed after the fatal shot.**

195. The prosecution's point was neatly summarized by the 1995 Trial Judge:

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

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<sup>104</sup> Paragraph 163

The Bain submission is that even if the magazine was “put there” it was placed by Robin not David.

**(g) Was David Bain inside the house – or on his paper route – when the murders occurred?**

196. The prosecution case was that David Bain was in the house at the time the members of his family were killed. For ease of reference, I repeat the main points:

- a) David Bain had every opportunity to murder his mother and siblings before he went on his paper route at 5.45 am – his father was sleeping out of earshot in the caravan at the back of the property;
- b) He finished his paper route early;
- c) David Bain admits he was at the foot of Every Street at 6.40 am, from which it would take only a few minutes to climb the hill to home;
- d) The computer on which the suicide note was written was probably turned on at 6.44.30 am;
- e) David Bain had completed his paper route early and was seen entering 65 Every Street *before* the computer turn-on time; and
- f) If David Bain’s story were true the washing machine (which he says he filled and started *after* getting home at 6:45 a.m.) would still have been running when the Police were exploring the house around 7.30 am, but it wasn’t.

197. David Bain submits that, on the contrary, the evidence establishes that the computer was turned on earlier than the Police allege, and he returned home later. Robin, not David, was the active user of the computer. The Bain submission is that the evidence puts David **outside** the house when the four murders occurred. Robin had come in from his caravan earlier than the Police believe. As mentioned, he (not David) collected the morning newspaper. Robin had every opportunity after committing the murders, to change his clothing, turn on the computer

and type his suicide note before shooting himself in the left temple with the same rifle used to kill his wife and other children. The door to the lounge was closed. Robin could have shot himself – immediately before or within several minutes after -- David Bain re-entered the house.

**(h) David Bain admitted to hearing a “gurgling” sound from Laniet as he entered her room after finishing his paper route. The Crown Law Office says he must therefore have been present as she drew her dying breaths and David Bain must therefore have been her killer.**

198. At the 1995 trial, the prosecution called the Crown pathologist, Dr Alex Dempster who expressed the view that the “gurgling sounds” were likely caused by Laniet struggling to breathe as blood from an initial gunshot entered her airways and lungs. The Crown Law Office says that if (as he admits) David Bain heard the gurgling noises he must have done so *after* she was struck by the first shot, and *before* she ceased breathing as a result of the second and third shots. He must therefore be the killer.

199. There is also, says the Crown Law Office, other evidence of David Bain being present at the killings. He told Police that when he came upon his mother, her eyes were open. When Police arrived at the house her eyes were closed. His aunt testified that David told her they were “dying, dying everywhere” [present tense] confirming the Crown Law Office says, that he remembered being present at their deaths.

200. The Bain Submission is that the importance of these latter incidents has been exaggerated. As to Laniet’s “gurgling” noises it is remarkable (to adapt the understatement used by the Privy Council) that David Bain would volunteer such a potentially incriminating statement if he were guilty. In fact, expert testimony and evidence at the 2009 trial (including that of Dr Dempster) established that dead bodies can emit “gurgling” noises probably for an hour or more after death, which is consistent with Robin as the killer before David got home and David as the innocent after-death finder of her body.

**(i) Smears of blood on David Bain's person and clothing.**

201. The clothing David Bain was wearing when the Police arrived at the home were examined by ESR scientists who concluded that at least some of the bloodstains came from Stephen. The Crown Law Office relies in particular on a blood smear on the crotch seam of David's black shorts. The Crown Law Office claims he wore, over his t-shirt, the blood-stained green sweater with fibres matching those found under Stephen's finger nails as well as the track-pants found in the wash. The Crown Law Office further contends that another garment had dilute blood on its shoulder which showed signs of an unsuccessful effort to sponge it clean. The Bain submission is that David never put on the green sweater worn by the killer (it was too small for him). The blood "smear" evidence, he says, is entirely consistent with "innocent transfer". David Bain freely admits stumbling through the darkened house searching for signs of life from members of the family who it became clear were already dead. There may also have been "innocent transfer" when he loaded the laundry (including the green V-necked sweater) into the washing machine without noticing the stains as the laundry was poorly lit.<sup>105</sup>

**(j) The Crown Law Office claims that fresh injuries to David Bain's forehead and knee observed on and after June 20 can only be attributed to his involvement in a death struggle with Stephen.**

202. On his arrival at the Police station on 20 June, David Bain was examined by a Police doctor, Dr Thomas Rankin Pryde, who made extensive notes of the "injuries" he observed. The Crown Law Office claims that David suffered these injuries at the time of the murders, which it attributes to the fight with Stephen. The Bain submission is that these injuries – minor as they are – had nothing to do with any fight with Stephen. These occurred when he fainted and fell to the floor of his bedroom in the presence of a Police officer and was "dragged" out from between the bed and some furniture.

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<sup>105</sup> Bain interview (re-examination) at p. 109

- 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 -
- A. Yes, it was very dim.

**(k) Importance of the Primary Issues**

203. My view is that if the members of the 2009 jury had accepted the prosecution's evidence and argument on one or more of these "primary" issues they would necessarily have convicted David Bain of five counts of murder. If the "Luminol" footprints did not belong to Robin I would agree with the Court of Appeal that there would be no physical evidence linking him to those parts of the house at the time the murders occurred. Robin could not have committed suicide if it was shown that he could not physically have reached the trigger of the gun that killed him given the angle and trajectory of the fatal bullet. He must have been murdered. If the fingerprints on the rifle stock were imprinted by David Bain with fresh human blood, it would be highly probative of David's guilt. If his hand shielded that part of the wooden rifle forestock from blood spatter it must have been because he was present when the blood spattered. Moreover, if only David knew of the location of the spare key, Robin would never have been able to utilise the murder weapon. Equally, if the prosecution could establish that David preceded his father into the house on the morning of 20 June, that would provide some foundation for the "ambush" theory. If David Bain's person or clothing carried airborne blood spatter from the murdered victims (as distinguished from blood "smears") he must have been present when the victims were killed. Further, if the jury had accepted that David Bain's "injuries" were the result of the fight with Stephen, or if only the killer could have heard Laniet "gurgle", then David Bain would not have been acquitted.

204. It must be emphasized of course, that the jury in the criminal trial need only have concluded that there was a reasonable doubt on the ultimate issue of guilt. They need not be unanimous issue by issue. Little can be inferred from the 2009 acquittal in respect of particular issues or, indeed about factual innocence. Under the Cabinet's "extraordinary circumstances" discretion, even if the jury rejected all of the prosecution's major points, this would not raise a presumption of David Bain's innocence.

205. The jury was concerned with reasonable doubt about guilt. The compensation inquiry is concerned with proof of factual innocence.

**2. Secondary issues – there are additional controversies which one or other party emphasizes but which, in my view, are neither inculpatory nor exculpatory. These issues include:**

**(a) *Whether Margaret’s broken spectacles and lenses link David Bain to the murders.***

206. The Crown Law Office says that the presence of Margaret Bain’s frames and the right lens in David’s room, with signs of injury to the left side of the frame likely sustained in the fight with Stephen, and the discovery of the left lens in Stephen’s room, ties David to the murders. Margaret’s spectacles were of no use to Robin, who was far sighted. David Bain is near sighted and his own glasses were in for repairs. David Bain admitted wearing Margaret’s glasses from time to time for the classroom or watching videos, but testified that he had not worn them recently. The Bain team points out that despite what must have been a very bloody fight between the killer and Stephen, there was no blood or other biological material from anyone found on the frames or lenses. The lenses were dusty. The breakage may not have been recent. The left lens could have been amongst the debris in Stephen’s messy room prior to June 20. The Bain team says that no reliable evidence links the breakage of Margaret’s glasses to the fight with Stephen, still less does the evidence connect David to the murders.

**(b) *David’s bloodied gloves were found in Stephen’s room.***

207. A pair of gloves that belonged to David Bain was found in Stephen’s room smeared with Stephen’s blood. The Crown Law Office says that David was wearing the gloves. Robin could have no motive to wear gloves to conceal his fingerprints. He was about to commit suicide. David, the Crown says, must have removed them to clear a misfeed in the rifle. In haste, he neglected to collect and get rid of the gloves afterwards. David Bain admits the gloves belong to him. He denies having worn them since the formal dance for which they were purchased. The issue is whether there is any evidence to connect him to wearing the gloves at the relevant time.

**(c) Was David Bain wearing the green V-necked blood soaked sweater?**

208. The Crown Law Office says that various blood stains on clothing David was found wearing are the result of seepage from outer garments, namely the green V-necked sweater and dark coloured track-pants found in the wash. David Bain denies wearing either outer garment on the morning of 20 June. He says the track pants were not his and explains the blood stains on his own clothing as the result of innocent transfer.

**(d) David Bain's palm print was found on the washing machine and related articles.**

209. The experts agreed that a palm print on the washing machine was made by David Bain. The Crown Law Office says it was made in blood from the murders. David disputes the print is in blood<sup>106</sup> but says that in any event, whatever the substance may be, it got on his hand when putting the dirty clothes into the machine (including blood stained clothing worn by Robin) in the dim light in the laundry room after he completed the paper route and before he discovered the murders.

210. The Crown Law Office also relies on blood smears found on the top of the washing machine powder container, porcelain basin and various light switches which it says must have come from the killer's touch. David Bain says that for the most part these smears and stains (including the blood stains on the green towel)<sup>107</sup> seemingly attributable to a botched clean-up are no more identified with him than with Robin, and that to the extent he is responsible such smears resulted from the blood on clothes worn by Robin during the killings, but changed before he shot himself, which transferred to David Bain innocently and without his knowledge.

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<sup>106</sup> ESR scientist Peter Hentschel did not think it the colour of blood when he examined it on site.

<sup>107</sup> The Crown notes that of three samples of blood on the towel one sample showed Robin's "partial" DNA profile", which it says cannot be accounted for by the injuries to Robin's hands because of the quantity of "his blood" on the towel, however, only the one sample disclosed Robin's "partial" DNA, not the entire towel. The Crown then concludes "it is certainly "possible" that the applicant got some of his father's blood on him". True, but it is also "possible" that he didn't, see Crown Law Submission p. 53, para 199-200.

**(e) David Bain “feigned a fit” for the benefit of the Police when located on 20 June**

211. According to the Police, David Bain continued his cover-up by pretending to stage “a fit” after the Police arrived. This artifice helps demonstrate his guilt. The Bain team says David simply fainted, which defence experts testified was a perfectly normal reaction to such a stressful event as finding his family murdered.

**3. Additional issues. There are a number of additional issues which form part of the mosaic of circumstantial evidence but which in my view cannot be probative of innocence.**

**(a) Robin’s physical injuries.**

212. The Bain submission argues that Robin’s hands showed recent physical injuries compatible with a fight with Stephen, including what appeared to be the marks of Stephen’s teeth on Robin’s fist. The Crown Law Office rejects this argument as total speculation without any plausible evidentiary basis.

**(b) Blood spatter on Robin’s hands and shoes.**

213. The socks on Robin’s body were clean but a defence expert identified what appeared to be droplets of blood on one of Robin’s shoes. There was evidence of what appeared to be blood on Robin’s hands. The Bain submission contends that the failure to test blood found on Robin’s hands and shoes was another example of Police “tunnel vision”. The Crown acknowledges the lack of testing but claims that at this stage, because of the lack of testing, it is speculative as to what the testing (had it been done) might have shown.

**(c) Robin’s full bladder**

214. The Crown Law Office notes that at the post-mortem, Robin’s bladder still held a normal “overnight collection” of 400 ml of urine. In its view, Robin would hardly have gone on a killing spree in the early hours of June 20 without relieving himself. The defence expert testified that the need to urinate depends on a variety of factors – both mental and physical – and the state of Robin’s bladder is not probative of anything.

**(d) Blood smeared on doorways and other surfaces.**

215. The Bain submission is that the height of these smears indicate they were made by Robin. The Crown Law Office of course, attributes them to David Bain.

## CHAPTER VII: THE CIVIL RULES GOVERNING THE RISK OF NON-PERSUASION

216. Before addressing the evidence on the various items of physical evidence I think it is convenient to touch on the legal framework appropriate to the assessment of a civil claim to compensation.

217. As stated earlier, David Bain bears the onus of establishing factual innocence. He must, in the jargon of the law, prove the elements of his cause of action. However, the Crown Law Office submissions appear to approach the compensation issue as if it were still a criminal case in which the prosecutor – asserting guilt - must refute beyond a reasonable doubt “facts” alleged by the defending party that raise, with some air of reality, a defence. For example, once David Bain in the criminal case had raised the issue of his father’s suicide, it fell on the Crown Prosecutor to persuade the jury beyond a reasonable doubt that Robin *did not* commit suicide, not on David Bain to prove that he did.

218. The approach in civil claims, which include the present claim to compensation, is less simple. The plaintiff will fail unless, at the end of the day, the cause of action is established on a balance of probabilities. That *legal* onus never shifts. However, the *evidentiary* onus within that overall framework may shift as the analysis progresses. As stated in the New Zealand text *Garrow & McGechan’s Principles of the Law of Evidence* (7<sup>th</sup> ed, 1984)<sup>108</sup> at page 19: “the burden of proof in any particular civil case in general lies upon the party, whether plaintiff or defendant, who makes the allegation. The burden of proof lies upon him who affirms, not upon him who denies”. (Emphasis added) This paragraph was quoted with approval by Justice Tipping of the High Court in Christchurch in *Humphrey v Fairweather* [1993] 3 NZLR 91 (HC). The judge also cited *Phipson on Evidence* (4<sup>th</sup> ed, 1990) at paragraph 4:02 for the proposition that “the burden of proof lies on the party who substantially asserts the affirmative of an issue”. The latest edition of *Phipson on Evidence* (17<sup>th</sup> ed, 2010) elaborates on the allocation of onus in a civil case as follows:

“So far as the persuasive burden [legal burden] is concerned, the burden of proof lies on the party who substantially asserts the

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<sup>108</sup> Now *Garrow and Casey’s Principles of the Law of Evidence* (8<sup>th</sup> ed. 1996) at p. 13 para. 2.2.

affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reason.”

See also: *Abil Property Taurarua Ltd v Cozzolino* (NZHC) 25 May 2010, CIV 2008-404-1800 Priestly J (Auckland).

219. The *Humphrey v Fairweather* case concerned a limitation defence, where there was clearly a separation between the plaintiff’s cause of action and the distinct and separate allegation by the defendant of facts giving rise to a statutory prescription. The dividing line between who has to prove what is less clear in a compensation inquiry but the principle that “he who asserts must prove” is the same and, in my view, it is applicable.

220. This discussion does not dilute the obligation of David Bain to prove his cause of action. If I am not satisfied on all of the evidence that David Bain is factually innocent on at least a balance of probabilities, I could not and would not recommend payment of compensation. However, given elements of the Crown’s Law Office’s Submissions, it is useful to keep in mind that in a civil context not all questions raised by the evidence are to be resolved in favour of the defending party. For example, the Crown Law Office seeks to undermine David Bain’s reliance on the evidence of Mrs Denise Laney about the time of David Bain’s return home (6.45 am) by suggesting David Bain might have entered the house earlier and popped out again for some unexplained reason, at which time he was seen by Mrs Laney *re-entering* 65 Every Street by “squeezing” back between the garden gate and the hedge. The Crown Law Office takes the position that its “pop in and out” example is “*merely highlighted as a possibility that the applicant (who carries the ultimate legal onus) must exclude if he is to succeed in his alibi.*” I do not agree. This “pop in and out” theory is a positive assertion by the Crown Law Office to explain away Mrs Laney’s testimony (or at least undermine its significance) and it is up to the Crown Law Office to prove facts that establish the “pop in and out” theory it positively asserts - not up to David Bain to refute such free standing speculation.

## CHAPTER VIII: ANALYSIS OF THE PRIMARY ISSUES CONCERNING THE PHYSICAL EVIDENCE

### 1. *Bloodied Sock Prints At The Murder Scene*

221. The Bain Submission asserts that the six bloodied sock prints found at the crime scene were made by Robin. At the Privy Council hearing, the Crown, represented by the Solicitor-General, David Collins QC, acknowledged in answer to a question from one of the Law Lords that the prosecution could not accommodate even one of these footprints “on our thesis [because] Robin was not there.”<sup>109</sup> It was the prosecution’s case that Robin innocently came into the house to say his prayers when he was ambushed and shot by his son without going to any of the rooms where the murders had occurred.

222. The concession was proper because on the prosecution theory, as noted by the Privy Council, Robin would never have been walking that morning in the part of the house where the footprints were found, let alone wearing bloodied socks. The Crown emphasises that Robin’s body, when it was found, was wearing clean socks. On David Bain’s theory, as the Privy Council noted, Robin must necessarily have changed his socks, as well as the rest of his clothing, after the murders and before his suicide. As already noted, a couple of pairs of socks - David could not remember whose – were put in the wash Monday morning from the clothes hamper in the laundry room.

223. Det. Lodge testified that the wash load included “two pair of socks... [and] one odd sock”.<sup>110</sup> These are identified as follows:

<b>Exhibit</b>	<b>Description</b>
110	off [clothes] line from laundry 1 x pair sports socks with black & green strips (stripes)
115	[clothes] line from laundry 1 x pair blue/grey works socks
121	On [clothes] line from laundry 1 x white sock

224. It is not possible at this stage to identify which of these socks, if any, belonged to Robin.

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<sup>109</sup> Letter dated 9 August 2012 to Mr J Karam from Paul Morten, Barrister, who attached his contemporaneous handwritten note of the argument before the Privy Council.

<sup>110</sup> 2009 transcript p. 715 ll. 15-20.

225. David Bain acknowledged that he had indeed been through the house after returning home from his paper route. That is how he was able to report to the 111 operator that “all” of his family was dead. The socks he was wearing when he was found by the Police were stained with blood. There is no doubt that David Bain was in and out of the bedrooms *after* the killings and before the Police arrived. This was freely admitted.

226. It is a curious fact, however, that when ESR tested the *inside* of David Bain’s Laser running shoes – the ones in which he had inserted his bloodied socks (on the “four before one after” theory) to run his paper route – no trace of blood was found. The Joint Report of the Police/Police Complaints Authority states:

David told Police he wore a pair of Laser shoes on the paper run. They were located in his room and were inspected by investigators but through oversight were not sent for full ESR examination. The only forensic attention they received was a visual check during the trial. No blood was detected. ... It has been confirmed in the course of our [post-trial 1997 investigation by ESR] that the Laser shoes had no blood on them. (emphasis added)

227. This, I believe, is compelling evidence that the socks were bloodied *after* the paper route – as David Bain says – and not before, as the Police contend.<sup>111</sup>

228. The Crown Law Office now argues that maybe David Bain was not wearing his new Laser shoes on June 20 but an old pair. There is no persuasive reason to accept such speculation.

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<sup>111</sup> The new “Laser” running shoes are shown in photograph 600/150 – exhibit 600. In his statement to detective Dunne (PC 0385) David Bain talks of wearing these shoes; “I have a new pair of Laser running shoes”. In my interview with him, David Bain testified as follows:

- 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 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 –*  
Q. *Which pair did you use?*  
A. *Paper run?*  
Q. *On the paper run?*  
A. *Ah, it would have been the newer pair. (Transcript p. 36)*

229. In 1995 defence counsel had conceded at trial that the Luminol sock prints had been made by David Bain. This important concession obviously puzzled the Privy Council which commented:

At trial it was accepted that the prints had been made by David. It is not clear why this should have been accepted, save that evidence was given by Mr Hentschel that socks taken to be Robin's were measured at 240 millimetres, and socks taken to be David's were measured at 270 millimetres. Evidence was given of the inside measurements of their respective shoes, showing Robin's at 275 millimetres and David's at 304 millimetres, but this did not displace the assumption and the jury were not told, by the Crown or the defence, that Robin's feet had been measured in the mortuary and found to be 270 millimetres. Thus in his Crown closing address to the jury the prosecutor submitted (according to his very full note): "there are the [Luminol] footprints – stocking feet – [too] big to be the fathers'.<sup>112</sup> (emphasis added)

230. At the subsequent 2009 retrial, the question was put to Det. Sgt Weir, as officer in charge of the crime scene – *"whoever had made these bloodied sock prints must have been involved in the killings"*, and he answered, *"that would be fair to say, yes."*

231. This then is an issue of key importance and it is necessary to review the evidence in some detail.

**(i) Discovery of the Sock Prints**

232. As stated earlier, Mr Hentschel the ESR scientist, discovered the sock prints - which were not visible under ordinary light - by spraying areas of the carpet in the darkened house with Luminol, a substance which produces strong [blue] luminescence when in chemical reaction with blood.

233. The six sock prints, four of which Mr Hentschel described as "partial", were located in Margaret's room, going in and out of Laniet's room, and in the hallway outside Margaret's room pointing towards the front door. [The location is marked on the Plan or Survey at Tab B

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<sup>112</sup> JCPC Judgment Paragraph 55

of the Book of Documents.] Mr Hentschel concluded that all the prints had been made by the same foot and, curiously, all made by the *right* foot – none by the left foot.<sup>113</sup>

234. Two of the six prints were described by Mr Hentschel as “complete”. He measured one of these to be 280 millimetres. Mr Hentschel’s 1995 trial evidence was quoted in the judgment of the Privy Council at paragraph 53:

*In his evidence given at trial Mr Hentschel said of that:*

*“I said I measured at 280 millimetres. That print encompassed both the heel and the toes, that was a complete print from heel to toe.”*

*This evidence he repeated:*

*“The other prints that I detected with Luminol showed the toes as well, taken from the top of the toes to the heel.”*

*Giving oral evidence to the second Court of Appeal, Mr Hentschel testified to the same effect. (emphasis added)<sup>114</sup>*

235. Despite the fact Robin’s foot had been measured at 270 mm by Det. Sgt Lodge at the mortuary and Mr Hentschel had derived David’s approximate foot size from the inside of his running shoe, Mr Hentschel based his testimony to the 1995 jury to exclude Robin *on the relative size of socks* belonging to Robin and David. He represented that this was a reliable indication of foot length (a position Mr Hentschel admitted at the 2009 retrial was of no “scientific benefit”<sup>115</sup> and was “not useful for comparative purposes”).<sup>116</sup>

236. It was curious testimony. Mr Hentschel must have appreciated as much as the rest of the population that men’s socks stretch and can accommodate a range of foot sizes. In any event, Mr Hentschel testified on this dubious “sock” theory that the 280 millimetre sock prints excluded Robin Bain.

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<sup>113</sup> As described later, the bottom of *both* of David Bain’s socks were bloodied and *both* socks tested positive with luminol. See para. 254 below.

<sup>114</sup> JPCPC Judgement at paragraph 53; See also Mr Hentschel’s retrial evidence page 1374;

<sup>115</sup> Retrial Page 1360

<sup>116</sup> Retrial Page 1380

237. The exceptional importance of such an attribution was spelled out in the clearest of terms by the Privy Council. Supposing, the Law Lords reasoned, the sock prints had instead been attributed to Robin?

*First, it would indicate that Robin had been to parts of the house on the morning of 20 June which, on the Crown's case, he would never have visited. Secondly, it would establish that Robin had changed out of blood stained socks, since if he made the print he must have been wearing blood stained socks and the socks he was wearing when he was found dead in the lounge were not blood stained. Thirdly, if he changed his socks, the jury might not think it fanciful to infer that he changed other garments as (on David's case) he had. The implausibility of Robin changing his clothes if he was about to commit suicide, was a point strongly relied on by the Crown, as something a normal and rational person would not have done. But the jury might conclude that whoever committed these killings was not acting normally or rationally.<sup>117</sup>*

(The Privy Council's point about Robin "changing his clothes" also relates to the police argument based on Robin (according to David) wearing clothes on Sunday that were the same or similar to those in which his body was found on Monday. The Law Lords question challenges the assumption of continuity that underlies much of the prosecution's case.)

238. At the 2009 retrial, Mr Hentschel attempted to back away from his earlier description of the 280 millimetre footprints as "complete", saying that "I have always felt that the foot that made that print was larger than 280mm."<sup>118</sup> In other words, he was now saying, the prints were **not** complete. He elaborated on this point in a rather imprecise and unsatisfactory fashion:

*"The Luminol reaction as I saw it showed areas of relatively high intensity if you like and it was the limits of that that was measured. But there could have well been some small areas outside that which are difficult to see, all right. And that is why I'm saying that the 280 is a minimum measurement, it could well be a little larger. How much larger I don't know"<sup>119</sup>. (Emphasis added)*

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<sup>117</sup> JCPC Judgment Paragraph 107

<sup>118</sup> Retrial page 1381

<sup>119</sup> Retrial page 1359

239. Mr Hentschel agreed in cross-examination that in the 15 years between the June 1994 investigation and the 2009 retrial he had *never* before suggested that a 280mm footprint could be made by a foot larger than 280mm. *“That is the first time you’ve ventured that opinion in this case in any courtroom or affidavit?” “Yes”.*<sup>120</sup>

240. Mr Hentschel offered no scientific basis for his “larger rather than smaller” view apart from some last minute experiments he did with footprints in ink which he agreed were not of a “scientific quality” and were not at “a level you would expect for trying to determine blood soaked on stockinged feet walking on carpet”.<sup>121</sup> What Mr Hentschel seemed to be saying is that because he *believes* David Bain to be guilty and David Bain’s foot is larger than 280mm it must therefore follow that the 280mm prints *must* have been no more than partial prints despite his consistent testimony for 15 years that they were complete prints.

241. Mr Hentschel also pointed out that *“because of the natural curve of the heel and toes, there will be parts of the foot that form part of the measurement of the foot but which do not contact the surface of the ground when standing.”*<sup>122</sup> No doubt this is true. It is also agreed that a person when walking leaves a larger print because of the flattening effect caused by the downward pressure on a moving foot. In order to make his murderous rounds the killer must have been moving around, not standing still. As it happens, however, “the natural curve of the heel and toes” and the difference between a print made by an individual when walking or standing,<sup>123</sup> were tested by ESR scientist Kevin Walsh in 1997 (for the Joint Police/Police Complaints Authority review) and in 2008 (for the 2009 retrial). So we do have some empirical ESR data on these points, but it does not originate with Mr Hentschel.

242. The Crown Law Office Submission urges acceptance of Mr Hentschel’s revised testimony (even if, by his account, not a revised view) on the basis that when Mr Hentschel used the word “complete” he simply intended to distinguish the two prints he described as being “from the top of toes to the heel” from the other four prints he described as “partial”. I accept that Mr

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<sup>120</sup> Retrial page 1356 lines 5-10

<sup>121</sup> Retrial page 1358

<sup>122</sup> Retrial pages 1419 lines 10 to 20

<sup>123</sup> Crown Law Office Submission - page 21, paragraph 74

Hentschel juxtaposed “complete” from “partial”, but it is clear Mr Hentschel also used “complete” in the functional sense that the print enabled him to inculpate David and exculpate Robin. The Bain submission simply takes the methodology that helped convict David Bain and, harnessing the subsequent test results of ESR scientist Mr Walsh, now uses it to David Bain’s advantage.

**(ii) The ESR test results**

243. Mr Walsh set out to establish what size print a 300 millimetre long foot would deposit while walking on carpet, when bloodied, as disclosed with Luminol. The results of Mr Walsh’s work were subsequently corroborated by tests performed by the defence expert, Dr Anna Michelle Sandilands, a forensic chemist based in Auckland, using the same methodology developed by Mr Walsh.

244. The work of Mr Walsh and Dr Sandilands was handicapped by the failure of Det. Sgt Weir, who was the Police officer in charge of Mr Hentschel’s activities at the scene, to preserve the portion of carpet where Mr Hentschel found the two “complete” footprints. Mr Hentschel explained that it was not his practice to keep such physical evidence after testing with Luminol. However, the decision to seize or not to seize material belongs to the Police. This was made clear by Det. Sr Sgt Doyle (Retrial p. 154).

245. The practical (and unfortunate) result of this failure to preserve the carpet (although other carpet samples at the crime scene were preserved) is that no other expert can reassess the correctness of Mr Hentschel’s original 280 mm measurements on which all the other expert testimony regarding these prints must now depend. Photographs had been taken of the luminol prints but the quality was so poor the photographs were useless. As stated, the house at 65 Every Street was deliberately burned down with Police consent within three weeks of the murders. Any remaining physical evidence including the carpet was destroyed in the fire.

246. Mr Walsh says he was instructed that Robin's foot "from the top of the toe to the extent of the heel was 270 millimetres"<sup>124</sup> and that David's foot similarly measured was 300 millimetres.<sup>125</sup> As a proxy for David's 300 millimetre foot Mr Walsh put his own right foot (298 millimetres) in a sock, which he stepped in a tray of animal blood. Mr Walsh then made a series of imprints on paper to remove excess blood, then stepped successively on hard surfaces and then carpet. The prints faded with each imprint until no longer visible. The invisible prints were then sprayed with Luminol and measured. In 2008 Mr Walsh repeated similar tests to simulate Robin's footprint by using a student who happened to possess a 270 millimetre foot.

247. The "natural curvature" of the heel and toe" referred to by Mr Hentschel as a source of uncertainty is an anatomical feature presumably shared by the feet of Mr Walsh and his student, and therefore taken into account in Mr Walsh's comparative measurements.

248. Mr Walsh concluded that the average length of a print left when walking by an individual with a 270 millimetre foot was 282 millimetres,<sup>126</sup> whereas the average print left when walking in nine imprints of a 298 millimetre foot (Mr Walsh's own foot) was 296.9 millimetres.<sup>127</sup> Given that David Bain's foot is 2 millimetres longer than Mr Walsh's, Mr Walsh agreed the average length applicable to David's foot would be 2 millimetres greater than his own i.e. 298.9 millimetres<sup>128</sup> almost 20 millimetres longer than the "complete" print measured by Mr Hentschel.

249. On the basis of his tests, Mr Walsh concluded ***"that a walking person with a 300 millimetre foot making sock prints with the sock completely bloodied would be expected to make a print greater than 280 millimetres"***<sup>129</sup>. More precisely, based on Mr Walsh's results, the arithmetic suggests the "average" for a 300 millimetre foot would be just short of 300 millimetres. In contrast, Mr Walsh's 2008 tests showed "average" print made by a Robin-sized

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<sup>124</sup> Retrial Page 1947

<sup>125</sup> Retrial page 1948

<sup>126</sup> Retrial Page 1954 lines 25-30 The "walking print" tends to be larger because of some extension of the foot when weight shifts when the foot is in motion.

<sup>127</sup> Mr Walsh testified at retrial page 1974: using my left foot of 298mm and making, wearing a sock that was completely bloodied over the entire sole, I made nine measurements of Luminol enhanced prints and they were and I will give them all, they were 286, 287, 293, 296, 297, 303, 306, and 308mm, and that's, I've ordered those from lowest, shortest to longest.

<sup>128</sup> Retrial Page 1982 lines 14-17

<sup>129</sup> Retrial Page 1952

270 millimetre foot when walking corresponds with the 280 millimetre print as measured by Mr Hentschel, and Mr Walsh so testified:

- Q. *And the conclusion you draw from that is, isn't it, that a person with a 270 millimetres foot, walking on carpet, giving a complete luminol print, is most likely to leave a print of approximately 280, that's the conclusion we draw isn't it?*
- A. Yes  
(Retrial p. 1978 ll. 5-10)

250. As to whether a 300 millimetre foot *could* make a print of about 280 millimetres, the Court of Appeal decision of 15 December 2003 relied explicitly on what turned out to be misinformation (seemingly introduced by the Police/Police Complaints Authority Report (1997) at paragraph 295). The Court of Appeal wrote:

*"In post-trial evidence the forensic scientist, Mr Walsh, has said that a 300mm stockinged foot could make a print of about 280mm".*<sup>130</sup>

251. In fact, as Mr Walsh stated in a clarification filed on consent with the Privy Council, such a print would necessarily be partial – not complete. The Walsh supplementary statement, set out in the Privy Council judgment at paragraph 60, is as follows:

... in relation to a person with a 300 millimetre foot, I stated "it is my opinion that a print of about 280 millimetres could be made". That means if a 280 millimetre print were made by a completely bloodied sole of a 300 millimetre foot, then the print must be incomplete to the extent of 20 millimetres. Therefore a portion from the tip of the toes, or the end of the heel, or both, must be missing from the print."  
(Emphasis added)

It seems that Mr Walsh had no trouble with the concept of a "complete" footprint.<sup>131</sup>

252. In a series of experiments that followed the protocol devised by Mr Walsh, but utilising David Bain's actual foot, the defence expert (Dr Sandilands) testified that when she "looked at

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130 Paragraph 156

<sup>131</sup> The Crown Law Office complains, quite correctly I think, that at the retrial the defence tried to ignore Mr Walsh's 1997 tests insofar as six Luminol prints measured smaller than his walking foot. The Crown says "the defence at the retrial prepared a document purporting to be a comparative table of test results but the table excluded those six results which didn't fit the [defence] theory".<sup>131</sup> This is a fair criticism of the Bain defence, but in the description above I do not ignore any of Mr Walsh's results. Nor did Mr Walsh. I am simply relying on the average of all Mr Walsh's results that led him to the conclusion "that a walking person with a 300 millimetre foot making sock prints with the sock completely bloodied would be expected to make a print greater than 280 millimetres" (page 1952). At the same time, on his tests, a Robin-sized 270 millimetre foot averaged 282 millimetres compared to the 280 millimetre print measured by Mr Hentschel. (retrial p. 1984 l. 33)

the Luminol lengths, the 300 millimetre foot deposited a Luminol enhanced mark that was on average [over 22 prints] 306 millimetres long, with a range of 300 to 315 millimetres and the basic conclusion from that is the smallest Luminol enhanced mark the foot made was never less than the actual foot length." (Emphasis added)<sup>132</sup> [Defence exhibits X and Y] In her view, based on results of the tests she conducted, "David Bain's right foot could not have made the complete bloodied sock prints recorded [by Mr Hentschel] at Every Street". (Emphasis added)<sup>133</sup>

253. The Crown Law Office submission criticizes the usefulness in the Walsh and Sandilands tests because:

"There is no evidence that the socks of either David Bain or Robin Bain were soaked in blood (as per experiments) before being completely transferred to the carpet."<sup>134</sup>

254. This is true, but the experiments performed by Mr Walsh and Dr Sandilands took this point into account by making many repetitions of the footprint without replenishing the blood, thereby creating progressively lighter intensities of bloodiness. By the time the Luminol was applied there was so little blood on the test socks that the prints were invisible to the naked eye.

255. The Crown Law Office submission also invokes Mr Hentschel's sweeping statement that

"From the years of experience that I have had in examining scenes, it is my view that the length of the print that I saw with Luminol is less than the actual length of the foot that made the print."<sup>135</sup>

256. A vague reference to "years of experience" is no substitute for actual tests. ("In my experience" is a general, all-purpose statement experts often resort to when caught without data.) The point is that Mr Hentschel admitted that he had never done any scientific tests on this point.

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<sup>132</sup> (Retrial page 3263).

<sup>133</sup> Retrial page 3268.

<sup>134</sup> Crown Law Office Submission Paragraph 85.

<sup>135</sup> Retrial page 1362 lines 24-26

257. I have no hesitation in recommending that the Minister accept the results of the tests of Mr Walsh (who on some points related to ballistics gave testimony quite prejudicial to David Bain) and Dr Sandilands that would, I conclude, attribute the bloodied sock prints to Robin and exclude David.

258. A further curiosity tending to exclude David Bain as the print maker is that Mr Hentschel was quite clear that all six footprints he found were made with a *right* foot. There is no explanation for why no *left* footprints were located. The socks David was wearing when found by the Police on 20 June 1994 were both bloodied as a result, he claimed, of going innocently from room to room in the early morning seeking family members. *Both* his socks, when tested by Mr Hentschel with Luminol, luminesced.<sup>136</sup> **None of the witnesses was able to explain satisfactorily how *if* the prints found by Mr Hentschel had been made by David Bain, only the right sock print on the carpet luminesced.**

259. A further important point, mentioned earlier, is the Police theory that David Bain got his socks bloodied during the early morning hours *before* going on his “alibi” paper route. It seems obvious that were he to have inserted the bloodied socks he was wearing when found by the Police into his Lasers [running shoes] to run the paper route he would have transferred in the process some blood to the inside of the running shoes. The Police seized the Laser running shoes but did not test the inside prior to the 1995 trial and conviction.<sup>137</sup> This drew some criticism from the Police/Policy Complaints Authority Report (1997):

We find no impropriety or misconduct over the handling of David’s shoes or socks but we believe officers were remiss in not sending the Lasers to the ESR for full forensic examination. Relying on a visual inspection during the trial lacked professionalism.

260. This observation apparently prompted the Police to have the inside of the Laser running shoes tested by ESR scientists after receipt of the Police/Policy Complaints Authority Report. When tested, no blood was found corresponding with the pattern on the bloodied socks. Indeed there were no blood stains at all. Dr Cropp of ESR tested a different and older shoe of

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<sup>136</sup> Retrial page 1303; see also Crown Law Office submission p. 25 footnote 76.

<sup>137</sup> See Police/Policy Complaints Authority Report paragraph 292

David Bain's and detected evidence of blood from an earlier injury to his big toe – seemingly unrelated to anything that happened on June 20.<sup>138</sup> Apparently the passage of time would not make it difficult to detect blood if it was ever there. The absence of blood is obviously supportive of David Bain's claim to factual innocence.<sup>139</sup> The Crown Law Office apparently understands its problem, because it argues that maybe David was wearing a pair of older shoes. There is no persuasive evidence to support this conjecture and David Bain denies it.

261. Of course the analysis of the Luminol foot prints, as on other points, is not free of doubt. Mr Walsh made some experiments with David's actual socks which produced variable results, e.g. depending on how they were worn. These experiments are referred to in the narrative of the Crown Law Office submission<sup>140</sup> but are not relied on as part of its argument on the issue.<sup>141</sup> More significantly, these variable results were not said by Mr Walsh to cast any doubt on his test results and the conclusions referenced above.

**(iii) Conclusion on the Luminol print issue**

262. Mr Hentschel's measurement of two 280 millimetre "complete" prints, together with Mr Walsh's tests corroborated by Dr Sandilands and the absence of blood on the inside of David Bain's running shoes, leads me to the conclusion that the footprints were *probably* made by Robin rather than David Bain.

263. I agree that that there must inevitably be some room for error in the Luminol measurement especially in the absence of the physical piece of carpet which Det. Sgt Weir and Mr Hentschel failed to preserve (a point to which I will return). Attempting to measure a blue "luminescence" in the dark does not exactly give rise to laser-like accuracy. Mr Walsh suggested the margin of error was about 5mm. However, it was the prosecution not the defence that put forward the sock print evidence at the 1995 trial to *exclude* Robin as the killer. (The Crown Law Office Submission acknowledges that the prosecution in 1995 "submitted to

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<sup>138</sup> Police/Police Complaints Authority Report paragraph 294

<sup>139</sup> Ibid paragraph 292 "It has been confirmed in the course of our investigation the Laser shoes had no blood on them".

<sup>140</sup> Crown Law Office Submission Paragraph 78

<sup>141</sup> Paragraphs 80 to 89

the jury that the measured footprint excluded Robin Bain”.<sup>142</sup>) As stated earlier, the prosecutor’s own notes made in preparation for his closing address to the jury included the annotation, “there are the [Luminol] footprints – stocking feet – [too] big to be the father’s” (emphasis added). Mr Hentschel’s opinion formed part of the evidentiary basis on which the conviction was obtained that put David Bain in jail for 13 years. It is too late in the day for the Crown Law Office to characterize Mr Hentschel’s methodology as too imprecise to be fit for the purpose of excluding David Bain as the killer. If the methodology was probative enough to help convict him, it is probative enough to help exclude him.

**2. *The Crown Alleges That The Crime Scene Evidence Makes Suicide By Robin A Most Unlikely Possibility. Therefore He Must Have Been Killed By David.***

264. The Bain Submission is that not only did Robin have the stress symptoms of a suicidal individual, but that the physical evidence at the death scene is more consistent with a self-inflicted fatal injury than with a homicide.

**(i) The physical impossibility of suicide?**

265. At the 1995 trial, the prosecution alleged that the appearance of the bullet wound to Robin’s temple, the angle and trajectory of the shot, and the blood spatter evidence, were all factors suggesting that Robin’s suicide was a physical impossibility. Thus the killer had to be David.

266. At the 2009 trial, each element of this argument was challenged. David Bain told the Police on June 20, 1994 that he had not used the gun since hunting the previous summer. He provided the same testimony at the 1995 trial. His evidence was read into the record at the 2009 trial. He told the same thing to me.

267. A key argument concerning the physical impossibility of suicide was about the distance between the gun and Robin’s head. Unless the muzzle of the rifle was in “contact or near

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<sup>142</sup> Crown Law Office Submission paragraph 7 footnote 6

contact,” Robin’s arm would not have been long enough for his hand to have reached the trigger.

268. A complication at the 1995 trial was that the Police armourer testified that the rifle was 20 cm longer than it was. If the prosecution had been correct on that point the trigger would have been beyond Robin’s reach. However the error was exposed by the defence in cross-examination, and the trial judge included the corrected measurements in his instructions to the jury.

269. The only expert who examined Robin Bain’s body was the Crown Pathologist Dr Alex Dempster. He described the gunshot wound to Robin’s temple as “contact or near contact”,<sup>143</sup> noting the slight buffer effect of the silencer fitted to the end of the barrel. His conclusion was based on a close examination of the entry wound. He did not measure the length of Robin’s arms as he ought to have done.

270. Dr Dempster disagreed with the opinion of the two other pathologists who testified for the prosecution at the 2009 retrial, Drs Thomson and Ferris, who both based their analysis on photographs of Robin’s head wound.<sup>144</sup> They contended that a greater distance must have existed between the silencer and Robin’s head. As previously noted, their distance evidence would rule out suicide. Drs Thomson and Ferris agreed that Dr Dempster had the very real advantage of actually seeing the wound rather than trying to interpret photographs.

271. Dr Dempster’s view was confirmed by the belated disclosure of Mr Henstschel that traces of blood were found towards the mouth of the gun barrel, being “blow-black” from the fatal shot. The blood could only have found its way into the barrel of the gun if its muzzle was in close proximity to Robin’s head when the shot was fired. The Crown Law Office correctly notes that the “blow back” would also be consistent with a contact shot fired into Robin’s head by David Bain. However, the immediate point is that the “blow back” evidence seems to refute the evidence of Drs Thompson and Ferris regarding a more distant shot. Moreover, the Crown

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<sup>143</sup> Retrial p 1621/5

<sup>144</sup> The failure of Dr Dempster and the Police to preserve the surrounding skin was in violation of the Detectives’ Manual which provides that in relation to homicide cases where there is a bullet hole, that the officer in charge is to ensure that the skin around the bullet hold is cut out by the pathologist and kept for testing. (Retrial page 1174)

Law Office acknowledges that the relevant literature reveals “unsurprisingly, [the Crown’s choice of word] the literature shows that contact wounds are likely indicative of suicide rather than homicide.”<sup>145</sup>

**(ii) Was Robin kneeling in prayer?**

272. The prosecution theory was that Robin was shot execution style while on his knees in prayer. There seems little evidence to support this view of a daily prayer routine. David Bain seemed to recall his father’s habit of sitting in the lounge reading the morning paper. The prosecutor’s theory of a prayer ritual seems to be based on a sighting some years earlier by Mrs Barbara Neasmith. Her evidence is not very strong. At the 1995 trial she said she was confused because she had seen various media portrayals of the event, and she described Robin on the one occasion she did see him in 1991 as *sitting* with his head in his hands.<sup>146</sup> At the retrial, she thought perhaps he was *sitting* on a beanbag with his elbows on his knees.<sup>147</sup> David Bain also recalls his father sitting rather than kneeling<sup>148</sup> but whether he was reading, praying or simply contemplating it was difficult to tell.

**(iii) Blood spatter on Robin’s shoe**

273. “Blood spatter” on the *top* of Robin Bain’s right shoe (apparently missed by Mr Hentschel) suggests that Robin cannot have been kneeling on both knees. The defence expert, Dr Manlove, considered that the blood spatter patterns on Robin Bain’s track pants from the fatal shot suggests that his right leg was bent at right angles at the knee. In Dr Manlove’s view Robin was probably standing with his right leg on the chair and with his head inclined to the left, the rifle barrel against his head and the gun stock resting on the chair. In that position, even Dr Dempster conceded (although he kept to his original view that suicide was less likely than homicide) that Robin could have reached the trigger and killed himself.

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<sup>145</sup> Paragraph 176

<sup>146</sup> Privy Council record 0863

<sup>147</sup> Retrial page 2646

<sup>148</sup> Bain interview p. 54 at 25-30

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, um, either sitting on the bean bag or in one of the chairs, the lounge chairs, um, comfortable chairs that are in, arm chairs, sorry.

**(iv) The Curious Placement of the empty 10 shot magazine**

274. An important element of the prosecutor's argument against suicide (and a point which found favour with the Court of Appeal) is that an empty 10 shot magazine was found close to Robin Bain's dead right hand on the carpet resting on its narrow, slightly convex edge. The Crown Law Office says it is unlikely such an object randomly dropped would wind up on its narrow edge. Police reconstruction tests support this conclusion. The position of the magazine was more consistent with deliberate placement than with a natural fall from Robin Bain's dying grasp.<sup>149</sup> I accept this to be so, but the issue resolves into the usual question – whose placement, Robin's or David's?

275. The curious placement of the magazine on the convex edge rather than on its flat side does not help in determining whether it was Robin or David who did it. Curious or not, either man could have done it.

276. The Crown Law Office Submission acknowledges that "*it is of course possible*" that Robin placed the magazine on the floor prior to committing suicide<sup>150</sup>, but the Crown Law Office cannot think of a "logical reason for his doing so" (ibid). But there is no "logical reason" suggested for David Bain doing so either.

277. The Bain argument is that the magazine must have been placed on the floor before Robin's death because in order to make the fatal shot Robin must have switched the empty 10 bullet magazine for the loaded 5 bullet magazine. Each of the 10 bullets was accounted for elsewhere in the house. When the Police seized the gun it was fitted with a smaller 5 shot magazine. It was a bullet from that 5 shot magazine that killed Robin. The Bain team theory is that Robin put down the empty 10 shot magazine on the floor as he fit the smaller 5 shot magazine to the rifle in preparation for suicide.

278. Contrary to the view taken by the Court of Appeal in 2002, I do not regard the evidence of the standing empty magazine as pointing decisively at David. In my view the placement,

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<sup>149</sup> Crown Law Office Submission paragraph 190

<sup>150</sup> Crown Law Office Submission paragraph 192

curious as it is, excludes neither David nor Robin. It is neither inculpatory nor exculpatory of either man.

**(v) The bouncing empty shell casing**

279. The Police located an empty shell casing in the computer alcove of the lounge where, on the prosecution's theory, David had concealed himself awaiting his father's arrival. The shell indicated, in the Police view, that the shot that killed Robin was fired from inside the alcove and is inconsistent with Robin in the lounge shooting himself.

280. The photographic evidence however, showed that there was an opening in the curtain and a gap between the curtain and the floor. The prosecution conceded that the gap would have permitted projection of the empty casing from the lounge into the computer alcove. This issue is, in my view, neither inculpatory nor exculpatory.

**(vi) Evidence of the misfed bullet**

281. The scenario proposed by the Crown Law Office is rendered even more difficult to accept if the bullet found in the lounge beside Robin had been misfed, as the defence expert Mr Phillip Boyce testified.<sup>151</sup> The Crown disagrees with Mr Boyle's analysis,<sup>152</sup> but if Mr Boyle is right Robin would hardly have waited patiently for David to clear the misfeed so he could be shot at again.

**(vii) Conclusion on the suicide issue**

282. I accept the Submission of the Crown Law Office that it is not possible to make definitive findings on every issue surrounding Robin's death. However, once it is conceded on the evidence, as the Crown Law Office now concedes (and properly so in my opinion) that neither the logistics of suicide<sup>153</sup> nor the ejected cartridge nor the curious placement<sup>154</sup> of the empty 10

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<sup>151</sup> Boyce evidence, 2009 retrial p. 3199 ll. 4-7.

<sup>152</sup> This bullet had been examined by Mr Hentschel prior to the 1995 trial, but he did not refer to it in his report and gave no evidence at the trial relating to his examination.

<sup>153</sup> Crown Law Office Submission paragraph 23.

<sup>154</sup> Crown Law Office submission para 207.

shot magazine<sup>155</sup> excludes Robin taking his own life, the answer to the question whether he probably did so must necessarily turn on a consideration of the other evidence.

283. I note that Dr Thomson, one of the pathologists added to the prosecution roster of experts after the 1995 trial, is reported by the Police/ Police Complaints Authority Report to be of the *“opinion that from the pathology evidence alone, it is impossible to conclude suicide or homicide. This, he believes, has to be considered with the other forensic evidence”*.<sup>156</sup> This seems to me a sensible conclusion.

284. I have found, for reasons already explained, that it is more probable than not that the Luminol footprints were left by Robin in parts of the house that implicate him clearly in the murder of his wife and the younger children. The Crown Law Office no longer contends that Robin could not physically have committed suicide, although it considers it unlikely. That concession, with which I agree, is enough when added to the Luminol prints to keep the David Bain claim to factual innocence alive at this stage of the analysis, in my opinion.

### **3. David Bain’s Fingerprints On The Rifle**

285. The prosecution’s case on this point rested largely on the testimony of ESR fingerprint expert, Mr Kim Jones, who examined the .22 rifle at the crime scene, and subsequently in the ESR laboratory. At both the original trial and the retrial, Mr Jones testified that David Bain’s fingerprints were “positive prints”, by which he meant that blood was already on his fingers when pressure was applied to create the print (rather than a “negative” print which would result if the fingers were applied to blood already smeared on the gun). A “positive” print would undermine any claim by David Bain that he innocently picked up the gun after the wooden stock had already been bloodied.

286. Mr Jones testified to the existence of a good deal of what “appeared to be” blood<sup>157</sup> on the rifle when “visually enhanced” under the polilight (a type of laser). Mr Jones’ expertise at the time with the polilight was questionable, as will be explained. Further, he says, he found no

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<sup>155</sup> Crown Law Office submission para192.

<sup>156</sup> P/PCA Report para 250.

<sup>157</sup> Retrial p. 2272.

blood between David Bain's fingerprints, suggesting to Mr Jones that "the hand had gone down first and has shielded that area from further [blood] contamination."<sup>158</sup> Mr Jones thought the fingerprints appeared recent in origin. He also identified a fingerprint on the silencer as belonging to Stephen. This, on the prosecution's theory, was deposited by Stephen as he attempted to fend off his attacker. This was not disputed by the defence. A number of other fingerprints were also found on the rifle, but they were not sufficiently clear to be positively identified. They may or may not have been Robin's. We will never know.

287. The Bain team concedes that the forestock fingerprints were made by David Bain. The controversy at the centre of this branch of the case concerns the origin of the blood that formed the ridges and valleys of these fingerprints – animal or human?

**(i) The taking of the fingerprints' blood sample**

288. In order to link David Bain's fingerprints to the killings, it was necessary to establish that the blood deposited by his four fingers was *human* blood from the crime scene. It would not be surprising to find animal blood on a hunting rifle. Nor would it be a surprise to find David's fingerprints on David's gun. Human blood elsewhere on the gun, or Stephen's print on the silencer, do not link David Bain to the murders. Such evidence would be equally consistent with Robin as the killer as it would be with the guilt of David Bain.

289. The prosecution's case on the bloodied fingerprints at the 1995 trial was based on a sample which Mr Jones said was taken "in the area" of David's left middle fingerprint. The sample was given to ESR chemist Dr Cropp who expressed the view, based on tests available to ESR in 1994/5, that "the fingerprint" consisted of human blood, although he couldn't say whose blood it was. Despite the testimony of Mr Jones that much of the rifle was smeared with blood, it is only the fingerprint blood that can tie David Bain rather than Robin Bain to the killings.

290. At the 2009 retrial however, a dispute developed between the two ESR scientists, Mr Hentschel and Mr Jones, about where and when this key "fingerprint" sample had been taken. While they agreed that the blood sample had not been sourced in the fingerprint itself (in order

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<sup>158</sup> Retrial p. 2383-4.

to preserve the integrity of the print for fingerprint analysis) but nearby within 5 to 10 mm,<sup>159</sup> there was otherwise disagreement. Mr Jones, relying on an exhibit transfer list, said Mr Hentschel, acting under Mr Jones' direction, took the sample on 22 June 1994 in Dunedin.<sup>160</sup> Mr Hentschel, relying on *his* own note made on 4 August 1994, said the critical sample was taken on 4 August 1994 in Auckland and immediately handed to Dr Cropp for analysis. Dr Cropp confirmed receipt of the sample in Auckland on that day.

291. At the 1995 trial Dr Cropp testified that he subjected the "fingerprint" sample provided to him by Mr Hentschel to the Ouchterlony test, which was the technology available to the ESR in 1994. Dr Cropp acknowledged that the Ouchterlony test shows "generally blood but it can show up sometimes other types of materials from animals."<sup>161</sup>

292. A disagreement also emerged between Mr Jones and Mr Hentschel as to the *location* on the rifle where the sample was taken. Mr Hentschel said the fingerprint that had been taken "closest to the trigger end of the firearm"<sup>162</sup> whereas Mr Jones claimed that on the contrary the "fingerprint" sample had been taken adjacent to the left middle finger print.<sup>163</sup>

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<sup>159</sup> Hentschel evidence to NZCA (2002) p. 112.

<sup>160</sup> 2009 retrial evidence p. 2293.

<sup>161</sup> Dr Cropp, 2009 retrial p 1449 II 5-6

<sup>162</sup> Hentschel evidence, 2009 retrial p 1287 II 5-8

<sup>163</sup> Evidence of Kim Jones, 2009 retrial, p. 2625-6

- Q Now coming back to Mr Hentschel and the 4<sup>th</sup> of August, not only do you disagree with him as to when he took the sample, but you disagree as to where the sample was taken from don't you?
- A. Absolutely not.
- Q. Absolutely not. Well Mr Hentschel says the sample was taken near the v shape on the gun, he says he took it in an area just by the v shape, the serrated v shape on the wooden stock, whereas you say it was taken right by the forefinger don't you – the middle finger, is that right?
- A. Left middle finger.
- Q. That's where you say it was?
- A. That's where I directed him to take the sample from.
- Q. But Mr Hentschel does not say that's where he took it from.
- A. Well –
- Q. He disagreed with you.
- A. - I would say that Mr Hentschel is not a fingerprint expert, I was actually standing beside him and directed him as to where to take the sample from.
- Q. All I am saying Mr Jones is it is another example of you disagreeing with another Crown witness about something, right, agreed?
- A. He is mistaken.
- Q. He is mistaken again. A Crown witness is mistaken, correct, is that what you are saying?
- A. He is mistaken, yes.

293. At the retrial the prosecution expressly invited the jury to disregard Mr Hentschel on this point and accept the testimony of Mr Jones,<sup>164</sup> but the credibility of Mr Jones presented a number of other difficulties for the prosecution including:

- a) At the 1995 trial Mr Jones had explained to the jury that when blood was illuminated under a polilight it “luminesced”. In 2009 he admitted that this was wrong. Blood does not “luminesce” under a polilight; blood absorbs light and shows up as dark. It is the background that luminesces. When this was pointed out by defence expert Mr Carl Lloyd, Mr Jones said his misstatement to the 1995 jury had been deliberate. He said he intended to convey the picture “in layman terms to the jury so that they would understand”.<sup>165</sup> He could not explain why he thought “luminesced” was an easier concept for the jury to grasp than “dark”. An alternative explanation is that at the time Mr Jones was not very expert with polilight technology.
- b) His testimony conflicted not only with Mr Hentschel but with Dr Cropp, Crown’s forensic biology expert as well:
  - Q. But do you understand generally that you do disagree with the Crown’s own evidence. One example being Hentschel, another being Cropp, just to start two of them, do you understand that?
  - A. They are mistaken.
  - Q. They’re mistaken?
  - A. They are.
  - Q. Well this meant to be the Crown case Mr Jones, not the defence. So the Crown case is mistaken, is that what you’re saying?
  - A. Those particular gentlemen are mistaken.<sup>166</sup>
- c) In his 1995 testimony Mr Jones testified that he had “chemically enhanced” the print of David Bain’s left forefinger as part of his analysis. However, in 2009, once a defence expert had seized on the potential problems created by chemical enhancement, Mr Jones changed his testimony to say that the print had only

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<sup>164</sup> Prosecutor’s closing address to the 2009 jury, p. 64 II 6-14

<sup>165</sup> Jones evidence 2009 retrial, p. 2610 I 30 to p. 2611 I 17

<sup>166</sup> See Jones’ evidence 2009 trial p. 2611 . 25 to p. 2612 I 4

been “visually” enhanced<sup>167</sup>. I find it difficult to believe a trained expert would mix-up “chemical enhancement” e.g. with superglue, (sometimes used by fingerprint analysts) and “visual enhancement” i.e. with a polilight.

294. As a result of the disagreements among Mr Hentschel, Dr Cropp and Mr Jones, who was relatively new to the job in 1994, we don’t really know where the alleged “fingerprint” blood sample was taken from, or when, although clearly it was from somewhere close to the fingerprints in question.

295. Fortunately, further ESR work after the 1995 conviction shed better light on the problem.

**(ii) DNA testing of the “fingerprint” blood sample by the ESR**

296. In 1997, as a result of inquiries by the Police/Police Complaints Authority, Dr Sally Ann Harbison of the ESR took fresh samples “from a reasonably large area encompassing the whole area of the prints” (retrial page 2545). In other words, her samples (unlike Mr Hentschel’s sample) incorporated the actual ridges of blood constituting the fingerprint itself. In her first test of the fingerprint samples Dr Harbison was “unable to detect the presence of human DNA”.<sup>168</sup> She then attempted to “clean up and concentrate” the sample<sup>169</sup> but the second test was declared “unreliable” and to be “ignored”<sup>170</sup> because of contamination or “operator error”.<sup>171</sup>

**(iii) Testing by the Victoria Forensic Science Centre**

297. The prosecution’s case on the fingerprints and the “shielding” issue accepted Mr Jones theory that the murder weapon was smeared with blood of some description. Once Dr Harbison had done her analysis, she prepared a diagram indicating 10 relevant areas on the rifle that showed potential blood staining. Her diagram, together with the rifle were provided to the

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<sup>167</sup> Jones evidence 2009 retrial p. 2610 | 30 to p. 2611 | 17 2622

<sup>168</sup> Dr Harbison explained at page 2540 that “I was unable to detect the presence of human DNA. There are alternative reasons for that, either it was not present or the DNA is present in too small amount for it to be detected or it may be degraded to the point that it can [sic] be detected.” (Retrial page 2450); Retrial page 2540.

<sup>169</sup> Evidence before NZCA (2002): JCPC page 1216.

<sup>170</sup> Retrial p. 1218.

<sup>171</sup> Retrial p. 1219.

Victoria Forensic Science Centre in Melbourne. The 10 relevant areas identified by Dr Harbison were tested for the presence of human blood by Dr S.J. Gutowski, a DNA expert, and Mr Nigel Hall, a bloodstain expert. On 12 August 1997 they conducted a “strong oblique lighting test” but no bloodstain were detected during the preliminary examination. More detailed work was conducted in October 1997 on each of the 10 areas identified by Dr Harbison with the following results:

- Area 1 reddish brown staining that appeared to be blood, but neither DNA analysis nor the Ouchterlony test could confirm “the presence of human blood”
- Area 2 no blood detected
- Area 3 no blood detected
- Area 4 same as area 3
- Area 5 reddish brown staining – using DNA analysis and the Ouchterlony test “the presence of human blood could not be found”
- Area 6 “no blood detected in this area”
- Area 7 “presence of blood could not be confirmed”
- Area 8 using DNA analysis and the Ouchterlony test “the presence of human blood could not be confirmed”
- Area 9 reddish brown staining that did not appear to be blood using DNA analysis and the Ouchterlony test “the presence of blood could not be confirmed”
- Area 10 “no blood detected in this area”

298. The report of the Victoria Forensic Science Centre signed by Mr Hall concludes with the statement that “I was unable to detect any bloodstains or apparent bloodstains on any other areas of the rifle” (p. 2244). The full report is found in the Privy Council Record at pp. 2239 to 2246.

**(iv) Testing by Dr Arie Geursen**

299. Dr Geursen, the defence expert, tested part of the blood sample obtained by Dr Harbison's laboratory and concluded that "the only reasonable explanation is that the DNA extracted from the fingerprint on the rifle is not of human origin."<sup>172</sup> The Crown says Dr Geursen was inadvertently provided with contaminated material and therefore his tests were not valid.

300. How the ESR came to supply the defence expert with a contaminated sample that rendered his work useless was not explained. Dr Geursen concluded that:

*24. There is incontrovertible experimental evidence that Dr Harbison did extract DNA from the fingerprint material on the rifle. The amount and the fact that it was amplifiable are such that if it was of human origin it should have yielded a positive result with the ACES kit. In my opinion, based on this scientific data, the only reasonable explanation is that the DNA extracted from the fingerprint on the rifle is not of human origin. (emphasis added)*

301. The Privy Council was clearly perplexed by the analysis of the Court of Appeal of this issue. In its decision dated 16 December 2003 the Court of Appeal had thought it to be:<sup>173</sup>

*"A powerful inference that the existence of David's fingerprints in the small area on the rifle which was otherwise uncontaminated with blood, establishes that the fingers which deposited the prints were in position at the time when all the other blood came onto and was spread throughout the rifle ... This aspect of the evidence, on its own, comes close to being conclusive of David's guilt. It is an almost irresistible inference that his prints must have been placed on the murder weapon contemporaneously with the murders".<sup>174</sup> (emphasis added)*

302. The Court of Appeal later referred dismissively to the tests done by Dr Harbison and Dr Geursen and concluded:<sup>175</sup>

*"In these circumstances we are of the view that nothing of moment has been raised to cast doubt on our earlier discussion of this topic which demonstrated, for the reasons there set out, that from a practical rather*

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<sup>172</sup> Evidence of Dr Geursen, JCPC Record p. 2262.

<sup>173</sup> In passages reproduced by the Privy Council at paragraph 95

<sup>174</sup> Court of Appeal para 62.

<sup>175</sup> Para 135.

*than a scientific point of view, David's fingerprints were almost certainly deposited on the fore-end of the rifle contemporaneously with the murders".*

303. The Court of Appeal added in paragraph 168:

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

(These extracts from the Court of Appeal were reproduced at paragraph 95 of the Privy Council judgment.)

304. The Privy Council did not agree with the Court of Appeal on the "rifle fingerprints" issue and the disagreement contributed to the appeal being allowed. The Privy Council stated at paragraph 112 that:

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

305. The 2009 jury eventually heard all the evidence, as envisaged by the Privy Council, including cross-examinations. An acquittal followed. I agree with the Court of Appeal's observation that David Bain's fingerprints – ***if they had been shown to be in human blood*** – would have been highly probative of David's guilt. However, the DNA testing is inconsistent with that conclusion.

306. I do not agree with the Court of Appeal that doubts about the fingerprint issue can be dismissed as a sideshow of “confused and uncertain science”, or that scientific issues ought to be decided “from a practical rather than a scientific point of view”. The prosecution has taken the position since 1995 that David Bain’s fingerprints on the rifle were imprinted in human blood.

307. The Crown Law Office contends that just because no human DNA was detected doesn’t mean no human DNA was present. This may be so, but it is the Crown that is making the positive assertion that David’s fingerprints were impressed on the murder weapon in human blood. Dr Harbison’s DNA evidence is a good deal more reliable and sophisticated than the older generation of blood typing techniques employed in 1994 and 1995 by Dr Cropp. The Bain position is that the sinister inference sought to be drawn from the “positive fingerprint blood” is simply wishful thinking on the part of the prosecution.

308. I find it inexplicable that the defence expert Dr Geursen was provided with a contaminated sample on which to do his work. We will never know what Dr Geursen’s test would have shown had he received an uncontaminated sample.

309. The evidence of Dr Harbison and the Victoria Forensic Science Centre is the best we have. Despite its frailties, Dr Harbison’s work in particular, holds that no human DNA was detected in the actual fingerprint blood. The fact her second test was compromised is not David Bain’s fault. I must rely on the best evidence I have. On a balance of probabilities, I conclude that the prints are not in human blood and that David Bain is entitled to succeed on this issue as well.

**(v) Absence of Robin’s fingerprints on the gun**

310. While it is true that none of the fingerprints on the gun could be positively identified as Robin’s, Mr Jones located a number of prints which, being incomplete or unclear, he was unable to identify. These partial prints may or may not have been made by Robin. We do not know.

311. It seems counter-intuitive to conclude that if Robin committed suicide there would not be fingerprints capable of positive identification somewhere on the gun. The defence expert testified that it is quite common in cases of gunshot suicide *not* to find fingerprints of the individual who killed himself. The Crown Law Office points out, quite correctly, that this conclusion is based on studies dealing with “latent” fingerprints (i.e. deposited in sweat not blood). Nevertheless, in light of the contest of expert testimony on this point and the other evidence pointing to Robin as the killer, I am not persuaded that the absence of identifiable prints positively attributable to Robin on the rifle is fatal to David Bain’s claim to factual innocence.

**4. Did David Bain’s Hand “Shield” Parts Of The Gun From Blood Spatter, Indicating His Presence At The Killings?**

312. The Court of Appeal considered practically conclusive of David Bain’s guilt the blood-stained condition of the rifle generally coupled with the uncontaminated area between David’s fingerprints, suggesting to that Court that his hand had been in position *on the rifle* contemporaneously with the murders. The Privy Council disagreed with reliance on this reasoning primarily on the grounds of fairness:

*“... it is not a point on which (as distinct from the fingerprints themselves) prosecuting counsel relied in his closing address to the jury, it was not one of the 12 main points of the Crown case which the trial judge listed at the outset of his summing-up and it is not a point which the judge drew to the jury’s attention in the course of his summing-up. There is no reason to think that this point was in the jury’s mind at all. The relevant evidence has not changed. Whatever the merits of the point may be, it can hardly be fair to rely on it for the first time on appeal 8 ½ years after the trial.”<sup>176</sup>*

313. The “shielding” issue was renewed at the 2009 trial. The defence was that any blood illuminated by Mr Jones’s polilight was essentially on the metal barrel, not on the wooden forestock where David Bain’s fingerprints were located. In addition, the defence expert Dr John Manlove testified that there was no other blood in the area of David’s fingerprints. In his view the whole premise of a “shielding” argument was false. As stated, the analysis of the Victoria

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<sup>176</sup> JCPC Judgment paragraph 117

Forensic Science Centre was to the same effect. In the result I do not believe this evidence contradicts the other evidence relied on by David Bain to establish factual innocence.

**5. Timings And Opportunities: Was David Bain Out Of The House On His Paper Route When The Murders Took Place?**

314. The prosecution's theory was based on the proposition that David Bain re-entered the house after his paper route but before Robin came in from his sleep in the caravan. The prosecutor's notes from his closing address to the jury in 1995 stressed the significance of the issue. It was, he declared, "**Imp[ortant] – He [David] was back in the house before the computer was switched on**".<sup>177</sup> Thus, it was alleged, David, not Robin, turned on the computer and either immediately or at a later time typed in a fake suicide notes

315. The evidence shows however, that the computer was turned on **before** David was seen re-entering the house at about 6.45 am.

316. The Crown Law Office submission mocks the defence theory as requiring Robin Bain to have killed himself in the space of a few short minutes<sup>178</sup> but it is not at all part of the Bain case that Robin was necessarily dead by the time David entered the house at 6:45 am. As I see it the likely chronology derived from the prosecution witnesses is as follows:

**5.45:** David Bain leaves to do his paper route.

**6.43:** The time the computer was turned on as established by the prosecution's expert.

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<sup>177</sup> JCPC Record, p. 1520

<sup>178</sup> Crown Law Office submission, para 60.

- 60. After the computer was switched on, a further 44 seconds elapsed before anything could be typed into the word programme. Accordingly, on the applicant's version, his father had no more than about 136 seconds to:
  - 60.1 Type the "suicide note";
  - 60.2 Get into the awkward position he adopted to shoot himself including, presumably, balancing the 10 shot magazine on its convex edge on the carpet;
  - 60.3 Clear a misfeed;
  - 60.4 Turn the light on and off as required (the applicant told Police the light in that room was off when he got home);
  - 60.5 Re-establish his original position and shoot himself.

**6.45:** David Bain is seen “squeezing” between the gate and the hedge of 65 Every Street by the prosecution witness Mrs Denise Laney, who noted the time by reference to her car clock (whose accuracy was later checked by Police).

**6.43 to perhaps 7:05 am:** Robin’s window of opportunity to commit suicide

**From 6.45 onwards** David Bain is in the house doing various tasks. He then returns to his room, discovers ammunition on the floor where it had not been when he left an hour earlier, finds his gun missing from his wardrobe, goes from room to room upstairs and downstairs in search of his mother and siblings and sometime after 7 am opens the door to the lounge and finds his father’s body.

**7.10:** David Bain, in a state of acute distress – to borrow the Privy Council’s expression – calls the emergency services.

317. The other elements of the prosecution case (to recapitulate) were that:

- (a) David Bain got home from his paper route earlier than usual;
- (b) Having ensured that he was seen by potential future defence alibi witnesses along the way;<sup>179</sup>
- (c) In time to switch on the computer before Robin entered the house after a night’s sleep;
- (d) Used the computer to write a fake suicide note designed to pin the blame for the murders on his father;
- (e) Awaited Robin’s arrival from the caravan;
- (f) Secreted himself in the computer alcove beside the lounge; and
- (g) Shot his father in his temple as Robin knelt in prayer.

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<sup>179</sup> Crown Law Office submission para 56.

318. By way of further support the Crown Law Office notes David Bain's statement to the Police that he had put on the washing machine *after* returning home. The Police testified that they did not hear the machine operating when moving about the house around 7.30 am. Assuming the wash cycle took an hour (denied by David Bain) David Bain must either: (1) have committed the murders, put his bloodied clothing in the washing machine and started it **before** leaving on the paper route, or (2) arrived home early, before 6.20 am, and at that time started the one-hour wash cycle. Either way, the Crown Law Office says he was home in plenty of time to turn on the computer at 6.44 am.

319. In support of the "four before, one after" theory, the Crown Law Office says that Robin simply could not have done in the hour or so while David was on his paper route all that was necessary to locate and load the gun<sup>180</sup>, commit four murders, botch a clean-up, change his clothes and do everything else to enable him to "get himself dead" in time to be discovered by David on his return trip up the stairs from Arawa's room around 7.00 am.<sup>181</sup>

320. If Robin could not do what had to be done in the hour or less when David was out on his paper route then he cannot have been the killer.

321. It will be remembered that David Bain told the Police that on the morning of 20 June 1994 he did his paper route in the usual way, returned home and took off his red sweatshirt, running shoes and Walkman, went downstairs as usual to put on the wash, returned upstairs within a few minutes only to find his mother – and subsequently his sisters and brother – and lastly his father – dead.

322. David Bain denies using the computer anytime on 20 June. He told the Police he had last used it "before the 27<sup>th</sup> of May."<sup>182</sup> Robin was considerably more computer literate than

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<sup>180</sup> Robin could hardly have taken the gun **before** David left for his paper route. The gun was in the bedroom where David was asleep.

<sup>181</sup> The prosecution put the point this way to the 2009 jury:

But, just think about whatever time [Robin] came into the house, let us suppose he woke up early. Earlier than the 6.30 that his clock said, as he must do to get into the house to do what he has to do in order to be dead by the time David returns home from his paper run. There is no doubt that the killer, whoever [he is] had not envisaged that there would be a delay in proceedings in Stephen's room. The killer undoubtedly did not envisage that he was going to have to fight in the way that the killer had to fight with Stephen.

But nonetheless the killer has to come in and kill Laniet, Margaret, Stephen and Arawa. What order, we will never know.

<sup>182</sup> David Bain statement to the Police, 20 June 1994 at p. 393.

David. He used the computer in connection with teaching at the school. David and his siblings used it largely for occasional computer games.<sup>183</sup>

323. It therefore becomes necessary to examine the evidence on the following contested points:

- i. What time was the computer turned on?
- ii. What time did David Bain arrive home?
- iii. What importance can be attached to the fact that the Police did not hear the washing machine when they first went around the house at 65 Every Street?

**(i) What time was the computer turned on?**

324. The prosecution's expert at the 1995 trial was Martin Cox, an independent computer scientist on the faculty at Otago University. I rely on his evidence to establish that the computer was turned on at 6:43 am on June 20. Martin Cox was called to the crime scene on Tuesday, 21 June. Mr Cox arrived at about 14.05 pm. He examined the Bain family computer in the presence of Det. Sgt Kevan Anderson. The "suicide note" was still on the computer screen. Mr Cox's evidence was that the temporary computer file containing the suicide note possessed its own internal stopwatch (the "system clock"). He initiated a "save" procedure at 14:16 (according to Det. Sgt Anderson's watch), performed the required key strokes to "save" the message (not timed by Det. Sgt Anderson), and then deliberately crashed the computer. By this procedure, he derived an elapsed time of "31 hours and 32 minutes after the computer had been turned on the previous day, June 20."<sup>184</sup>

325. In fact, as will be discussed below, Det. Sgt Anderson's watch was belatedly checked for accuracy as Mr Cox had requested but not until seven days later. At that time the watch was found to be running two minutes fast. This adjustment, had it been disclosed to Mr Cox, would have modified the computer start up time from 6.44 am to 6.42 am on 20 June 1994. Mr Cox

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<sup>183</sup> *Ibid* p. 393.

<sup>184</sup> 1995 trial record page 134

was not advised of this error nor was the 1995 jury. The Court of Appeal decision of 15 December 2003 held that, “the Crown should have ensured the correct position [6:42 am] was brought to the jury’s attention”.<sup>185</sup> The Privy Council stated: “It is now clear that the jury should not have been told as a fact that the computer was switched on at 6.44 am.”<sup>186</sup>

326. For present purposes it is unnecessary to dwell on the “two minute error”, as it was factored into the time calculation at the 2009 re-trial. (It is an element however of the Police lack of due diligence discussed in relation to the “Extraordinary Circumstances Discretion” in Part Two of this Report.)

327. At the 1995 trial Mr Cox’s evidence was as follows:

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

328. This was not correct. Det. Sgt Anderson had not recorded the precise time of the “save” operation at all even though the “save” time was the key to this whole timing exercise.

329. At the 2009 retrial Mr Cox agreed in cross-examination that in fact the “save” operation would only have taken a few seconds to accomplish after the 14.16 start-up:

- Q. ... You type “message” and you go Enter, Enter. And once you’ve done that, a very small delay and its saved to the hard disk?
- A. Yes.
- Q. So you’ve achieved what you set out to do once you’d done that?
- A. Yes.
- Q. It’s now saved.<sup>187</sup>

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<sup>185</sup> NZCA judgment paragraph 106

<sup>186</sup> JCPC Judgment paragraph 108

<sup>187</sup> 2009 retrial p. 683, ll. 5-10.

330. It was then put to him that a defence expert would be called to testify that he performed the save operation in 15 seconds while “trying not to be too fast”. Mr Cox was asked whether he wanted to dispute this and he said:

A. ...15 seconds to complete the operation seems reasonable assuming you have the name “message” already set.<sup>188</sup>

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Q. ... When you told the first jury that you did that [i.e. the save operation occurred] at 1416, I want to be fair to you and say, that was quite a reasonable thing for you to have said to them because we’re only playing around with 15 seconds, it would not be unreasonable for you to say, I saved it at 1416. Do you see that?

A. Yes.

Q. I’m not trying to trap you in this, and I’m not trying to accuse you of misleading the jury, you told the jury emphatically, **I saved it**, these are my [sic] words, at 1416, correct?

A. Yes.

Q. And what you’re saying today is, that that could have been done within 15 – might have been done as fast as 15 seconds. That is correct?

A. Yes, that’s correct.

Q. And therefore it was pretty fair to tell the jury 1416, correct?

A. I believe so.<sup>189</sup>

331. In re-examination Mr Cox extended the time it took him to “save” the file from 15 seconds to “perhaps a minute after beginning”<sup>190</sup> (i.e. 14.16 plus a minute equals 14.17 on 21 June which, working backwards, produces a computer start-up time of 6.43 am on 20 June).<sup>191</sup>

## (ii) The “pretty odd” evidence of Maarten Kleintjes

332. The Police Complaints Authority Joint Inquiry subsequently mandated an ESR computer expert, Mr Maarten Kleintjes, to review Mr Cox’s computer timing evidence. Mr Kleintjes identified a number of variables, including the two-minute error of the Anderson watch as well

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<sup>188</sup> *Ibid.* p. 394, ll. 20-25.

<sup>189</sup> Cox cross-examination, 2009 retrial, p. 694 l. 20 to p. 695 l. 14. See also Crown Law Office submission para 40-41.

<sup>190</sup> *Ibid.* p. 702 ll. 13-17.

<sup>191</sup> The Crown Law Office says it doesn’t matter when the computer was switched on. What matters, it now says, is when the “suicide” message was typed, a fact which is not now capable of determination. Nevertheless, the Privy Council recorded in its judgment that at the 1995 trial “the judge reminded the jury that it was one of the Crown’s key points that the computer had been switched on at 6.44 am, just after David had returned home” (para 64) (Emphasis added)

as other deficiencies<sup>192</sup>, the different elapsed times it might have taken Mr Cox on 21 June to perform his various operations on the computer. According to Mr Kleintjes, factoring in all of these variables could shift the critical time either earlier or later, within a range of 6.39.49 to 6.49.11 am.

333. Mr Kleintjes did not favour either the earlier or the later of these times. Either extreme, he said, would require all of the variables to coincide in pushing the time to the earliest limit or the latest limit, an unlikely event which he compared to rolling sixes on dice 20 times out of 20.<sup>193</sup>

334. At this point, however, Mr Kleintjes disappoints. Having quite sensibly identified a number of variables not known to or not taken into account by Mr Cox, he was unable to offer any sort of probability analysis about which direction the 6.42 am figure should be shifted, or by how much. Instead he took his two “impossible” extremes (2009 trial p 766 ll. 15-26) and simply split the difference between 6.39.49 am and 6.49.11 am to produce a compromise figure of 6.44.30 am (which the prosecution tried to dignify with the phrase “median logic.”)<sup>194</sup> “Splitting the difference” may be acceptable for lawyers haggling over settlement of a personal injury claim, but such an approach ought not to be dressed up as “median logic.” No doubt Mr Kleintjes did not strike a more persuasive balance because the information provided to him simply did not permit a more precise response. At the Court of Appeal hearing in October 2002 Mr Kleintjes approach was described from the bench as “pretty odd.”<sup>195</sup> And so it was.

335. In the absence of more helpful assistance from Mr Kleintjes than just splitting the difference between what Mr Kleintjes himself described as two impossibilities, and recognising as I do that there are clearly potential inaccuracies in the computer start-up timing, the best

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<sup>192</sup> Retrial evidence page 730

<sup>193</sup> Ibid page 767

<sup>194</sup> Closing address p. 25

<sup>195</sup> JCPC record page 1149

evidence we have is Mr Cox's corrected time of 2.16 pm plus one minute, or 2.17 pm, which, establishes a computer turn on time of 6.43 am on Monday, 20 June.<sup>196</sup>

336. The computer turn on time was one of the key points in the prosecution's argument for a conviction in 1995, but as stated earlier, the Crown law office now says it really doesn't matter when the computer was turned on. I disagree with the Crown Law Office on this point. If Robin was up and about in the house prior to David's return from his paper route, and if it was Robin who turned on the computer, it is scarcely imaginable that David Bain could have ambushed his father with a "contact or close contact" shot to Robin's forehead. There was no sign of a struggle in the front lounge, and the Crown Law Office does not even attempt an explanation of how David, holding a rifle, could have peacefully manoeuvred his father into a position on the carpet to be executed.

337. If the computer turn on evidence was important enough to be "one of the Crown's key points" in sending David Bain to prison for 13 years, it is equally probative now that the computer evidence appears, on the whole, against the Crown Law Office's position.

338. I conclude that the evidence, such as it is, establishes on the balance of probabilities a 6.43 am computer turn on time being the number put forward by Mr Cox at the 2009 retrial.

**(iii) What time did David Bain arrive home?**

339. The evidence advanced by the prosecution established that David Bain arrived home at 6.45 am on 20 June.

340. Although a number of witnesses were called to testify about seeing David Bain at various points on the paper route on the morning on 20 June 1994, the only witness who could place him at his garden gate was Mrs Denise Laney who worked at the Karitane Rest Home further up the steep hill on Every Street. She testified at the retrial that she had driven past the Bain house on her way up the hill at 6.45 am and saw "the paperboy squeezing through the

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<sup>196</sup> The Crown Law Office now suggests that at the 2009 trial "Mr Cox appears to be confused about what he told the 1997 (PCA) review team", (submission para 34) but that, I think, is not the point. The issue is not what he told the P/PCA team, but his evidence in 2009 that he wished to move his time estimate forward one minute from 2.16 pm to 2.17 pm. The key is his reference point of 2.16 pm – not what he told or didn't tell the PCA people more than a decade earlier.

gate ... he had a yellow [*Otago Daily Times*] bag".<sup>197</sup> She did not know his name but he was "tall and thin" which describes David Bain.<sup>198</sup> In a statement to the Police dated 27 June 1994 she fixed the time of 6.45 am by reference to the digital clock in her vehicle which read 6.50 am but which she said, and the Police later confirmed, was five minutes fast.<sup>199</sup>

341. The 1995 jury was alive to the importance of the issue of the time of David Bain's return home. One of its four questions was to have Mrs Laney's evidence re-read.

342. Another witness at the rest home, Mrs Tania Donaldson (formerly Clark) also saw the paperboy (recognised by the yellow bag) entering the bottom of Every Street from Heath Street. In her initial statement to the Police on 20 June 1994 she said her sighting was at 6.45 am, which would place David Bain at home several minutes later than 6.45 am (allowing time for him to walk up the steep Every Street hill). Unlike Mrs Laney, she did not check a watch or clock, and at trial was uncertain of the time she saw the paperboy.<sup>200</sup>

343. Again, the Crown raises a number of different arguments as to why Mrs Laney's 6.45 am time should not be taken as accurate, and if it is, why it should bear little or no weight. However, it is the best evidence we have. Ms Laney's 6.45 am time was established with reference to a clock, and the accuracy of the clock was checked and verified by Police. If they did not exercise due diligence in that exercise (as will be discussed in Part Two), their failure should not be visited on the head of David Bain. I accept a "gate" time of 6.45 am. If anything the time might have been later. I recommend that 6.45 am be accepted as correct.

344. On this point the Joint Report of the Police/Police Complaints Authority states:

We find the time was determined as accurately as possible and that nothing was done to improperly or unfairly impact upon David Bain. We do not accept there was any attempt to falsify or distort timings.

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<sup>197</sup> Retrial page 2142 lines 5-30.

<sup>198</sup> Retrial page 2147 lines 17-20.

<sup>199</sup> As will be discussed, the Police/Police Complaints Authority report notes that there is "uncertainty over the accuracy of the watch of the Police officer who checked the vehicle clock." It is hard to explain how a Police officer charged with verifying the accuracy of the vehicle clock would not verify the accuracy of his own watch before doing so.

<sup>200</sup> Retrial page 2138.

The problem of this aspect of the case is not Police misconduct. The issue is Police ineptitude. In my interview on July 19, 2012 with Det. Sr Sgt Doyle, he agreed that the Police timing efforts in this case were “amateurish”.<sup>201</sup>

345. Fifteen years earlier the Joint Police/Police Complaints Authority report despite its generally positive review of the Dunedin CIB made a similar observation.

We conclude this section by commenting that the timing of the paper round, the time the computer was turned on, and the duration of the washing machine cycle were all very important aspects of the case. We emphasise the necessity for accurate time measures to be kept and made in criminal investigations. (para. 132)

346. I don't agree with Joint Report that the Police ineptitude on timing issues did not “unfairly impact upon David Bain”. Timing evidence was critical to the defence. It was not properly investigated. It is the responsibility of the Police to collect the evidence. The best evidence they have is Mrs Laney's time of 6.45 am.

347. The Crown Law Office now argues that:

“If Ms Laney's evidence is to bear the substantial weight placed upon it by the applicant then it must, as submitted, include the speculative assumption that the applicant entered the property only once and did not, for instance, first enter at an earlier point for reconnaissance purposes and later emerge to check the road or footpath for any reason.”<sup>202</sup>

In the absence of any plausible reason why David Bain would be popping in and out of the house at 6.45 am in the morning the suggestion of the Crown Law Office has, in my view, no substance. David Bain denies he did any such thing.<sup>203</sup>

348. Mrs Laney's evidence does not put David Bain in the house until *after* the computer was turned on at 6.43 am. It cannot be said these times are established beyond a reasonable doubt, but in my opinion the sequence of the computer turn on time *prior* to David's arrival home is established as more probable than not. On a balance of probabilities, the computer was turned

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<sup>201</sup> Doyle interview, p. 27.

<sup>202</sup> Crown Law Office Submission – paragraph 56

<sup>203</sup> Bain interview p. 34 ll. 25-31.

on by Robin, ensconced in the alcove of the lounge with the door to the hall closed, shortly before David Bain got home.

349. The Bain submission is that Robin must have shot himself with the rifle (fitted with the silencer) at some point between 6.43 am (when he turned on the computer) and whatever time it was that David returned up the stairs after putting on the washing, went in to his room – then into his mother’s room – then to the rooms of his sisters and brothers – then back up the stairs to the lounge where he found Robin’s body. It is likely that this activity consumed several minutes. The gun was fitted with a silencer. The lounge door was closed. On the evidence, the fatal bullet could well have been fired after David got home.

350. It is tempting to create scenarios, as did the prosecutor, to ridicule the idea that Robin did what he had to do to “get himself dead” by the time David entered the lounge. Yet David Bain has never suggested there was any significant delay between finding his father’s body and calling 111. In my interview with him he testified “I could have been directly out of there [the lounge] and to the phone.”<sup>204</sup> The “missing 20 or 25 minutes” is a Police creation. According to David, when he saw his father’s body, he took the phone from the lounge into his own room to call emergency services. That would place the discovery of his father’s body just prior to his call to 111 at 7.10 am. My view is that, on a balance of probabilities – but not beyond a reasonable doubt – Robin did manage to kill himself in the space of time between the computer turn on time and David’s eventual discovery of Robin’s body in the lounge 15 or 20 minutes later.

**(iv) What importance can be attached to the fact the Police did not hear the washing machine when they first arrived at 65 Every Street?**

351. The Police believed the Bain washing machine on the regular “full” cycle would take about an hour to run a “full cycle”. David Bain’s initial statement to the Police was that in his experience the full cycle varied between 45 minutes and an hour.<sup>205</sup> The Crown Law Office argues that if, as David Bain claimed, he started the laundry after he returned home at 6.45 am,

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<sup>204</sup> Bain interview p. 51 ll. 3-5.

<sup>205</sup> He repeated this variable timing in my Bain interview p. 41 ll. 25-27.

the machine would still have been running at about 7.30 am when the Police began to look through the house, yet the Police didn't hear it.

352. Accordingly, the jury at both trials was invited to conclude that David Bain must have put on the laundry *before* he went on the paper route at 5.45 am, which fit the revised prosecution theory of how the murders occurred ("four before and one after") and reject David Bain's evidence that the red sweatshirt retrieved by the police from the wash was worn that morning on his paper run.

353. The washing machine was 10 or 12 years old and "well used."<sup>206</sup> The wash cycle was initiated by a turn and push mechanical dial system and there is the possibility (nothing more) that on 20 June David Bain inadvertently initiated a less than full cycle.

354. At the retrial the Crown called Mr David Preston, a Dunedin washing machine repair man, who was familiar with the Bain machine. He had given it something of an overhaul a couple of years earlier despite telling the Bains that the machine was so old that even the essential repairs would be so expensive as to make no sense. He urged them to buy a new washer. The Bains decided to keep their old machine. At the request of the Police Mr Preston performed tests on 25 June 1994 on the longer "superwash" cycle and concluded that the wash cycle of the Bain machine took 25 to 30 minutes plus the time required to fill with water.<sup>207</sup> The fill time varies with the water pressure, he said, which in that area of Dunedin is "unusually high". However, at the time of the attempted reconstruction he remarked that for some reason the pressure was unusually low (p. 987 l. 22) and in at least one test the tub filled "very slowly" (p. 986 l. 32). This would have the effect of extending to an unusual extent the test time taken to run a complete cycle.

355. Det. Sr Sgt Doyle advised me that he considered the washing machine evidence to be one of the most compelling elements of the case. (As in the Sherlock Holmes story, *Silver Blaze*, where the significant fact was that the dog *didn't* bark.) Nevertheless, I would be cautious in treating an old washing machine as a type of stopwatch. There was no reason for the Police to

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<sup>206</sup> 2009 retrial p. 978 ll. 14.

<sup>207</sup> Retrial page 989 lines 15-20.

be on the look-out for washing machine noise as they moved through the house. They did not descend immediately to the basement on arrival. They first of all “cleared” the upper floor of potential dangers. David Bain says he used the shorter “normal” cycle not the “supercycle” and the old turn and push dial mechanism could have been set even lower. Mr Preston was not asked by the prosecutor about David Bain’s evidence of the variability of the wash cycle between 45 minutes and an hour (caused, presumably, by variations in the fill time). A cycle of 45 minutes would have finished about the time the Police got to the laundry room.

356. In light of the other evidence, I am simply not prepared to accept that an antiquated washing machine establishes that David Bain turned it on before he left to do his paper route at 5.45 am. I agree that this issue is not free from doubt. Few issues in this case are. But the probabilities favour David Bain, in my opinion.

357. At the retrial Mr Preston testified that the reconstruction “took a lot longer than I expected to be honest... in the normal sequence of events the machine would have taken about 40 minutes” (p. 981 l. ll. 9-22)

## **6. *The Palm Print on the Washing Machine***

358. In his examination of the laundry area, a “faint” palm print was identified on the washing machine. Mr Jones did not note in his initial examination that this print was reddish [bloodlike] in colour, but later work identified the palm print as David’s and likely it was blood. David Bain told the Police when first interviewed on 20 June that he had put on a load of “dark” clothing in the washer on his return from the paper route. It is common ground that clothing included the bloody outer clothing worn by the killer – including (possibly) the socks and (definitely) the green V-necked sweater which matched fibres found under Stephen’s finger nails. While David Bain did not notice the blood on the dark clothing in the dimly lit laundry (as already noted, one of the detectives later went to turn on the light in that room only to discover the light was already on), it is no doubt likely that in handling clothing with blood on it some of the blood came off on his hands, which likely transferred to the washing machine when he touched it. He says he did not wash his hands *after* putting on the laundry, so some blood

from the load of clothing must have persisted there for some time to a greater or lesser extent. The evidence is not exculpatory but nor do I find it inculpatory in light of David Bain's acknowledged handling of the bloodied "coloured" clothing in the laundry basket and the likelihood of innocent transfer.

## **7.     *Ascertaining The Time Of Death***

359.   The evidence does not disclose with any precision the timing of the Bain family deaths on June 20. The best (and not very scientific) evidence we have is that of the experienced Chief Ambulance Officer for the Otago region, Mr Craig Wombwell, who examined the bodies at around 7.40 am, and described them as still warm, albeit Robin warmer than the others.<sup>208</sup> All of this on a morning described by Mrs Donaldson, the rest home worker, as a "real cold, icy, frosty morning."<sup>209</sup> The supposition that Robin died last is consistent with the sequence required by the murder suicide theory.

360.   Mr Wombwell described even Stephen's skin as cool but still somewhat warm to the touch despite the fact Stephen was more or less unclothed as he lay in the unheated house.

361.   Stephen's warmth, to the extent it persisted, is consistent with murder occurring *after* David left the house at about 5.45 am.

362.   The appearance of the *wounds* also suggested to officer Wombwell that the deaths were recent. He testified with respect to an earlier statement he gave to the Police:

Q.     *And then you said, "My thoughts were that the wounds were relatively fresh", agreed?*

A.     *Yes.*

Q.     *And then you said, "I would have thought that they would've died within the last hour to an hour and a half, especially Robin Bain", is that what you said?*

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<sup>208</sup> Officer Wombwell's disposition of 4 October 1994 states in part: "I noted, as I said before, that the first deceased male (Robin BAIN) I checked was still very warm. I would estimate that he had only died within the last hour. The other bodies were also still relatively warm but the first male was considerably warmer than the other bodies" (JCPC record page 57).

<sup>209</sup> Retrial page 2132

- A. *I don't remember precisely but yeah that's my understanding of – yeah, in my experience of .22 bullets to the head, yes.*<sup>210</sup>

363. The guesstimate of “within the last hour to an hour and a half” would put the timing very approximately at between 6:10 and 6:40 when David Bain was out of the house on his paper route.

364. The core body temperature cools more slowly than the temperature of the skin and core body temperature measurements are therefore thought to give a more reliable indication of the time of death. The Crown pathologist Dr Dempster had arrived at 65 Every Street around 9.00 am prepared to take core body temperatures but Det. Sgt Weir was concerned about disruption of the crime scene and did not permit him to enter the house for several hours at which point Dr Dempster concluded no useful information would be obtained from taking delayed body core temperatures.

365. I put little weight on the evidence of timing of the deaths but the evidence, frail as it is, favours David Bain, in my opinion.

**8. *The Crown Relies On David Bain's Admission That He Heard A "Gurgling" Noise From Laniet's Body As Proof That He Was The Murderer***

366. David Bain's evidence was that *“when I went into her [Laniet's] room, I heard groaning type sounds muffled by what sounded like water. Turned on the light, they came from her. Went over to her but could see there was nothing I could do. I didn't touch her”*.<sup>211</sup>

367. The prosecution alleges that David Bain's admission of hearing what became known as the “gurgling” sound means Laniet was still alive when he approached her and this admission points to him as the killer. This position was endorsed by the Court of Appeal which held that “the new evidence concerning Laniet's gurgling could not lead a reasonable jury to have a

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<sup>210</sup> Retrial page 361 lines 20-27

<sup>211</sup> Crown Law Office Submission paragraph 332

reasonable doubt either” (para. 168). The Privy Council’s disagreement on this point formed part of the basis of David Bain’s successful appeal and a new trial.<sup>212</sup>

368. The basic facts are not in dispute<sup>213</sup>:

- a) Laniet Bain suffered a shot to her cheek, a shot which all pathologists agreed would not have been fatal, and after which she would still have been breathing and possibly conscious and capable of organised movement.
- b) She had inhaled a large amount of bloody fluid deep into her airways and lungs.
- c) She suffered two other shots, both of which destroyed vital parts of the brain and were likely to be immediately, or almost immediately, fatal.
- d) There were complex blood smears on Laniet’s palm and her bedding, suggestive of movement after the initial shot.

369. Prior to the retrial, the Crown pathologist, Dr Dempster, expressed misgivings about the significance of the “gurgling” sounds. Following the 2007 Privy Council decision, he wrote to a Crown prosecutor in Dunedin, Mr Robin Bates, an email<sup>214</sup> to express his concerns about aspects of the Crown’s medical evidence “prior to any decision concerning a retrial”, as follows:

*Dear Robin [Bates]*

*Before any decision is made with respect to a retrial or otherwise for David Bain I feel that I should raise with you, a component of my evidence in the original trial, on which events subsequent to the trial have influenced my opinion.*

*It is as to whether Laniet could have continued to have respiratory activity [i.e. the “gurgling issue”] at the time when David returned from his paper round. Assuming the alternative proposition that Robin was the killer, one would have to allow 15 minutes or so for him to have cleaned up after the shooting.*

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<sup>212</sup> Privy Council Judgment para 113: The trial jury was encouraged to regard David’s evidence of Laniet’s gurgling as a clear indication of his guilt. “The evidence before the third Court of Appeal revealed a sharp conflict of opinion as to the order in which the shots were fired at Laniet’s head (arguably relevant to the congestion of the airways and the likelihood of gurgling) and the phenomenon of post mortem gurgling. Without hearing any of these witnesses and without giving any reason for discounting the evidence of the witnesses relied on by David, the Court of Appeal found it possible to regard the issue as concluded in the Crown’s favour by its further evidence. But the evidence of Professor Ferris is the subject of sharp expert criticism”. [para 113]

<sup>213</sup> See Crown Law Office submission page 87.

<sup>214</sup> Retrial page 1693 defence exhibit N.

*Subsequent to the first trial, I was the pathologist in the case of a motor vehicle crash in Kaikorai Valley Road. In that case the driver of the vehicle suffered an injury which almost completely transected the lower brain at a point below where Laniet suffered, what I believe, was the fatal gunshot injury. The victim in the crash was reported by the ambulance officers who attended the case, about 15 minutes after it occurred, to be making a few gasping respirations when they arrived at the scene.*

*As a result of this case, I do not feel that I can express a firm opinion that Laniet could not have been heard to have been making gurgling noises at the time David returned from his paper round. It is impossible to determine conclusively the precise effect on the nervous system of any single gunshot wound unless it completely destroys the medulla or hindbrain.*

*At the time of the trial I felt that prosecuting counsel, as reported, placed a greater emphasis on this point than I would have preferred on the basis of my evidence. I did expect, however, that my evidence, which I assume was scrutinised by the defence pathologist from the Victorian Forensic Institute, would have been challenged, if he saw any issues in it to which he took exception. Similarly other pathologists who had scrutinised my evidence in reviews of the case have not, to my knowledge, raised specific concerns.*

*For what it is worth it is my opinion that a lot of the scientific evidence which was presented, not permitted to be presented (such as ESR report on the spatter pattern on the curtain) or subsequently raised as issues by the defence (such as the length of Robin Bain's arms), should also be critically reviewed prior to any decision concerning a retrial.*

*Sincerely,*

*Alex Dempster*

*(Emphasis added)*

370. Dr Dempster's reservation about whether Laniet's body could still have made a "gurgling noise" at the time "David returned from his paper round" was borne out at the retrial by a defence witness, Mr Ray Pritchard, who worked in a mortuary facility associated with Otago Medical School.<sup>215</sup> He gave the following anecdotal experience:

*"During the course of my work, there were many occasions on which I experienced the phenomenon of gurgling noises emanating from dead bodies. In my experience this has happened particularly when there has been a collection of fluid and or gases in the lungs which escapes and makes gurgling noises, sometimes spontaneously but more often when the body is moved."*

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<sup>215</sup> Retrial page 2996

371. Further evidence was given by Robert Murray Cooper who in 2009 had been with St John's Ambulance for about 30 years, and who was one of the ambulance officers called to the Bain house on the morning 20 June 1994. He testified as follows:

- Q. *With the recent dead have you had any experience of bodies making noises after they're dead?*
- A. *In my experience, there are times where gases in the body, the bowel may make noises yes.*
- Q. *How long after the death can that occur, in your experience? From what you've seen and observed yourself?*
- A. *Those that I've observed is probably within half an hour, to an hour after the death.*
- Q. *Is this when the body is moved or when the body is still stationary?*
- A. *It can certainly happen when the body is moved, but it can certainly happen when the body is stationary.<sup>216</sup> (Emphasis added)*

372. An anecdote to similar effect was provided to the 2009 jury by Dr Peter Ross, a forensic chemist who had been with the Police Forensic Services Department at Melbourne since 1977 (called by the defence in relation to gunshot evidence). Dr Ross' recollection concerned his examination of the body of a woman approximately one hour after she had committed suicide. He testified:

*"... as my back was turned, I was – I was the only one in the room apart from a trainee and the trainee was watching what I was doing and nobody else in the room and [I heard] "hurgh". We both turned around, I went straight out of the room and said, "are you sure she's dead she just groaned", and the doctors in the ER said "it happens". Nobody touched her. As I said, there were two of us in the room, the groan, quite unequivocally came from the deceased. The doctors in the ER were able to calm me down enough to say "she's dead. Don't worry, it happens."*

- Q. *And from the time of your callout, you understand that was within an hour of her being declared dead?*
- A. *It was approximately one hour.*

373. David Bain says he started his paper route around 5.45 am. He would have been in Laniet's room sometime after 6.45 am on his return. If the murder had taken place within an

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<sup>216</sup> Retrieval page 3075

hour of his return, the gurgling evidence would indicate that she must have been killed after he left on the paper route. On the “four before one after” theory, David’s encounter with Laniet’s body would have occurred after more than an hour, which is outside the “gurgling” period suggested by the witnesses.

374. One must be cautious, of course, in extrapolating from such anecdotal evidence a conclusion about Laniet’s time of death. My point however, is that in light of the revised view of Dr Dempster, and the collective evidence of mortuary worker Ray Pritchard, the ambulance para-medical Robert Murray Cooper, and forensic chemist Dr Peter Ross, I do not believe the “gurgle” evidence assists the Crown Law Office’s position, much less does it deliver the knockout blow contended for it by the 1995 prosecution.

#### **9. Crown Reliance on David Bain’s Physical Injuries**

375. When examined by the Police surgeon, Dr Thomas Rankin Pryde, starting at 11.20 am on 20 June, David Bain had a number of scrapes and bruises that he could not explain. The Crown Law Office makes the positive assertion that these injuries were the result of a fight between David Bain and his brother Stephen at the time Stephen was killed.

376. My impression from looking at the photographs of David Bain taken on 20 June 1994 is that the severity and importance of these injuries has been rather exaggerated. Dr Pryde himself was somewhat dismissive of what he found, speaking of a “superficial graze” and “superficial scrape,”<sup>217</sup> except for a bruise on the right temple which he stated was “roughly” 10 hours old -- Dr Pryde chose to describe it as a “whack” on the head – and a loss<sup>218</sup> of skin from an abrasion on his left knee.<sup>219</sup>

377. The prosecution argued that great force would have been required to overcome Stephen’s resistance, and that David Bain at 22 was a bigger and stronger man than Robin at 58. There is something to this. However, Robin was an active outdoorsman in good physical shape. More importantly the prosecution theory is that the struggle began with a serious

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<sup>217</sup> JCPC page 611

<sup>218</sup> Crown Law Office Submission paragraph 282

<sup>219</sup> Crown Law Office Submission paragraph 282

gunshot wound to Stephen's hand – the bullet then grazed his scalp – suffered as he raised his arm to fend off the attack, which bled profusely. Stephen was fighting with one good hand and a profusely bleeding scalp wound, and no doubt in excruciating pain. He would have been a severely handicapped opponent.

378. As to David Bain's "whack" on the head, the evidence relied upon by the Crown Law Office is that while being attended to by the ambulance men and Police officers at the scene, David Bain complained about a pain on the right side of his forehead. None of the Police officers present noticed any head injury until 8.47 am, when an officer observed what appeared to be a grey greenish bruise about the size of a 50 cent piece in that area<sup>220</sup>. When questioned on 20 June by the Police, David Bain said immediately "*I can't remember anything that would've done it except when I blacked out [he had fainted in his bedroom after the Police arrived]. I don't know how I got the skin off my left knee either.*"<sup>221</sup> (emphasis added)

379. The only explanation offered by the defence was that after David Bain fainted to the floor he was pulled out from where he had fallen between his bed and a dresser, by Constable Leslie Norman Andrew, who reported in his statement of 22 June 1994 that:

Once [David] had fallen back I rushed in and dragged him back from where he was. I dragged him to the end of the bed and placed him in the recovery position on the floor. (emphasis added) (p. 3)

380. The Bain submission is that in this process David "must have" collided with the furniture beside the bed. I put "must have" in quotation marks because how precisely he was "dragged" is pure conjecture. Cst. Andrew does not remember the details.

381. Cst. Andrew did not note the existence of any bruise *before* the fainting episode, and acknowledged that he would not have noticed a collision between David Bain's head and furniture due to the "speed of the event."<sup>222</sup> This may indicate that the discoloration had not emerged until 8.47 am or so because it had just been suffered during the earlier fainting spell.

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<sup>220</sup> JCPC page 602

<sup>221</sup> JCPC page 398

<sup>222</sup> Crown Law Office Submission paragraph 279;

382. The ambulance officers did not report any bruise on David Bain's forehead at the initial encounter in his bedroom around 7.30 am.

383. The bruise was certainly visible by the time David Bain was examined at 11.00 am or so by the Police surgeon, Dr Pryde, who later purported to pinpoint it at "roughly" 10 hours old, within a time range between seven and 13 or 14 hours. He assigned a similar time to a scraping of skin from David Bain's knee.

384. Dr Dempster refused to associate himself with Dr Pryde's pinpoint timing of the injuries<sup>223</sup>. He did not believe bruises could be aged with such precision. I will have more to say about Dr Pryde below. For the moment it is sufficient to note that the other pathologists were so critical of Dr Pryde's purported "pinpoint timing" of the bruise that the prosecutor did not have Dr. Pryde put forward this evidence in 2009. Instead his evidence was changed to say the bruise was "recent".

385. The Crown Law Office submission goes on to say at paragraph 284 that "there was also evidence of livid scratches across [David Bain's torso]." These were said to have been observed by a prison officer, Mr Thomas Samuel, who strip searched David Bain following his arrest on Friday, 24 June. Mr Samuel described seeing scratch marks and bruising around the right shoulder area towards the chest, consistent, he said, "with clawing or grabbing through clothing."<sup>224</sup> (Emphasis added) Mr Samuel's evidence did not come to light in 1995, but the Crown Law Office says "very similar marks were also described by David's friend, [ ... ], who observed them on Wednesday, 22 June."<sup>225</sup>

386. I don't know how the Crown Law Office can say "very similar". There are no photographs recording either what Mr Samuel claims to have seen or what [ ... ] saw. She drew a sketch but it is not very informative. [ ... ] described what she saw as

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<sup>223</sup> JCPC pages 856-7

<sup>224</sup> Retrial pages 2410-11

<sup>225</sup> Crown Law Office Submission paragraph 285

more of a slight graze “like what you would see if a kid fell off a pushbike and grazed their leg.”<sup>226</sup> This would make it compatible with the “faint and drag” episode with Cst Andrew.

387. Words like “livid” and “clawing” and “grabbing” are highly emotive, and indicative of obvious wounds. Yet no such scratches or marks were noted by Dr Pryde, who as stated was nothing if not meticulous in recording any injuries or blemishes during his 20 June strip search. I doubt if he would have missed “livid scratches” as described by Mr Samuel (who as stated had not testified at the 1995 trial).

388. The original police hypothesis was that the piece of skin found in Stephen’s room might have come from David’s knee. It was taken by Chief Inspector Robinson to Australia for DNA testing on the eve of the 1995 trial. Had it proved to be David’s, of course, and been consistent with the knee injury, the evidence would have been highly probative of guilt. But DNA testing confirmed that the piece of skin found in Stephen’s bedroom came from Stephen himself.

389. On the whole, therefore, the evidence of David Bain’s injuries are of little probative value. It certainly does not link David in any convincing way, to a fight with Stephen, although once again I am speaking only of probabilities – not beyond a reasonable doubt.

#### **10. *Blood Smears on David Bain’s Person and Clothing***

390. The prosecution alleged that one of the stronger strands in the “rope” of intertwined circumstantial evidence against David Bain was evidence of bloodstains found on David Bain’s clothing. I agree with the Crown Law Office on the importance of this point.

391. There is no doubt that David Bain’s shirt had on them some “smears” of Stephen’s blood. “Smears” or “stains” are the result of transfer rather than direct exposure, as Dr Cropp explained in relation to David Bain’s shirt:

Q. As a person understanding bodily fluids, can you tell us what a blood smear is?

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<sup>226</sup> [ ... ] evidence 2009 retrial p. 2374 l. 25-30.

A. Yes, a blood smear is where something with liquid blood has actually come in contact with another surface and caused the blood to smear onto that surface and transfer.

Q. Would it be fair to say that blood smears occur where there is movement of a surface with another surface with wet blood?

A. That's correct.

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Q. You would agree with me that really this is a light smearing on the fibres of the fabric, on the outer fibres of the fabric that we see there, correct?

A. Yes that's correct.

Q. That would be consistent, wouldn't it, with the shirt brushing against a bloodied surface?

A. Yes either the shirt coming in contact with the surface or the surface moving on to the shirt yes.<sup>227</sup>

392. When first seen by the Police, David Bain was wearing a white t-shirt (with the insignia "Queen's Baton Relay Run"), a pair of black rugby shorts, and a pair of white socks.

393. The t-shirt had several blood "smears" or "stains". In 1997, Dr Harbison analysed this blood as coming from Stephen.<sup>228</sup>

394. There was a small bloodstain on the seam of the front crotch area of the black rugby shorts. The stain was "faintly" visible under the polilight. Again, the 1997 tests of Dr Harbison confirmed this blood was Stephen's.<sup>229</sup> However, according to Dr Cropp "*it was on the outer surface of that material?*" "*Yes*" "*Its consistent with a smear,*" "*It could be, yes.*"<sup>230</sup>

395. I have already rejected the argument that the socks were the source of the 280 millimetre "luminesced" sock prints described by Mr Hentschel. It is implicit in that finding that the blood on David's socks is accounted for by innocent transfer from other objects in areas of the house already smeared with blood. Innocent transfer may also account for the blood stains found on David Bain's clothing.

396. That having been said, there is force to the submission of the Crown Law Office regarding the trace of blood on the seam of the crotch of the black rugby shorts. The question

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<sup>227</sup> Dr Cropp evidence, 2009 retrial pp. 1481-1482

<sup>228</sup> Retrial pages 2534-5

<sup>229</sup> Crown Law Office Submission paragraph 157

<sup>230</sup> Dr Cropp evidence, 2009 retrial p. 1482.

is whether the concern created by this item of information has enough force to displace the other elements of proof that tilt the balance in favour of factual innocence.

397. I do not think that it does.

398. In the first place, no one contests the presence of bloodstains or smears on the clothing David Bain was wearing when found by the Police on the morning of 20 June.

399. Second, it strikes me as curious why David Bain, if he was the killer, would not have earlier disposed of the clothing he was still wearing when the Police arrived. On the Police theory, he had plenty of time and opportunity to do so. Why, in particular, would he not have put this clothing in the wash before leaving on his paper route?

400. Third, given the great amount of blood generated by the fight with Stephen, the amount of blood discovered on David Bain's clothing is too minimal to have been directly exposed to the fight. The Crown Law Office seeks to explain this by speculation about an "outer" layer of clothing, but the fact the green sweater was found in the wash is not equivalent to being found on David Bain. No one suggests the sweater belonged to him and it is too small for him. David Bain denied changes of clothing from the time he got up to do his paper route until the time the Police arrived two hours later except to take off the red sweatshirt on his return at 6.45 am.<sup>231</sup>

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<sup>231</sup> Bain interview at p. 104 l. 27 to p. 105 l. 14:

- Q. ...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, 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 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.

401. Fourth, the experts are agreed that the blood is “smeared” on the clothing. It did not originate from airborne blood spatter or blood dropping or spraying directly onto the clothing from an open wound.

402. Fifth, if David Bain wore the green V-necked sweater over his t-shirt, one might expect more blood on the t-shirt above the “V” yet no blood was found in that location. I do not accept the Crown’s “black skivvy” argument as persuasive.

403. David Bain testified that the clothes he put on when he got up were the clothes he was wearing when he was found by the Police, and that he had never put on the outer clothing as suggested by the Police.<sup>232</sup>

#### ***Who Wore the Green V-Necked Sweater: Robin or David?***

404. At the 2009 retrial all parties recognised that the green V-necked sweater provided an important link to the killer. Senior Det. Sgt Doyle affirmed that fibres of this sweater were discovered under Stephen’s fingernails:

- A. *That is correct, under Stephen’s fingernails.*
- Q. *Those clearly, when they were tested came from a green jersey that was found having been through the washing machine?*
- A. *Correct.*
- Q. *The suggestion is that whoever did the killings wore the green jersey?*
- A. *Correct.*
- Q. *Again it depends of course as to who was wearing the green jersey?*
- A. *Correct.*<sup>233</sup>

405. When Det. Sgt Dunne questioned David Bain on Tuesday, 21 June about the contents of the washing machine David Bain recalled “a green rough knit jersey”. He was asked “whose is that?” David Bain responded “Arawa’s”. He testified at the 1995 trial that the sweater belonged to Robin but stated in my interview with him that Arawa often wore it as she liked “baggy” sweaters. He said Arawa had not worn it recently.<sup>234</sup> At the 1995 trial, David Bain said

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<sup>232</sup> Bain interview p. 37 l. 25 to p. 38 l. 7.

<sup>233</sup> Evidence of Det. Sgt Weir, 2009 retrial page ??

<sup>234</sup> Bain interview p. 56 l. 17.

that the green V-necked jersey belonged to Robin and claimed that Robin had been wearing the jersey over the weekend prior to the murders.<sup>235</sup>

406. The prosecutor suggested to David Bain in cross-examination that he changed his story to deflect blame onto Robin once the link between the sweater and the killings had been established.

407. There is nothing in the evidence that connects either Robin or David to the wearing of the green sweater on 20 June. The absence of evidence of blood on the neck of David's T-shirt in a place unprotected by the "V neck" suggests to me that David Bain is telling the truth. The Crown Law Office then adds the further speculation that the "V" was covered by a "black skivvy", (a sort of high necked garment found in the June 20 laundry load) but there is no evidence David wore the "black skivvy" on June 20 either, and he denies under oath wearing it.<sup>236</sup>

408. In his closing address to the 2009 jury, the prosecution said "It's a loose, baggy jersey. Whether it belongs to Arawa, as David's first account was, or whether its Dad's as his second account was doesn't really matter" (p. 35). Arawa was 5'10" tall and was slightly built. David Bain is 6'4". Robin was about the same height as Arawa but stockier and more muscular, as would be expected of an active individual. At the trial David Bain was asked to put on this sweater (Exhibit 98) in front of the jury. It was seen to be too small. He testified that there was about a six inch gap between the bottom of its sleeve and his wrist.<sup>237</sup>

409. The present question therefore amounts to this: is there evidence that the bloodsmears on David Bain's clothing were the result of wearing the green V-necked sweater in the fight with, and murder of, Stephen?

410. The Bain team says it is not surprising that David Bain had some blood smeared on his clothing resulting from innocent transfer. First, he freely acknowledged that he had handled

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<sup>235</sup> Bain cross-examination, 2009 retrial p. 2692 l. 29 to p. 2693 l. 34.

<sup>236</sup> Bain interview p. 37 ll. 30-31.

<sup>237</sup> Bain interview p. 83 l. 26.

the clothing, including some items that the Police say had blood on them, in the laundry. He says he was unaware of the presence of blood and this activity was completed before he became aware of the killings. Second, some blood must have got on his clothing (certainly on his socks) as he moved through the house after returning from his paper route, and when he touched Stephen looking for signs of life.

411. David Bain's position is based on what he was actually wearing at the time he was located by the Police. If guilty, he might have been expected to change his blood smeared clothing before he left on his paper route or during the prosecution's "missing 20 or 25 minutes" before the Police arrived. The Crown Law Office position depends on David having worn the green V-necked sweater which did not belong to him and was too small, plus a black skivvy and track pants. David denied the pants in the wash belonged to him.<sup>238</sup> There is no reason in the evidence to adopt the assumptions about outer clothing proposed by the Crown Law Office.

412. Accordingly, while of concern to me, I conclude in the end that the clothing evidence does not undermine David Bain's claim to factual innocence. As stated, the blood stains on the clothing are not explained away beyond any reasonable doubt, but I am satisfied on a balance of probabilities that the innocent explanation is more likely than not to be correct.

### **Conclusion with Respect to the Primary Issues**

413. None of the foregoing points are free of difficulty. There are solid evidence-based arguments on both sides. Nothing has been established beyond a reasonable doubt. However, the "extraordinary circumstances discretion" does not require such a high standard of proof. At this stage of the analysis, I believe David Bain has met the lower probabilities standard.

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<sup>238</sup> Bain interview p. 82 l. 11 to p. 83 l. 16.

## CHAPTER IX: SECONDARY ISSUES CONCERNING THE PHYSICAL EVIDENCE

414. I now turn to consider a number of other issues raised by the Crown as standing in the way of David Bain's claim to factual innocence.

### **1. *Do Margaret's Spectacles and Lenses Used on Occasion by David Link Him to the Murders?***

415. The prosecution theory, as mentioned earlier, was and is that David was wearing the spectacles found at the crime scene at the time of the murders, had them knocked off his head in the fight with Stephen, and in the melee the frames sustained damage. In the rush of events, David simply overlooked the need to conceal these items as part of his cover up.

416. The established facts are as follows:

- a) The glasses in question belonged to his mother, Margaret. They were in a "man's" style. They were normally kept in a drawer in her bedroom.
- b) David has used his mother's glasses in the past (when his own were unavailable) to see the black board at class and for watching TV or video.
- c) On the morning of the shootings, 20 June 1994, the Police found in David's bedroom the broken frames of Margaret's glasses, with both lenses missing. The left wire of the frames was slightly damaged.<sup>239</sup> The right lens was found nearby in David's bedroom. It was "dusty". The left lens was nowhere to be seen.
- d) David Bain did say "I can't see" on the morning of 20 June in the presence of Cst van Turnhout,<sup>240</sup> who then noticed the broken glasses on the chair.<sup>241</sup>
- e) Dr Pryde, the Police surgeon, noted a small bruise on David Bain's forehead, but it was on the right side of his head – opposite to that part of the forehead that

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<sup>239</sup> NZCA evidence (2002) of Mr Sanderson, page 1105 lines 23-24

<sup>240</sup> Bain interview p. 74 l. 9, p. 101 ll. 3-6.

<sup>241</sup> Cst van Turnhout evidence, 2009 retrial p. 440 l. 31 to p. 441 l. 10.

would likely have been in contact with the frame when, on the prosecution's theory, the glasses were dislodged in a fight with Stephen.

- f) The left lens was subsequently found on 24 June by Det. Sgt Weir in Stephen's room partially covered by a skate boot and some clothing.
- g) David Bain was (and is) unable to offer any explanation of how Margaret's frames were damaged or how these items came to be located where they were found after the killings.
- h) No one suggests that Robin required use of these glasses. He was far sighted.

417. The "spectacles and lenses" evidence gives rise to a number of contentious issues, but its importance was considered marginal and inconclusive by the Court of Appeal:

"The glasses and lens issue has not featured significantly in our analysis of the strength of the case against David. It does not in any way tend to exculpate David."<sup>242</sup>

418. I agree that the evidence is non-exculpatory. The issue is not free from doubt. It does not strengthen David Bain's claim to factual innocence, but nor on a balance of probabilities does it weaken it, in my opinion, for the reasons which follow.

**(a) Was David Bain wearing his mother's glasses during the weekend prior to the murders?**

419. The critical issue is whether there is any physical evidence that David Bain was wearing Margaret's glasses at the time of the murders on the morning of 20 June 1994.

420. The prosecution alleged that (i) David Bain wore Margaret's glasses on the weekend before the murders and (ii) this fact, together with other circumstantial evidence, gives rise to the inference that David Bain was wearing Margaret's glasses at the time of the murders and (iii) David Bain is therefore the murderer.

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<sup>242</sup> Paragraph 244

421. Several witnesses (including David Bain) were called by the defence to say that David had *not* been wearing the glasses during the weekend before the murders. David Bain reiterated this claim in my interview:

- 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 the 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... the last time I ever thought of using them was months before. I can't be any more specific.

422. However, the prosecutor at the 1995 trial believed he had an understanding with defence counsel Michael Guest, that David Bain would not dispute that he wore Margaret's glasses at some point during the weekend.<sup>243</sup> In the absence of a volunteered waiver of solicitor client privilege by David Bain I am prepared to *assume* (without deciding) that David Bain *did* wear Margaret's glasses at some point during the weekend of 18-19 June 1994.

423. I say "without deciding" because I did not hear the several witnesses who gave conflicting evidence on this point (other than David Bain).

424. I am also prepared to assume that Mr Guest conveyed such an understanding to the prosecutor, Mr Wright with David Bain's agreement, as discussed below in Chapter XXII dealing generally with the lack of a volunteered waiver of solicitor client privilege.

425. Reference should also be made to the Report dated 19 May 2000 prepared for the Secretary of Justice by Sir Thomas Thorp in relation to David Bain's Petition of 15 June 1998 for the exercise of the [Royal Prerogative](#) of Mercy.<sup>244</sup> He interviewed Michael Guest (prior to Mr Guest's disbarment) under the terms of a limited waiver of privilege<sup>245</sup> and concluded that Mr

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<sup>243</sup> Bill Wright evidence to the New Zealand Court of Appeal (2002)

<sup>244</sup> Opinion for the Secretary of Justice re a Petition for the Exercise of the Royal Prerogative of Mercy by David Cullen Bain, Auckland, 19 May 2000, by Sir Thomas Thorp.

<sup>245</sup> The Limited waiver in favour of the Ministry provided as follows:

I DAVID CULLEN BAIN confirm that I waive privilege *only as it relates to the inquiry by the Minister of Justice into the following issues* raised by my petition to the Governor-General for the exercise of the Royal prerogative of mercy:

- *Errors by defence counsel in the preparation and conduct of my defence;*
- *Non-disclosure of certain material by the Police before trial and appeal;*

Guest's evidence against his former client on the issue of wearing Margaret's glasses "provided a stronger case against the Petitioner [David Bain] than was available at [the 1995] trial."<sup>246</sup>

The Thorp Report recommended that there was "no need to consider the question of reference to the Court of Appeal under s. 406" (p 24 para 3.4.2). He clearly put more weight on the glasses and lens issue than did the Court of Appeal on the reference three years later which stated, as mentioned that this issue "has not featured significantly in our analysis of the strength of the case against David" (para 244).

426. In 2009 the prosecution called David's aunt, Mrs Janis Clark, who testified that David had admitted to her on the day after the killings that he *had* worn his mother's glasses that weekend. She had not so testified in 1995, but explained that she was never asked the question.

427. Having assumed in the Crown's favour that David Bain **did** wear Margaret's glasses on the prior weekend, the real question is the strength of the inference sought to be drawn by the Crown Law Office that he was also wearing Margaret's glasses in the early hours of Monday morning when the murders were committed. The strength or weakness of that inference depends on all of the other circumstantial evidence that either supports it or refutes it. In my view the inference is far from inevitable and should be determined, as with other issues in the Bain case, on the physical evidence, not on conjecture.

428. The prosecution called Dr Gordon Sanderson, at the time an associate professor in the Department of Ophthalmology at the Dunedin School of Medicine. He testified that wearing Margaret's glasses would improve David's sight from 75% of normal to 90% of normal. At the same time, Margaret had astigmatism in one eye, which David did not, and the correction for

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- *Unfounded prejudicial allegations by the Crown which were not seriously challenged by counsel; and*
  - Trial by ambush on the part of the Crown.
- This waiver of privilege is only to the extent that you may discuss these matters with officials from the Ministry of Justice, and further that any discussions with officials concerning privileged information shall not be disclosed, in whole or in part, to any other person or the media without my authorization.  
(Emphasis added)

Reproduced from R v Bain [2008] NZCA 585 at para 54. A copy of the actual waiver is attached as Appendix A to this Report.

<sup>246</sup> See Thorp Report at p 16, para 3.2.3.6.

Margaret's astigmatism caused David considerable irritation if the glasses were worn for any length of time.<sup>247</sup>

429. David Bain's evidence is that the sharpness of vision began to deteriorate at about 30cm (about a foot) but that he could see well enough without glasses to play sports and participate in orienteering, which requires the ability to identify markers at considerable distances.<sup>248</sup>

There was a video playing at home on the Sunday evening, June 19, but he sat close to the television set.<sup>249</sup>

430. The prosecution theory is that David Bain's eyesight is so limited that without glasses David Bain could not have seen his victims to murder them with the precision evident in the fatal shots. This issue cuts both ways. If David Bain was *not* wearing glasses this theory would tend to exclude him as the killer. On the other hand, as the prosecution alleged, the presence of the broken frames in his bedroom would remain totally unexplained.

**(b) Did Det. Sgt Weir "plant" the lens in Stephen's bedroom?**

431. The 1995 trial evidence of Det. Sgt Weir regarding the circumstances in which he says he found the left lens in Stephen's room, including the discredited photograph 62, has given rise to a great controversy described in the Privy Council judgment as follows:

"Detective Sergeant Weir told the jury that he had found the left hand lens in a visible and exposed position in which, as is now accepted, he had not seen or found it. His evidence to the jury was more consistent with the Crown's case that the lens had become dislodged during a struggle, than the finding of the lens, covered in dust, under other articles on the floor".

432. Despite the acknowledgement of Det. Sgt Weir to the Joint Police/Police Complaints Authority inquiry in 1997, to the Court of Appeal in 2002, and again at the 2009 retrial, that his

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<sup>247</sup> David Bain's evidence was as follows (retrial pages 2668-9):

On occasions in the past I have worn my *mother's glasses* if my glasses were not available, but only for watching TV programmes, basically that is it or *going to lectures*. I couldn't wear them for extended periods, she had astigmatism... so it was a strain to wear those glasses. *I don't know how those glasses came to be in my room.*

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On the Sunday night without my glasses to get the chips I had no difficulty driving. The street lighting was adequate and Laniet was there. ...it was only one kilometre or so away.

<sup>248</sup> Bain interview p. 29 ll. 1-20.

<sup>249</sup> Bain interview p. 28 l. 5.

interpretation of photo 62 at the 1995 trial was wrong, the Crown Law Office is still asserts at least the possibility that Det. Sgt Weir's 1995 testimony was correct. There is, it says, conflicting testimony on the point.<sup>250</sup>

433. In my interview with Det. Sgt Weir in Dunedin on 19 July 2012 we discussed these events at some length. He stated:

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.<sup>251</sup>

434. There is no credible evidence supporting the "planting" allegation and, as stated earlier, I reject it.

**(c) Absence of any blood or other biological material on the frames or lenses**

435. The extremely bloody conditions of the fight between the killer and Stephen are stressed in the submission of the Crown Law Office and graphically depicted in the crime scene photographs. The source of the blood was described in some detail by the Crown pathologist, Dr Dempster. In his analysis, the first shot to hit Stephen passed through his hand and grazed his scalp *"so it may well have been that Stephen was grappling with the firearm and even had his hand over the end of the firearm at the time of discharge. The bullet passed between the fourth and fifth metacarpal bones on the back of the hand and it didn't strike any of the bones. It just passed through the soft tissue and then it passed along the surface of the scalp ... that's the injury there [indicating a photograph] running along the surface of the scalp. It didn't penetrate the scalp and quite of a lot of bleeding happened from that ... [photograph 15] shows us the bullet passing through the – through the scalp and causing that injury which bled all over the place when the fight was going but it wasn't – the [initial] bullet wound that effectively killed Stephen."*<sup>252</sup> (Emphasis added.)

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<sup>250</sup> Crown Law Office Submission p 60 para 230.

<sup>251</sup> Weir interview p. 76 ll. 25-31.

<sup>252</sup> Retrial pages 1582-3

436. The Crown Law Office Submission says:

“It is an inescapable inference from the quantity of blood in Scene F [Stephen’s room], and the evidence of a struggle, that whoever was the murderer had a large amount of Stephen Bain’s blood on them”.<sup>253</sup>

437. At a later point the Crown Law Office Submission states:

A frantic struggle had occurred in an unusually confined and cluttered area. Numerous items, many of which were bloodstained, were heaped precariously on the bunks immediately above the area where the lens was located and could well have been dislodged.<sup>254</sup>

438. I find it persuasive that despite extensive testing the ERA scientists found no blood or biological material of any description on the frames or lenses. This seriously undermines, in my view, the prosecution theory that they were involved in the bloody struggle and, as part of a botched clean-up, were carried by David Bain back to his bedroom with hands bloodied (according to the police) after throwing off his opera gloves in the struggle in Stephen’s room.

439. The police evidence is clear that the lens found on the chair in David Bain’s room was “dusty”.<sup>255</sup> It had therefore not been washed prior to the arrival of the police as part of the “clean up”. If the glasses had not been washed, it seems likely his hands had not been washed either, which suggests the police theory is wrong.

440. All of this raises the question as to whether these glasses were damaged by means unknown at some earlier time.

**(d) Does the dust on the lens found in Stephen’s room indicate those glasses “had not been worn for some time”?**

441. Dr Sanderson testified that he was told by Det. Sgt Weir that “*we will just ignore the fact that when the lens was found [in Stephen’s room] it was covered in dust*” or words to that effect.<sup>256</sup> Dr Sanderson was asked whether dust on the lens “may have suggested it had not

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<sup>253</sup> Paragraph 151

<sup>254</sup> Paragraph 247

<sup>255</sup> Retrial evidence p. 594 line 21, endorsed by the Crown Law Office Submission at p. 64 footnote 248.

<sup>256</sup> Retrial evidence of Mr Sanderson page 2165

been worn for some time?” And he replied “that’s certainly an inference”.<sup>257</sup> In other words, Dr Sanderson took Det. Sgt Weir to be saying it would help the prosecution if the lens was clear and weaken the prosecution if the lens was dusty. I will return to this evidence in Part Two of this Report.

**(e) Conclusion on the issue of Margaret’s glasses and the dislodged lenses**

442. The Crown Law Office correctly submits that “the applicant [David Bain] is still faced with the unexplained presence of the broken glasses in his bedroom, coupled with his facial and other injuries.”<sup>258</sup> Yes, I agree that the presence of these items where they were found is unexplained, but so is the absence on them of blood, or other biological material. It is the Crown Law Office that makes the positive assertion that the broken glasses and lenses link David Bain to the killing of Stephen. All of the Police witnesses at the scene commented that the house was a terrible mess (as mentioned, one constable described it as a “pigsty.”) The fact David Bain sometimes wore his mother’s glasses is not proof that he did so at the relevant time. The unexplained location of the frames and lenses where they were found in the “pigsty” after the killings is just that – unexplained. The Court of Appeal effectively relegated the “glasses and lens” issue to being probative neither of guilt nor innocence,<sup>259</sup> and I agree with the Court’s conclusion on this point.

**2. Crown Reliance On David Bain’s Opera Gloves Found In Stephen’s Room**

443. Det. Sgt Weir also found two “opera” gloves in Stephen’s bedroom smeared with Stephen’s blood. The Court of Appeal considered the bloodied gloves provided “support” for the guilty verdict (para. 166). The Crown Law Office submits that the only rational explanation for the presence of these gloves is that the killer wore them “to avoid leaving fingerprints”<sup>260</sup>, and that Robin, having decided to commit suicide, had no need for such concealment. Of course in the nature of these events, it cannot be said *when* Robin decided to take his own life. It may have been long premeditated. It may have been in the agony of a killing spree.

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<sup>257</sup> Sanderson evidence (2002) JCPC record page 1105 lines 12-15

<sup>258</sup> Crown Law Office submission para 240

<sup>259</sup> Paragraph 244

<sup>260</sup> Paragraph 258, and see Prosecutor’s 2009 closing address p. 37

444. David Bain has no explanation for how the gloves got to Stephen's room but suggests Stephen could "quite possibly" have borrowed them at an earlier date ("cos he was well-known for coming into, 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.")<sup>261</sup> However the appearance of the gloves in the photographs clearly suggests some involvement in the fight.

445. The important point is that there is no evidence linking the gloves to David at any relevant time except through ownership which, as the Crown properly argued in the case of Margaret's spectacles, is irrelevant. Robin's hand is smaller than David's. A smaller hand can fit in a larger glove.

### **3. *Only David Bain Knew The Location Of The Key To The Trigger Lock Of The Murder Weapon***

446. It will be recalled that one of the three key issues identified by the Court of Appeal as almost conclusive of David Bain's guilt was the key to the trigger lock. The Privy Council disagreed:

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

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<sup>261</sup> Bain interview p. 100 ll. 5-8.

rummaged about among David's belongings to look for the key. It was in a jar on David's desk across the room from where the rifle and the ammunition were kept. The defence contend that this is a place where a searcher might be expected to look and, if he looked, to find it." (emphasis added)

447. There also seems to be a fourth assumption, namely that the spare key was retrieved from the jar on the morning of 20 June. David Bain says he does not recall when he last noticed that the spare was in the jar "it may have been the day prior. It may have been months prior... when I lifted the jar and I may not even have noticed that it was gone."<sup>262</sup> The key might have been taken by Robin a day or some days earlier.

448. At the 2009 trial there was evidence that individuals other than David knew of the location of the spare key. It is apparent (as the Privy Council noted) that Robin had used the murder weapon without David's knowledge on previous occasions to shoot (at least) the 20 spent rounds found in his caravan. He could similarly have had access to it on June 20. When the caravan was searched at least one live .22 shell was found on the top bunk.<sup>263</sup>

449. I do not accept the "trigger key" issue as inculpatory of David Bain.

**4. *The Curious Position Of The Empty 10 Shot Magazine On The Floor Beside Robin's Body Resting On Its Narrow Edge Rather Than On Its Flat Side***

450. This was the second of the three points found particularly persuasive by the Court of Appeal (para. 165) but whose probative value was doubted by the Privy Council:

*"It must be very questionable whether the jury attached significance to this point. The magazine in question was found on examination to be defective. A live round found beside the rifle showed signs of having been misfed. The possibility must exist that, the magazine having caused a misfeed, it was replaced and put on the floor. But even if it be accepted that the magazine was put in the position in which it was found and did not fall into that position, the question remains: who put*

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<sup>262</sup> Bain interview p. 14 ll. 7-8.

<sup>263</sup> Murray evidence, retrial p. 206, Exhibit 154.

*it there? It could have been David. But there is no compelling reason why it could not have been Robin.”<sup>264</sup> (Emphasis added)*

451. The evidence at the 2009 retrial does not improve our knowledge of this issue. I accept the view of the Crown Law Office that it is likely the empty magazine was placed not dropped. However, as the Privy Council noted, the question remains of who placed it. Its position was as consistent with suicide as with murder. The curious placement is therefore neither exculpatory nor inculpatory of David *or* Robin, in my opinion.

### **5. A Misfed Bullet In The Lounge Beside Robin’s Body**

452. The Crown disputes the evidence of a misfed bullet (referred to by the Privy Council in paragraph 118 just quoted) even though it is clear the killer experienced a number of misfeeds at the crime scene – in Stephen’s room and in Laniet’s room.

453. The Police did discover a loose bullet in the lounge close to Robin’s body. The Bain team says this is clear evidence of suicide because if David Bain had been the killer and there had been a misfeed as, according to the prosecution, Robin knelt in prayer directly in front of him Robin would hardly have waited patiently for David to clear the mechanism to allow a second attempt at assassination. The Crown Law Office notes that with a self-loading weapon the “misfeed” occurs after the *previous* shot but this does not advance the argument if, as seems to be clear from the presence of both magazines in the lounge, one of them empty, that the fully loaded 5 cartridge magazine was newly attached to the rifle mechanism and the misfeed occurred in the lounge.<sup>265</sup>

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<sup>264</sup> JCPC at para. 118

<sup>265</sup> The Bain submission offers the following explanation in its response memo dated 25 May 2012 at p. 84

There were five bullets associated with the five-shot magazine in the rifle. The killer bullet, the one on the floor (Exhibit 18) which misfed, one in the breech that automatically loaded after the killer shot, and two left in the magazine.

Exhibit 18 must have been the last one loaded into the magazine. The magazine was full. When the magazine was inserted to the rifle, the breech has to be operated manually to load the first bullet (Exhibit 18).

It did not load properly. It would have to be cleared. It was on the floor right beside the trigger of the rifle on the lounge side of the green curtains.

454. The defence ballistics expert, Mr Philip Boyce, considered the markings on the bullet to be evidence of a misfeed,<sup>266</sup> albeit he agreed the markings were not identical to those found on the bullet misfed in Stephen's room. Mr Walsh of ESR did not believe it was a misfeed. The Crown Law Office sides with Mr Walsh but it offers no credible alternative explanation for a bullet in that condition to be located where it was. On a balance of probabilities I believe this evidence supports the David Bain case.

#### **6. David Bain "Feigned A Fit" On The Morning Of 20 June As Proof Of Guilt**

455. A couple of Police officers and ambulance personnel suggested that on the morning of 20 June David Bain was faking an emotional breakdown to paint himself as a victim rather than the perpetrator.

456. The defence's position is that David Bain did not feign a "fit", but simply fainted, which was not unexpected in the circumstances.

457. Numerous witnesses did not regard David Bain's behaviour as contrived. The undertaker Derrick Hope said, contrary to Bain family members who came and gave evidence against David, that "David was in deep shock, emotionless, zombie like"<sup>267</sup> "he was in even deeper shock on Thursday, still zombie like"<sup>268</sup> and "people act differently in death, there is no set pattern". The Telecom operator Wilblim<sup>269</sup> said there was a lot of groaning and thought the caller "must be on drugs or was drunk". Dr Alex Dempster who saw David Bain before noon on June 20 said "David Bain looked as if he was in a catatonic state, that is frozen in movement and attitude."<sup>270</sup> Constable Stapp said "he was in real distress ... sounding hysterical, particularly after he recovered from fainting" (emphasis added) and Constable Stephen described him as "convulsing and having passed out".

458. Dr Brinded considered that post-traumatic stress disorder (PTSD) explained David's conduct on the morning on 20 June as well as his partial memory loss. Dr Brinded freely

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<sup>266</sup> Boyce evidence 2009 retrial p. 3199 ll. 3-6.

<sup>267</sup> Page 2969

<sup>268</sup> Page 2970

<sup>269</sup> Page 502

<sup>270</sup> Page 1630

acknowledged that PTSD affects perpetrators as well as victims. The point however is that David Bain's "fainting" spell the morning after the killing of his family does not support the suggestion that he was putting on a performance to mislead the investigators.

459. I accept the view that David Bain simply fainted. The whole issue is not of great probative value in any event. Given the conflict of evidence it cannot be said the episode tips the balance one way or the other. I am certainly not prepared to accept the assertion of the Crown Law Office that on the morning of 20 June David Bain "feigned" a fit and otherwise put on an artificial display of emotion designed to dupe the Police into thinking him innocent, as part of an ingenious but incompetent cover-up.

## **7. Robin's Full Bladder**

460. Dr Dempster noted in the post mortem that Robin Bain's bladder contained 400 ml of urine, a normal "overnight collection". The Crown Law Office assumes that Robin would be unlikely to have embarked on a killing spree without relieving himself. However, the expert evidence of Dr Grant Russell, a consulting urologist from Wellington, was that urinary functions are highly variable.

- A. Certainly in some people, many people in fact, 400 mls would create urgency and a need to pass urine. But in many others this is not the case and we've got to consider here an ageing male with an enlarging prostate and I would suggest to you that 400 mls may be well tolerated and may not cause any urgency at all.
- Q. And with an ageing male and with prostate enlargement, what can this functioning level of the bladder be before you have the urge to urinate?
- A. That's an interesting question and certainly in public practice particularly where it's not uncommon to admit ageing men with two, three, four, five litres of urine sitting in the bladder that they're not even aware of... and they're totally unaware of that huge amount of urine sitting in the bladder and the only symptom many of them will complain of is a need to let their belt out because the lower abdomen has distended and the

other symptom they sometimes get is leakage of urine in bed overnight.<sup>271</sup>

461. The defence urology expert of course had not had an opportunity to examine Robin's prostate. The point is just the general one that given the absence of more precise evidence the "full bladder" theory adds little of value to the controversy over David Bain's claim to factual innocence.

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<sup>271</sup> 2009 retrial p. 3599 ll. 17-34.

### **CONCLUSION ON SECONDARY ISSUES**

462. For the reasons given, I do not believe the secondary issues – individually or collectively – help resolve the issue of factual innocence. While creating suspicion and generating numerous theories and conjectures, they fail to connect David Bain to the killings in the manner suggested by the Crown Law Office, in my opinion.

**CHAPTER X: REMAINING ISSUES CONCERNING THE PHYSICAL EVIDENCE RELATED TO ROBIN**

463. The Police were initially of the view based on the scene investigation that this was a case of murder/suicide by Robin. As Det. Sgt Doyle stated:

*“Our initial assessment looking at the situation was that Robin was the killer, so it was on that premise that we looked at Robin”.*<sup>272</sup>

464. However, the Police seem not to have looked very *hard* at Robin. They overlooked sampling, or if sampled failed to test, and if tested then failed to preserve, relevant material from the crime scene.

- i. Failure to record properly the injuries to Robin’s hands. David Bain alleges such injuries were consistent with Robin getting into a fight with Stephen. A defence dental expert said marks on Robin’s fist were compatible with being made by Stephen’s teeth (although this evidence, based on photographs, is necessarily speculative);
- ii. Blood stains on Robin’s hands were either not sampled at all, or were sampled but not tested, and the samples then wrongly destroyed on the instructions of Det. Sr Sgt Doyle;
- iii. Finger nail scrapings from Robin which might if tested have yielded evidence that Robin had been in a fight with Stephen were never analysed, even though they were still in the possession of the Police at the time of the 1995 trial;

465. The Bain team suggests that Robin’s guilt can be inferred from physical evidence at the scene that was *not* tested. I agree with the Crown Law Office that none of this evidence was probative of Robin’s guilt. On the other hand, it underlines the ineptitude of aspects of the 1994 Police investigation and the 1995 Trial preparation.

466. The failure of the Police to even attempt to identify the source of the blood on Robin’s hands, at least to the extent of submitting the evidence to the Victoria Forensic Science Centre,

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<sup>272</sup> Retrial page 163

in 1995 is particularly puzzling in light of the importance of this information acknowledged by Det. Sr Sgt Doyle:

- Q. Come back to the blood samples on Robin Bain's hands. You do agree with me don't you that clearly an explanation was required somehow as to where that blood came from ?
- A. Correct.
- Q. Pardon?
- A. Correct.
- Q. The position today is that we will never know and can never know whether that was Stephen's blood or Laniet's blood can we, we can never know?
- A. Correct.<sup>273</sup>

467. The Crown Law Office says, appropriately enough, that is impossible to know whether "lost evidence" would have favoured the prosecution or the defence. It suggests the bruises and markings had more to do with Sunday gardening than a fight with Stephen (para 265.) The point is that in many instances the evidence that was not tested *ought* to have been tested, and the evidence that was wrongly ordered destroyed by Det. Sgt Doyle on 26 January 1996, or burned in the fire of 7 July 1994, *ought not* to have been destroyed. The Police, having made serious errors of judgment in this regard, are in no position to speculate that the evidence thus destroyed would have been of no consequence, or been of no help to exculpate David Bain.

468. It is apparent that there were serious limitations on the capacity of ESR in 1994 to perform sophisticated blood tests. Det. Senior Sgt Doyle said that in cases where tests were not done perhaps the lack of expertise of ESR (and not a more sinister interpretation) might be the explanation. However prior to the 1995 trial, Chief Inspector Robinson (the officer in charge of the entire investigation) took a number of samples for testing to the forensic laboratory in Melbourne. In particular he took two samples which were thought might provide evidence useful for the prosecution. Chief Inspector Robinson did not take other items of evidence which ESR had apparently found not to be capable of being tested in New Zealand, but which *might* have produced a result in Melbourne, and *might* in that case have helped exonerate David Bain. We will never know. These examples include a blood sample taken from

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<sup>273</sup> Retrial page 127 lines 15-27

Robin Bain's hand (Exhibit 97) and scrapings taken from under his finger nails (Exhibit 51) which if properly analysed *might* have implicated Robin Bain in the murders.

469. If for example (and it is a big "if") the stains on Robin's hands were shown to be in Stephen's blood, then it was conceded by the Crown Pathologist Dr Alex Dempster that this would clearly point to Robin's guilt. Equally, if Robin's nail scrapings could be traced to *any* of the victims, it would point to Robin's guilt.

470. The Crown Law Office submits that the Bain team's "what might have been" submission is all conjecture and speculation. This is true. The point is however that speculation and conjecture would not be necessary if the Police had done their job properly. The potentially exculpatory samples once seized by the Police ought to have been properly tested either by the ESR in New Zealand, where possible, or in the alternative at some larger facility in Australia, such as the Victoria Forensic Science Centre. Further, if the crime scene samples had not been prematurely and improperly destroyed on the instructions of Det. Sr. Sgt Doyle on 26 January 1996, they would have been available for the much more sophisticated DNA testing available before the 2009 retrial.

## **CHAPTER XI: SUMMARY OF CONCLUSIONS AS TO FACTUAL INNOCENCE**

471. In response to the Minister's Mandate letter I conclude that it is more likely than not that David Bain is factually innocent.

472. While the "rope" of circumstantial evidence woven by the prosecution in 1995 and 2009, and still endorsed by the Crown Law Office, was made up of many strands, close examination of each of the strands – one by one – reveals on the whole evidence more consistent with David Bain's innocence than guilt. The better view of the physical evidence, and the supporting testimony of experts called in large part by the prosecution, establishes David Bain's factual innocence on a balance of probabilities, in my opinion.

473. To recapitulate briefly: The foundation of my conclusion of factual innocence lies in the evidence of Robin's footprints in areas of 65 Every Street where, if David was the killer, Robin would not have visited on the morning of 20 June.

474. Secondly, this physical evidence is reinforced by the "timing evidence" related to David Bain's claim that he was out of the house on his paper route when the killings occurred. The timing evidence is flawed by the failure of the Police to set their watches correctly, but taking the prosecution evidence at face value it establishes the sequence of events if not the precise minute when things happened, that puts Robin in the house before David's return and effectively undermine the prosecution's "ambush" theory.

475. Third, the Crown Law Office properly concedes that many of the issues advanced in the 1995 prosecution are no longer tenable, including the impossibility of Robin's suicide by reason of the length of the rifle compared to the length of his arm, the position of Robin's body on the floor of the lounge, the bouncing empty shell casing, and the placement of the 10 shot magazine. Others of the remaining Crown Law Office arguments (e.g. Laniet's "gurgling") are rebutted by the evidence currently available. Still other prosecution issues (especially the fingerprint blood on the rifle, and the blood smears on David's clothing) while raising suspicions, are capable of innocent explanation and do not, in my view, undermine David Bain's claim to factual innocence established on the other evidence. Still other issues such as

Margaret's glasses, the opera gloves and the green V-necked jersey, simply do not connect David Bain to the crime scene in any reliable way.

476. None of the foregoing points are free of difficulty. Nothing has been established beyond a reasonable doubt. Nevertheless, the cumulative effect of the items of physical evidence, considered item by item both individually and collectively, and considered in light of my interview with David Bain on 23 July 2012, persuade me that David Bain is factually innocent of the murder of his parents and sisters and brother as alleged by the prosecution. I recommend that this conclusion of factual innocence be adopted by the Cabinet.

**PART TWO:**

**EXERCISE OF THE EXTRAORDINARY CIRCUMSTANCE DISCRETION**

477. The terms of the Cabinet directive are clear. While proof of factual innocence on a balance of probabilities is a condition precedent to compensation, it is not by itself sufficient to warrant recommendation of an *ex gratia* payment.

478. For ease of reference I repeat the relevant criteria for the exercise of the “extraordinary circumstances” discretion set out in the Minister’s letter to me of 10 November 2011 as follows:

*“Examples of such circumstance include, but are not limited to, serious wrongdoing by authorities – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury. The test of “extraordinary circumstances” is inherently open-ended and the list above cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid.”<sup>274</sup> (Emphasis added)*

479. Clearly, in this case, there is no such acknowledgement of factual innocence by the Crown Law Office, nor is there any “judicial finding of serious wrongdoing by authorities”. I have already rejected as unproven the Bain team submission that Det. Sgt Weir “planted” evidence.

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<sup>274</sup> Paragraphs 39 and 40

## CHAPTER XII: INTERPRETATION OF “SERIOUS WRONGDOING” BY AUTHORITIES

480. The Minister’s letter states, as set out above, that “*failing to take proper steps to investigate the possibility of innocence*” may qualify as “serious wrongdoing by authorities” although not every instance of negligent (as opposed to malevolent) Police failure would justify compensation. Something more is required.

481. It is significant that the Minister speaks of the “possibility” of innocence – not probability. The Police are expected to pursue avenues of investigation that might reasonably uncover evidence probative of innocence – not only those leads that seem to offer a definitive outcome e.g., DNA testing. The Crown Law Office cites *R v. Donaldson* [1995] 2 NZLR 641 as authority for the relatively low standard imposed on the Police to collect or preserve evidence that is inconsistent with guilt for purposes of the *New Zealand Bill of Rights*. Further, in terms of civil liability, the Crown Law Office states that “Police liability in the common law of New Zealand is firmly based on advertent misconduct [i.e. not mere negligence], malicious prosecution or misfeasance”. However, for present purposes, this standard is too stringent. If such deliberate misconduct could be proven a claimant would be entitled to compensation *as a matter of right* in the civil courts – not an *ex gratia* payment at the sole discretion of Cabinet.

482. Secondly, the expression “failing to take proper steps” is a classic description of negligence. I suggest that negligent as well as deliberate state misconduct may come within the Cabinet discretion.

483. Thirdly, the expression “proper steps” invites consideration of procedure not outcome. Even if the “proper steps” would not have yielded results favourable to the accused, a full and impartial investigation is still an obligation owed to every New Zealander. In the present case, for example, the test of blood smears on Robin’s hands, which might have originated with one or other of the victims, was an obvious “proper step” to take. This was especially so when other crime scene samples (but not Robin’s blood smear samples) were taken by Chief Inspector Robinson to Melbourne for advanced DNA testing prior to the 1995 trial. We do not

know what the outcome (if any) would have been, but testing the blood on Robin's hands would certainly have been a "proper step to investigate the possibility of innocence".

484. Fourthly, the Minister's letter states that "claims of extraordinary circumstances have to be considered on their merits on a case-by-case basis, as does the assessment of the interests of justice." My observations are necessarily specific to this investigation and this case.

Whether this evidence signals deeper institutional problems that existed in the Dunedin CIB in 1994-5 may now only be of historical interest.

485. Fifthly, the words "serious misconduct by authorities" ought, I suggest, be interpreted to include consideration not only of the seriousness of what was done (or not done) by state officials but also the gravity of the consequences for the individual who is wrongfully convicted. Some who are wrongfully convicted may spend little time in jail. David Bain spent 13 years. Others may have a high reputation in the community which, despite little or no jail time, will be stigmatized forever by the wrongful conviction. There will always be some members of the community who will refuse to accept the outcome of a prosecution – whatever the outcome. In other cases, the impact on the individual might be minimal.

486. The judgment of the Privy Council dated 10 May 2007 is, in my view, an unmistakable if politely worded condemnation of many aspects of the 1994 Police investigation and the presentation of evidence at the 1995 trial. Too much that the Police ought to have done was left undone and, of even greater concern, too much of what they did discover was not provided to the jury and thereby the jury was misled, according to the Privy Council.

487. Anyone caught up in a situation similar to that confronted by David Bain on June 20 1994 would no doubt expect to be treated by the authorities in a fair, open-minded and careful manner.

488. Although the Privy Council decision was ostensibly based on "new evidence," much of the evidence that demonstrated "an actual miscarriage of justice" could with reasonable diligence have been (and according to the *Detective Manual* should have been) found and evaluated by the Police prior to the 1995 trial. When these oversights and failures were

remedied, to the extent possible, in the case presented to the 2009 jury, David Bain was acquitted.

489. If this interpretation of the Cabinet directive is acceptable, David Bain is not required to prove state criminality, bad faith, ulterior motives or malicious prosecution. It would be sufficient, that David Bain's 1995 wrongful conviction was brought about by an institutional failure on the part of the New Zealand authorities – a failure that constituted a serious and marked departure from the accepted standards of Police investigation of the day.

490. In this particular case, the consequences for David Bain were deeply serious – not only in terms of 13 years of loss of liberty, but of a life that (at 22 years old) never really had a chance to get started.

491. I suggest, respectfully, that a serious institutional failure resulting in a man spending 13 years in prison for crimes he probably did not commit should not be considered to be “in the ordinary run of cases in which appeals have been allowed”.

492. However, in light of the fact that my mandate is to make a recommendation, and that any decision to award compensation will be taken by the Cabinet, **I indicated to the parties at the outset that I would set out in this report the essence of David Bain's catalogue of allegations of “extraordinary circumstances” even in respect of matters where I disagree with him, and provide my commentary of agreement or disagreement.** The Cabinet will then have the information it may wish to consider in disposing of the claim for compensation according to its own judgment of the “interest of justice” in this case.

### CHAPTER XIII: ALLEGATION OF PROSECUTORIAL MISCONDUCT

493. The Bain Submission makes various allegations of prosecutorial ambush and misconduct, which are addressed below.

#### (i) Unfair cross-examination tactics

494. The Privy Council expressed disapproval of the prosecutor's attempt to impeach David Bain's credibility on the ownership of his mother's glasses.<sup>275</sup> According to Det. Sgt Weir, the prosecutor was quite well aware of Dr Sanderson's changed view that the controversial glasses belonged to Margaret not David. Det. Sgt Weir says the prosecutor's "stance" was that ownership was irrelevant.

495. Ownership *would* have been irrelevant except that at the 1995 trial the issue was turned into an attack on David Bain's credibility. In his cross-examination of David Bain, the prosecutor suggested (although the Crown Law Office now says this is a misinterpretation of his questions) that David was a liar in stating that Margaret's glasses did not belong to him. The Privy Council certainly understood the cross-examination as an attack on credibility and set out in the basis for this conclusion as follows at paragraph 79:

*David Bain testified as follows:*

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

*The cross-examination of David Bain on this point was as follows:*

- Q. The pair of glasses which have been produced to the court, a saxon frame?  
A. Yes.

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<sup>275</sup> Reference has already been made to Dr Sanderson's changed opinion on the issue of ownership and the jury's question regarding his evidence. This was information in the possession of the Police and prosecutor prior to the 1995 trial. The Privy Council commented: "If Mr Sanderson's fresh evidence be accepted, the jury were given an answer which did not reflect his revised opinion and could have led the jury, reasonably in the circumstances, to draw an inference unfairly adverse to David." (para 110)

- Q. *You say they are not yours but they are an older pair of your mother's?*
- A. *That's right.*
- Q. *The ophthalmologist, Mr Sanderson, from the hospital was of the opinion that they were an earlier prescription of your existing optometry prescription?*
- A. *That is incorrect...*
- Q. *The ophthalmologist was of the opinion that the prescription of the two lenses that fitted the frame are similar to the prescription prescribed for you in October 1992. Do you recollect him giving that evidence?*
- A. *I do, that is only in one lens though, not the other.<sup>276</sup>*
- Q. *You say he is wrong?*
- A. *Yes.*

*(Emphasis added).*

496. In my opinion the prosecutor's message to the jury was clear – there was a credibility contest between David Bain and the distinguished ophthalmologist with no vested interest in the outcome. David Bain was not telling the truth. If he cannot be believed on the small things why should he be believed on the big things? The 1995 jury certainly understood the question of ownership to be contentious. In the course of its deliberations it asked the question:

*The glasses found in David's/Stephen's rooms. Whose were they according to the optometrist?*

497. The trial judge simply restated to the jury the evidence of Dr Sanderson and David Bain on the point.

498. The Court of Appeal in its judgment of 15 December 2003 acknowledged:

*...that the jury could have seen the Crown as challenging David's evidence in this respect and thus as impugning his credibility.<sup>277</sup>*

499. The Privy Council agreed:

*If ownership of the glasses was in itself an immaterial matter, David's credibility was certainly not: the central question the jury had to resolve was whether they could be sure that David's account of events was untrue. While it cannot be known what motivated the jury to ask the question as to whose the glasses were, according to Mr Sanderson, it*

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<sup>276</sup> A reference to the fact Margaret had astigmatism in one eye and David does not.

<sup>277</sup> Paragraph 140

*may have been because they saw in this a valuable indication of David's credibility or lack of it.<sup>278</sup> (Emphasis added)*

500. The prosecutor's unfair use of the issue of ownership to impeach David Bain's credibility is hard to fathom but I am reluctant to conclude that he acted in bad faith. In the heat of the cross-examination, he may simply have lost track of the underlying facts – an affliction not unknown to trial counsel in a heavy case. In general the prosecutor in his cross-examination was quite fair given the evidence then available to the parties.

**(ii) Allegation of prosecutorial “ambush” of the defence**

501. One of the most bitter recriminations relates to Dr Pryde's amazing “pinpoint” attribution of the timing of David Bain's forehead injury as “roughly 10 hours” old. It was in the course of Dr Pryde's strip search that much of the evidence of David Bain's injuries, relied on by the prosecution as incriminating, was collected. This opinion conveniently placed the time of the injury at an hour when David claimed to have been asleep. It was highly prejudicial to the defence.

502. At the 2009 retrial the prosecutor was persuaded that the Dr. Pryde's “roughly 10 hour” opinion was so discredited as to be unusable.

503. The Crown Law Office acknowledges that the “roughly 10 hours” evidence was not disclosed to the defence. However, according to Det. Sr. Sgt Doyle, who was responsible with Det. Sgt Weir for putting the 1995 prosecution depositions together, Dr Pryde's opinion came as much of a surprise to the Police and the prosecution as it did to the defence.

504. This evidence may have had a considerable impact on the 1995 jury. It came from a respectable professional medical person. At the 2009 trial Dr Pryde's estimate was modified to “recent.” There is no evidence the prosecutor knew about Dr Pryde's “roughly 10 hour” opinion in advance any more than did Det. Sr Sgt Doyle. It appears Dr. Pryde was, in this respect, a rogue witness.

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<sup>278</sup> Paragraph 110

**(iii) Change of position**

505. The Bain Submission lists a number of reversal of positions by the prosecution. However, I do not think the Bain team can rely on that ground given the number of changes in their own positions over the years in response to new or changing evidence (as to the identity of the maker of the luminol footprints for example.)

506. It is inevitable that there will be twists and turns in proceedings as complex and protracted as the Bain case.

**(iv) Failure to disclose**

507. The Bain team complains that the Crown prosecutors made inadequate disclosure prior to the 1995 trial. They state that “items as significant as the finding of blood in the barrel of the rifle, and that traces of [what appeared to be] blood were seen in Robin’s fingernail scrapings, and the smear from his little finger were not disclosed by the Police or ESR in any report made available to the defence or in evidence” (para 5.1.1.8).

508. It appears however that in 1995 disclosure depended much more than today on the diligence of defence counsel making disclosure requests [see legal memorandum from Professor Paul Rishworth at Tab J of the Book of Documents]. David Bain’s 1995 counsel, Michael Guest, simply did not ask for much of the ESR material that turned out to be critical to the 2009 acquittal. There were instances of Police documents not disclosed (such as Mrs Laney’s important second statement firming up her eyewitness identification of David Bain at the garden gate at 6.45 am) but there is no compelling evidence that failure to disclose was a deliberate act on the part of the prosecution.

**(v) Conduct of Crown Law Office**

509. The Bain team also faults the Crown Law Office for its sometimes aggressive tone (and in the Bain team’s view, some liberties with the evidence). However, the adversarial system is a harsh environment and the Crown Law Office has done what it is supposed to do, namely to say what can reasonably be said against David Bain’s claim for compensation.

**(vi) Conclusion:**

510. I do not recommend that compensation can or ought to be based on prosecutorial misconduct.

#### **CHAPTER XIV: ALLEGATIONS OF WRONGDOING BY THE POLICE**

511. The Bain submission argues that if David Bain is unable to prove his factual innocence beyond a reasonable doubt, it is because the investigation of the crimes at 65 Every Street was incompetent, numerous clues were missed, and there were (according to the notes of the investigating Police officers) important pieces of evidence that were either not collected or not properly analysed and in any event not preserved. In my interview with him, David Bain claimed “if the Police had done their job right the first time it wouldn’t have happened. None of this would have happened.” (p. 89 ll. 2-3)

512. The allegation extends both to the failure to take proper steps to investigate the possibility of innocence but also a failure to fairly present the result of the investigation that *was* done.

513. The Bain Submission makes numerous allegations of Police ineptitude and misconduct. These are positive assertions; it is up to the Bain team to prove them. I conclude that some of these complaints are justified. Some are not.

**CHAPTER XV: WHAT LEVEL OF COMPETENCE WAS PROPERLY EXPECTED OF THE DUNEDIN POLICE IN 1994/95?**

514. An important threshold issue that arises at this point is by what standard in 2012 is the conduct of the Police in 1994/5 to be judged? What standards of care and due diligence were accepted by the Police themselves almost 18 years ago?

515. As noted earlier, the Joint Police/Police Complaints Authority Report of 1997 acknowledged that the applicable procedures for criminal investigation in 1994 were set out in the *Detective Manual* (1983), a document described by the New Zealand Commissioner of Police in its preface as:

*"A practical guide for investigators and a convenient source of reference to investigation procedures and basic law. Numerous members of Police of various ranks have contributed to this second edition which reflects a vast range of practical Police experience."*<sup>279</sup>

516. The Crown Law Office submits that the *Detective Manual* is irrelevant. In its view:

*"This document, long since replaced by "Best Practice" recommendations, was never more than an internal set of instructions and guidance. It has no legal effect in relation to the investigation of crime, and there has been no suggestion that it founds some form of duty of care."*<sup>280</sup>

517. I disagree. While I understand that the *Detective Manual* may now have been replaced by something newer, the Joint Report of the Police/Police Complaints Authority (1997) makes it clear that the *Detective Manual* was indeed applicable to the 1994/95 Police work. It states:

The basic investigative procedure is laid out in the *Detective Manual* and is invariably closely followed in every instance. (para. 8)

518. Det. Sr. Sgt Doyle confirmed this to be the case when I interviewed him in Dunedin. With reference to the above statement he said:

A. I would agree with that. There's room, of course, for initiative and for various fluctuations depending on the nature of the

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<sup>279</sup> Police manual November 1983, Defence Exhibit OO, preface.

<sup>280</sup> Paragraph 346.1

inquiry and things that may occur but the basic structure is there full stop, yes.

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

A. That's correct Sir.<sup>281</sup>

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

A. Oh, absolutely Sir... (p. 14)

519. Accordingly, I proceed on the basis that the *Detective Manual* sets out in a general way the standards of behaviour expected of a Police investigation of homicide in Dunedin between June 1994 and June 1995, provided it is understood that, as the manual itself states, the procedures described therein are *"a general guide only, and should be adapted where necessary to meet the individual circumstances of a particular enquiry"*.

520. The general instruction at paragraph 13.5 of the *Manual* emphasises the need for thoroughness and an "open mind".<sup>282</sup> For example, an arrest should not be made until the elements of a plausible reconstruction of the crime scene – *including the results of expert testing* – are available. Few of the results of the ESR forensic tests were available to the Dunedin CIB when they rushed to judgment with the decision to charge David Bain on the second day following the murders (Wednesday). Many of the Manual's most basic instructions

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<sup>281</sup> Dunedin Jim Doyle interview pp. 6-7; to the same effect in the Milton Weir interview at p. 6.

<sup>282</sup> Reconstruction

1. A reconstruction is the logical piecing together from all the information available through examination and enquiry, of what activity has taken place in a given area, over a relevant period of time.
2. Make a preliminary reconstruction as soon as possible i.e. when there is sufficient information available about the scene. Reconstruction is a continuing process as new information is obtained. A main reconstruction cannot be finalised until all available facts are known.
3. The O/C scene [Det. Sgt Weir] is responsible for reconstruction, assisted by members of the scene team, investigation team, and experts. A reconstruction is made by –
  - a. Assessment of all the information, including witnesses' statements, members' job sheets, and inventories;
  - b. Questioning the significance of physical evidence found, and details noted at the scene, and making deductions there from;
  - c. Assessment of photographs, plans and maps;
  - d. Consideration of the physical factors of the scene at the time of the crime e.g. lighting, weather, access and security; presence or absence of vehicles, traffic, people;
  - e. Consideration of expert and all other opinions with an open mind, testing different theories to prove or disprove their validity; Experimentation at the scene to check feasibility. **(Emphasis added)**

were ignored, instructions that were clearly designed to prevent miscarriages of justice as well as to help bring offenders to trial.

521. The Joint Police/Police Complaints Authority Report (1997) describes the *ad hoc* nature of the organization of homicide investigations in New Zealand at the time:

Permanent homicide squads do not exist in our structures and when a suspicious death is reported an *ad hoc* homicide team is created by drawing investigators and support staff from other activities.”<sup>283</sup>

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Attention to detail is the catch-phrase for investigators and they must be constantly mindful of the fact things may not always be as they seem. An open mind must be maintained, facts should be verified and statements corroborated as far as possible before conclusions are drawn. Expert opinion and/or past experience should be sought and where a hypothesis is developed or a theory advanced it should be tested by reconstruction and measured against contrary views, theories or explanations.<sup>284</sup> (emphasis added)

**(i) The Police failed completely to adapt themselves to the complexity of this criminal investigation**

522. The Police response to criticisms by the Bain team is generally that the Police did what they did in the way they always did it. For example, the failure to follow up Laniet’s allegations was brushed aside with the comment that “this was a homicide investigation, Mr Reed, not an incest investigation, and that was our focus”<sup>285</sup> as if the one precluded the other, rather than being inextricably intertwined.

523. Similarly, Det. Sr. Sgt Doyle says it was not the practice of the Police officers to synchronize watches. This is scarcely a credible reason not to synchronize watches where precision timing was the object of the exercise, as with the investigation of David Bain’s “out of the house” alibi.

524. Sometimes, as here, “the way we’ve always done it” is just not good enough.

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<sup>283</sup> Paragraph 8

<sup>284</sup> Paragraph 10

<sup>285</sup> 2009 retrial p. 159.

**(ii) Evidence was prematurely destroyed**

525. Det. Sr Sgt Doyle was aware of the Police obligation to preserve evidence (whether or not it had been filed as an exhibit at trial) until all appeals were exhausted, but he nevertheless ordered the destruction of all such material to be completed by 26 January 1996 despite the possibility of a further appeal to the Privy Council, and without consulting defence counsel. His only explanation was that in his experience such appeals were rare. The evidence does not suggest the destruction was malevolent. It was an unfortunate triumph of tidy housekeeping over proper Police practice. However it was *potentially* seriously prejudicial to David Bain.

**(iii) Little thought was given to the assignment of suitable officers to important jobs**

526. In many cases detectives who were assigned had little relevant background and were poorly briefed as to the purpose of their assignment.

527. According to Det. Sr-Sgt Doyle, the “selection” rather depended on who first came through the CIB office door on Monday, June 20, 1994. The officer put in charge of the crime scene, Det. Sgt Weir, was selected because he turned up at the Dunedin CIB Monday morning when Chief Inspector Robinson happened to be looking for a recruit for that job.

A. ... We had a situation that morning where we’d been advised of this incident out in Every Street and basically it was as staff came in that they were appointed to particular positions. So if you had an NCO come in he would be appointed as OC of whatever the position was and we’d look and see how many people he needed. So at the very early stages it was a matter of very basically filling in the boxes to get people into position so that the -

Q. Was it whoever came in the door first?

A. More or less, yeah. So if you were lucky enough to be there, as it was with myself. I’d – unfortunately I didn’t miss the plane the day before and I nearly missed a plane from Australia otherwise it would have been another detective senior sergeant, they would have been sitting there. So it was the luck of the draw. (pp. 12-13)

528. Det. Sgt Milton Weir was relatively junior in the ranks of the Dunedin CIB. He had arrived in Dunedin “on promotion” the year before, and this was the first time he had received

an assignment as officer in charge of the scene in a homicide case.<sup>286</sup> Det. Sr Sgt Doyle described the job of the officer in charge of the crime scene as “a most critical role.”<sup>287</sup>

529. Det. Sgt Weir, it will be recalled, was the officer who participated in Mr Hentschel’s luminol footprint examination. He had never engaged in such an analysis before and admits he had a poor understanding of what was going on. He failed to recognize the importance of preserving the carpet evidence of the luminol prints.

530. Det. Kevan Anderson was assigned to assist Mr Martin Cox in the examination of the Bains’ computer despite (i) not understanding what he was doing; (ii) why he was doing it; and (iii) he lacked a proper “timepiece” to do the job. He did not appreciate the importance of noting when the message was “saved” by Martin Cox,<sup>288</sup> although of course that was the whole point of Mr Cox’s exercise.

531. Det. Lodge was in charge of Robin’s body but seems to have been unaware of the importance of wrapping the hands in plastic to preserve possible evidence of firearms discharge residue, as described below.

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<sup>286</sup> Interview with Milton Weir, p. 7 ll. 8-15.

<sup>287</sup> Doyle Dunedin interview, p. 11.

<sup>288</sup> Weir interview p. 42 ll. 20-25.

## CHAPTER XVI: FAILURE TO TAKE PROPER STEPS TO INVESTIGATE INFORMATION ACTUALLY POSSESSED BY THE POLICE IN JUNE 1994 REGARDING THE POSSIBILITY OF DAVID BAIN'S INNOCENCE

### (i) Allegation of Robin Bain's possible mental instability

532. Prior to the arrest of David Bain the Police had knowledge that Robin was stressed and potentially unstable. Yet by Wednesday 22 June the Police had eliminated him as a suspect. The Police were aware of marital discord and the curious activities at the school over which he presided. In failing to follow up questions about what could have "triggered" the seemingly inexplicable crimes of 20 June, the Police betrayed tunnel vision focussed on David that ignored reports that Robin, not David, was the suspect with a history of instability. As stated, the Privy Council was critical of the Police failure to probe this issue:

*"The jury might accept the evidence of three professionals, as yet uncontradicted, that stories of the kind described above are not written by children and published in a school newsletter without participation of the principal of a two-teacher school [as suggested by the Court of Appeal], and there is no evidence to support the [Court of Appeal's] suggestion that they [the stories] could have been inspired by movie watching."<sup>289</sup>*

533. The issue was belatedly pursued by the Police in advance of the 2009 trial. By that time, however, the Police objective was clearly to advance the prosecution, not to conduct the sort of dispassionate inquiry that ought to have been conducted in 1994/95.

534. I concluded earlier that in light of the conflicting evidence at the 2009 retrial regarding Robin's mental state I cannot, in the absence of seeing and hearing the witnesses make findings of credibility one way or the other. The jury might well have agreed with the defence witnesses. We will never know. However, my point at this stage is not whether the evidence would or would not have supported the allegation concerning Robin's mental instability. The point is that the Police, having decided on Wednesday, 23 June<sup>290</sup> to charge David Bain with the murders, ignored potentially important issues in their rush to judgment.

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<sup>289</sup> JCPC Judgment, paragraph 105

<sup>290</sup> Evidence of Det. Senior Sgt Doyle at Dunedin on 19 July 2012 at page 37 ll. 20-30.

**(ii) Police failure to take proper steps to investigate information that Laniet had accused her father of incest and planned to expose him to the rest of the family on the weekend prior to the murders**

535. The *Detective Manual*, which Det. Sr. Sgt Doyle acknowledged as authoritative, specifically instructs the Police to pursue the issue of motive in their attempt to “reconstruct” the crime scene.

536. The fact Chief Inspector Robinson considered the timing of an antiquated washing machine as decisive, and took no interest in information about a potential incestuous relationship between a suicide suspect and his daughter suggests either blinkers or a wilful blindness to information that did not support a “tunnel vision” of the case.

537. The Police had been led almost immediately by a cell phone in Laniet’s possession to Dean Cottle and the incest allegation against Robin.

538. Senior Det. Sgt Doyle attributed the decision not to pursue this lead to Chief Inspector Robinson – the head of the investigation. The only explanation - that “this was a homicide investigation, not an incest investigation”<sup>291</sup> - was, in my view, untenable. The two aspects of the crime reconstruction were not mutually exclusive. In fact, they were intimately interrelated.

539. The lack of interest in a possible motive for Robin is all the more surprising as the Police never did uncover a motive for David Bain other than a minor disagreement with Robin on 19 June as to whether Robin would take the family chainsaw to Taieri. This is hardly a plausible motive for David Bain to kill five people in the absence of evidence (of which there was none) of a serious mental disorder.<sup>292</sup>

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<sup>291</sup> Evidence of Det. Sgt Doyle page 159 lines 26-28

<sup>292</sup> At the 2009 retrial the “incest” issue was explored in great detail

540. The Privy Council did not dispute the correctness of the 1995 trial Judge's ruling that Dean Cottle's evidence should be rejected as unreliable<sup>293</sup> but a diligent Police investigation might have led to other witnesses. The Law Lords went on to make this criticism clear:

*"...the question must arise whether [Dean Cottle's] evidence would have been rejected had it been known that three other independent witnesses gave evidence to broadly similar effect... If the jury found Robin to be already in a state of deep depression and now, a school principal and ex-missionary, facing the public revelation of very serious sex offences against his teenage daughter, they might reasonably conclude that this could have driven him to commit these acts of horrific and uncharacteristic violence."*<sup>294</sup>

541. The fact the Police were able to come up with witnesses at the 2009 trial to attack the incest allegation does not excuse their failure to "take proper steps" to investigate the possibility of innocence – to conduct a fair and dispassionate search for the truth prior to David Bain's arrest.

*Comment: It seems clear Laniet spoke of incest to some friends and acquaintances. My criticism of the Police does not imply either an acceptance or rejection of her incest allegation. The point here is not whether the evidence of people like Dean Cottle, [ ... ], and Leanne McNaught would eventually prove reliable. The issue is the Police failure to conduct a timely investigation. My view is simply that in terms of the Minister's instruction, this was a clear case of the "Police failing to take proper steps to investigate the possibility of innocence"*<sup>295</sup>.

**(iii) Failure to test both Robin's body and David promptly for firearm discharge residue**

542. It is absolutely basic Police work in a firearms case, as laid out in the Detectives Manual to preserve and test samples from a suspect's hands and clothing for firearms discharge residue (FDR). This will indicate if a person has recently fired a firearm. As explained in the Joint Police/Police Complaints Authority Report (1997), the test involves "checking suspects for

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<sup>293</sup> Mr Cottle turned out to be an unsatisfactory witness. He failed to show at the 1995 trial despite a subpoena. A bench warrant was issued. Mr Cottle was brought before the court after the prosecutor had delivered his closing address to the jury. The trial judge declined to reopen the evidence to permit Cottle to give evidence because he was satisfied Cottle was an unreliable witness. He must be taken to be correct in this assessment but the point made by the Privy Council was that prompt action by the Police might have uncovered other witnesses who could have corroborated that Cottle was truthful.

<sup>294</sup> JT Paragraph 106

<sup>295</sup> Paragraph 39

*discharge residue blown back on to [mainly] the hand[s] which held the weapon. It is to be expected in ideal conditions that minute particles could still be found on a live and active person up to two/three hours after shooting occurred – provided the firer has not washed since. On a dead body, the dust could remain much longer because it is only lost through movement.”* (para 134)

543. The Police say they did not test David Bain the morning of 20 June because he said he washed his hands to remove newsprint ink. This is curious. **It must be rare for the Police not to do a test because the individual concerned assures them that nothing of interest to the prosecution will be found.**

544. If the test had been done quickly on David and proved negative, it might have been of assistance to establish his innocence. On the other hand, if FDR were found on Robin’s hands, it would be an important indicator of suicide and would have been of great importance to the defence. On the prosecution theory there would be no FDR on Robin’s hands.

545. Det. Sr Sgt Doyle was asked why Police had not checked David’s hands for firearms residue after locating him in his room at 65 Every Street. He suggested it would have been “insensitive” to do the test as David was then considered a victim.<sup>296</sup> Yet by 11.00 am or so, David Bain was at the Police station being strip searched and tested for FDR by Dr Pryde, who found nothing positive.

546. Although Robin’s body had been properly wrapped in plastic when removed to the mortuary, his hands were not separately bagged as required by the *Detective Manual* and the

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<sup>296</sup> Det. Sgt Doyle explains:

- A. Exactly. Also – like as far as the Police were concerned, that morning David Bain was a victim of coming home and finding this situation. I cannot in my own mind even imagine a Police officer with any sensitivity suddenly going to him and saying, hey listen David we want to test your hands for firearm discharge residue within three hours of us arriving at the house and not knowing the full facts. It’s just no possible.
- Q. He was subjected to very invasive tests of the body wasn’t he? Swabs taken?
- A. He was examined by a doctor.
- Q. When was that done?
- A. Later that day.
- Q. It involves strip searching, swabs of intimate body parts, doesn’t it?
- A. There are a number of tests, yes, all of those included.
- Q. All of those are done?
- A. Yes. (Emphasis added) (Retrial pages 146-50)

plastic sheeting (which might have collected any residue shaken loose in transit) was thrown away. The Joint Police/Police Complaints Authority Report (1997) was critical of this investigative failure:

“Again, with the benefit of hindsight, we find that earlier consideration should have been given to preserving Robin’s hands and clothing for firearm residue testing. At the very least his hands and lower arms should have been enclosed in plastic/paper bags at the earlier opportunity. Those containers should have been subsequently examined for residue as should the upper outer clothing of David and Robin. (para 142)

547. I do not accept that this was only clear “with the benefit of hindsight.” The procedure was specifically laid down in the *Detective Manual*. Det. Sr Sgt Doyle accepted that this breach of standard procedure was a Police responsibility.

A. Yes, yes, Detective Lodge. Detective Lodge had that responsibility and he’s an experienced detective, he should have, he should have done that.<sup>297</sup>

*Comment: the Bain complaint is justified. Firearms Discharge Residue was perhaps David Bain’s best hope of establishing Robin to be the murderer. Of course, the presence of FDR on David might have been similarly helpful to the prosecution. The Crown Law Office says it is impossible to say what the results of such tests would have been. This is true, but it was the failure of the Police to do such basic tests in breach of the Detective Manual that created this unsatisfactory situation.*

#### **(iv) Dr Pryde’s strip search**

548. As stated, a firearms residue test was belatedly performed by the Police surgeon, Dr Thomas Rankin Pryde, beyond the three hours in which it should have been done according to ESR standards.<sup>298</sup> Nothing was found that could be positively identified as FDR

549. Dr Pryde’s strip search on Monday, 20 June 1994 was nothing if not thorough, and included “samples from the groin and penis”<sup>299</sup> (it has never been suggested that sexual activity

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<sup>297</sup> Doyle interview p. 34 ll. 2-7.

<sup>298</sup> Weir evidence 2009 retrial, p. 1156 ll. 15-18.

played any role in these murders). David Bain was stripped naked at a time when, according to the Police, he was not even a suspect. The Crown Law Office argues:

*“The Police had not formed any view as to the identity of the killer and, in terms of the decision of the NZCA in R v Goodwin decided in 1993, the right to counsel under section 23(1)(b) of the NZBORA arose only on arrest (as distinct from the Therens standard; arrest or detention). The applicant was not arrested or, for that matter, detained. Nor was he on 20 June a suspect to whom the “Judges’ Rules” applied.”<sup>300</sup> (Emphasis added)*

550. When Det. Sgt Dunne arranged to have David Bain taken to the Police station during the morning of 20 June he noted “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.” (Police interview with David Bain, p. 378)

551. The Crown Law Office resists the description “strip search” but how else to describe it? It was extremely invasive.<sup>301</sup>

552. Det. Sr Sgt Doyle explained in my interview with him that the purpose of Dr Pryde’s search was to collect evidence that might *eliminate* David Bain as *suspect*. David Bain signed a consent form that disclosed he was being examined “on an allegation of homicide”. Most of the tests seemed to have had little to do with exculpation.

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<sup>299</sup> JCPC page 613

<sup>300</sup> Paragraph 347.2

<sup>301</sup> David Bain describes it as follows:

- A. [Dr Pryde] ... then went through the various series of things, starting with making me strip and examining -
- 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?
- A. Yes. Completely naked.
- Q. So if there were marks on your chest at that point –
- A. Oh yes.
- Q. - they would have been evidence to Dr Pryde?
- A. Very much, another example of the stuff that’s come up that’s just proven to be ridiculously false.
- 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, um, took fingernail samples, saliva samples, um, he, um, put a swab up my penis, um, he...

(Bain interview, pp. 62-63).

*Comment: It is difficult to understand Dr Pryde's role in all this. He is the one who volunteered that the bruise on David's forehead was "roughly" ten hours old. He came up with the term "whack" on the head. It was never explained how taking a swab of David Bain's penis could advance the Police inquiry in this case.*

- (v) There was inadequate follow-up to tasks that had been assigned, and the "job notes" made by Police officers to record what was done seem too often to have been lost in the paper shuffle.**

553. The "second statement" by Mrs Denise Laney was lost in the paper shuffle for reasons that are unexplained. Its absence allowed the prosecution in 1995 to suggest she had been unable to make a positive identification of David Bain at his garden gate. This was wrong.

554. The Joint Police/Police Complaints Authority Report (1997) noted that the critical job sheet of Det. Sgt Anderson respecting the Martin Cox computer analysis was somehow misplaced.

In the present case the failure to locate Detective Anderson's original job sheet may have contributed to the confusion but we are bound to say this may have been avoided if more attention had been paid to this aspect when the file was being prepared for prosecution. Data must be processed in a way which ensures corrected information speedily reaches officers dealing with those details. We ask that the Commissioner take particular note of this point. (para. 132)

555. Det. Robinson checked Det. Sgt Anderson's watch for accuracy but Martin Cox was never told of the 2 minute error. Det. Sgt Anderson was told of the error but did not see fit to mention it in his 1995 evidence.

**CHAPTER XVII:            THERE WAS CONFUSION WITHIN THE DUNEDIN CIB REGARDING THE ALLOCATION OF ROLES AND RESPONSIBILITIES**

556. Det. Sgt Weir did not seem to appreciate that it was up to him – not Mr Hentschel – to preserve the carpet samples subjected to the luminol footprint analysis.

557. There were important observations recorded in Mr Hentschel's notes that Det. Sgt Weir (being responsible for preparing Mr Hentschel's deposition) did not ask for and did not receive.

558. Det. Sgt Lodge in charge of Robin's body not only failed to preserve possible evidence of FDR but neither he nor the pathologist saw fit to preserve the skin sample surrounding Robin's gunshot wound, thus unleashing the debate among the experts about whether the fatal shot was close, intermediate or distant. (I accept, however, Det. Sr Sgt Doyle's evidence that preservation of the sample was primarily the responsibility of the pathologist, Dr Dempster.)

559. Det. Sgt Anderson testified in 1995 that the computer message was saved at 14.16 pm even though he had been told his watch (and thus his timing) was out by two minutes. He seemed to think himself at liberty to give incorrect evidence because error correction was only the responsibility of the Police officer, Det. Robinson, who checked the watch. The erroneous time was never corrected in front of the jury.

**CHAPTER XVIII: THE CONFUSION EXTENDED TO THE DIVISION OF RESPONSIBILITIES BETWEEN THE POLICE AND NON-POLICE WORKERS AT THE CRIME SCENE**

560. The Police are in charge. The experts provide their specialized knowledge but they are not ultimately responsible for putting the prosecution case together (although as the expertise becomes more erudite the Police may have to rely to a greater extent on the expert's view of what should be kept). The general rule is, as Det. Sr Sgt Doyle explained,

- A. ... generally in a situation like that there would be a collaborative approach between the person who was responsible – the Police officer who was responsible for that particular phase and the scientist or expert, whoever it was, it would be a collaborative approach on what we should do, but ultimately the responsibility still remains with the Police officer.
- Q. They're the ones who carry this exercise forward to trial?
- A. Absolutely.<sup>302</sup>

561. Det. Sgt Weir, the officer in charge of the scene, did not live up to this responsibility in important instances.

**(i) The photography of the crime scene**

562. While extensive, the photographs were poorly organised and documented. In the work done subsequent to the 1995 trial it was often difficult to establish the sequence of photographs. Det. Sgt Weir, who was responsible for putting together the crime scene evidence in the 1995 trial said *"when I got the scene photographs from the 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."*<sup>303</sup>

563. The Police photographer said to have edited the crime scene video had no recollection of doing so. The video camera was equipped with a date and time function but this was not activated.<sup>304</sup>

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<sup>302</sup> Doyle interview p. 31. Mr Doyle pointed out that in the case of pathologists the Police would primarily rely on their expertise as to what should be sampled and preserved.

<sup>303</sup> Weir interview p. 22 ll. 17-22.

<sup>304</sup> Evidence of Police photographer Trevor Edward Gardener, 2009 retrial page 32.

564. The Police failed to secure from the pathologist, Dr Alex Dempster, a volume of what were called the “mortuary photographs” which showed details of injuries to Robin and which, when belatedly produced at the 2009 trial by Dr Dempster himself, shed additional light (helpful to David Bain) on weaknesses in the Police investigation.<sup>305</sup>

565. As the *Detective Manual* directs, and as Det. Sr Sgt Doyle confirmed, the overall responsibility to have photographs ordered in a useful way belongs to the Police not the photographer.

- A. At the particular point in time whoever the photographer is working under, the OCC or the OC body or whoever it is, he comes under that particular officer’s control.
- Q. And, as I read the manual, it is up to that officer to make sure the evidence produced is produced in a form usable at trial.
- A. Yes. (p. 28)

**(ii) Carpet samples subjected to the luminol footprint examination were not preserved**

566. Det. Sgt Weir was in charge of ESR Peter Hertschel’s visit to the crime scene on June 21 when they jointly performed the “luminol” footprint investigation. Although some sections of carpet from elsewhere in the building were lifted and kept, this critical piece of carpet – on which so much now depends - was not. Det. Sgt Weir was in charge of both Mr Hertschel and collection of samples/exhibits, yet he seemed to think it was Mr Hertschel’s decision.<sup>306</sup>

567. Had the actual piece of carpet been preserved, Mr Hertschel’s measurements could have received subsequent scrutiny from defence experts and from ESR scientists including Mr Walsh. As Det. Sgt Doyle testified at the 2009 trial:

- Q. *But what you didn’t do was cut out those parts of the carpet and keep those bloodied sock print parts, you never did that did you? Well we know you didn’t Mr Doyle.*
- A. *Mr Weir would have to comment on that, I’m, I don’t recall them no.*

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<sup>305</sup> 2009 retrial evidence p. 1604 ll. 15-20.

<sup>306</sup> Weir interview p. 19 ll. 15-20.

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 Hertschel, being the expert in terms of the luminol and luminol examinations to be able to say to me, “This is something that we should secure, Milton,” in which case I would then have taken responsibility for securing it.

- Q. *But being the officer in charge and looking back on it, that certainly should've been done for such an important bit of evidence?*
- A. *That's why I'm hesitant, I thought it had of been done.*
- Q. *You thought it had been done?*
- A. *Yes.*
- Q. *Well that's the answer isn't it? It should have been done?*
- A. *I agree.*<sup>307</sup>

568. There was clearly a misconception on the part of Det. Sgt Weir regarding the division of responsibilities between himself and Mr Hentschel.

569. The carpet, as will be recalled, went up in flames when the house was burned down on 7 July 1994. The result was that only the ESR experts had an opportunity to inspect the primary evidence. In the case of a multiple homicide it ought to have occurred to the Police that the defence might want to enlist its own experts.

*Comment: I agree with this complaint as, apparently, did Det. Senior Sgt Doyle in the testimony quoted above.*

**(iii) The plan of survey was incomplete**

570. The Bain team complains that the plan of survey (Tab B in the book of documents) does not show important items such as the dresser in David's room where it is said he "whacked" his head. Det. Sgt Weir explains that by the time the survey was done many items had been removed from the house. There were no items in place intentionally omitted if they were thought to have any significance.

*Comment: There is no reason to doubt Det. Sgt Weir's explanation.*

**(iv) Failure to preserve evidence on Robin's body**

571. The Detective Manual puts on the officer in charge of the scene the responsibility "to ensure that no evidence is lost" and in particular "Cover hands and feet with plastic bags and place the body in a plastic sheet to avoid losing evidence." Det. Sgt Weir thinks this was not his

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<sup>307</sup> Retrieval page 154

responsibility.<sup>308</sup> He says Det. Sgt Steve McGregor (who was not necessarily on site) or Det. Lodge should have done so, but they didn't.

*Comment: Who was in charge? The reporting structure did not seem to leave much scope for supervision. Det. Sr. Sgt. Doyle held daily "conferences" to keep everyone in the loop but at least Det. Sgt. Weir seemed to think attendance was optional if he had something to do he considered more important.*

**(v) Failure to take steps to ascertain the time of deaths,**

572. The Bain Submission complains that the Police pathologist, Dr Alex Dempster, arrived at the crime scene shortly after 9.00 am on 20 June, but was refused permission to enter the premises by Det. Sgt Weir until around noon. This made it impossible for him to measure body core temperatures in an effort to establish more precisely the time and sequence of death of the various members of the Bain family. Such evidence might have been important in determining whether or not their deaths took place within the window of opportunity open to David Bain to commit the murders, or whether they occurred while he was out on his paper route.

*Comment: Det. Sgt Weir assumed responsibility for this decision. He explained that Dr Dempster could not obtain core body temperatures without moving the bodies – thereby disturbing the crime scene. His decision was in accordance with the Detective Manual and seems justified.<sup>309</sup> In any event, establishing a precise time of death is notoriously difficult, and core body measurement was likely not precise enough to be of much assistance in this case.*

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<sup>308</sup> Weir interview p. 25 l. 20 to p. 26 l. 12.

<sup>309</sup> Det. Sgt Doyle retrial pages 141-2.

## CHAPTER XIX: LACK OF DUE DILIGENCE: THE INVESTIGATION WAS IN IMPORTANT RESPECTS “AMATEURISH”

### (i) Failure to take proper steps to ascertain the “timing” relevant to the alibi defence

573. A central clock was maintained at the Dunedin CIB and regularly checked for accuracy against Telecom time.<sup>310</sup> The detectives had the resources ready at hand to get the time correct.

574. It was apparent once the Police had interviewed David Bain on the morning of 20 June, and heard that he had been out on his paper route from 5.45 am until about 6.45 am, that there was an alibi issue to deal with. The precise timing of his return would be a critical issue.

575. Yet various different lines of Police inquiry aimed at establishing or debunking David Bain’s “window of opportunity” were carried out by different Policemen using different watches which were not synchronised either to Telecom or to each other. This confusion has hindered all subsequent efforts to tie down the precise sequence of events.<sup>311</sup>

576. In my interview with Det. Sr Sgt Doyle in Dunedin he acknowledged that this aspect of the Police investigation was “amateurish”. Extracts from my interview with him are as follows, (although reference should be made to the transcript found at Tab E of the Book of Documents for the full context of his answers.)

- Q. David Bain says that, “He looked at his watch at the corner of Heath Street and Every Street and it was 6.40,” and then at some other point he says, “it was exactly 6.40.” And so far as I can determine on the record, I can’t find that his watch was ever tested for accuracy.
- A. That’s correct. (p. 23)

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<sup>310</sup> P/PCA report Det. Sr. Sgt Weir 2009 p. 151

<sup>311</sup> Evidence of Det. Sgt Doyle at retrial page 151:

*A. There was a clock in the operation room that we were using and that would’ve been the time base. Probably sadly, there was no other steps taken to actually establish a time base.*

*Q. But normally you get an officer to get a corrected time on some watch or clock or whatever, make sure it’s accurate and everything is worked from that time so that later misleading times don’t occur, that’s correct isn’t it?*

*A. Subsequent to the PCA review, that has become I understand standard practice. But up until then, no it wasn’t standard practice.*

*Q. There was some criticism wasn’t there of a lack of a time base by people?*

*A. I think I recall that a recommendation was made to the then Commissioner of Police to introduce a standard time base in major inquiries and I agreed with that. [retrial p. 151]*

- Q. Although it is treated as a fact. Then there's this issue with Denise Laney and as you would remember she is the lady who was, thought she was late for her job at the rest home and her clock said 6.50 and she knew it was five minutes fast. Now that clock was tested but according to the PCA report they didn't bother to look at the accuracy of the watch that was being used to test it?<sup>312</sup>
- A. Sure. (pp. 23-24)

577. At this point Det. Sr Sgt Doyle made reference to the fact the Police didn't hear the washing machine running when they were searching the house:

- Q. So on the computer aspect, leaving aside the washing machine for the moment, we have Detective Anderson who is assigned to deal with Mr Cox and doesn't really seem to have much of an idea of what Cox is up to or why he is doing it -
- A. Sure. (p. 26)

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- Q. ... I would have thought one would set out to identify a Policeman who had some understanding of what was being examined that, given the object of the exercise was to identify time, that a person would have been picked to have a watch that, if it didn't have a second hand, would at least demarcate itself in minutes – [This was in reference to the evidence that Det. Sgt Anderson's watch did not have a hand to indicate seconds, and nor did it have marks for individual minutes beyond the standard five minute intervals.<sup>313</sup>]
- A. Oh, I totally agree with you on that and I can't disagree.
- Q. Yes, and -
- A. It surprised me and disappointed me that that did not occur. I would have thought that a trained detective would have had enough savvy to have taken that on board. (p. 26)

578. Det. Sr Sgt Doyle emphasized that in 1994 computers were much less common than today and that the Police work had to be viewed in that light.

- Q. ... you've got a very serious murder investigation, five dead people, and you've got some evidence that is either going to put David Bain in the [Every Street] house at that time, the relevant time, or possibly exclude him and the thing is conducted with what seems, on the surface to be a pretty amateurish approach.

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<sup>312</sup> Crown Law Office submission para 55.2.

<sup>313</sup> Crown Law Office submissions para 29.4.

- A. Oh, I think, looking back in hindsight, that it was amateurish. I can't disagree with that. I, I would like to think that, well I'm sure that would have been done better now if the same thing occurred today, I'd expect it to be.
- Q. But don't you think by the standards of the day that this was a pretty poor performance?
- A. It would be very easy to say yes but I don't think this is as simple as that because I think that we were dealing with a totally new arena. The fact that the initiative was even used to go and try to determine that what time the computer was turned on and that probably, I certainly know of my own knowledge of computers at that stage, it wouldn't have even crossed my mind. Someone had, had brought that up and said, "Let's try it."
- Q. But if somebody had the sense to undertake the job why wasn't it done properly in terms of accuracy of timing? (p. 27)
- A. I can't answer that Sir. I, I agree that it should have been done better and that's about all I can say about it. (p. 28)

579. The Joint Police/Police Complaints Authority report expressed the same concern but, as was its style, looked more to the future than to judge the past.

We conclude this section by commenting that the timing of the paper round, the time the computer was turned on, and the duration of the washing matching cycle were all very important aspects of the case. We emphasise the necessity for accurate time measurements to be kept and made in criminal investigations. (para. 132)

*Comment: The amateurish behaviour of the Police in checking out the alibi seems to me an egregious instance of "failure to take proper steps to investigate the possibility of innocence" within the terms of the Minister's letter.*

**(ii) The provision of a contaminated DNA sample to the defence expert, Dr Arie Geursen**

580. Dr Geursen described having his work rendered useless by ESR's supply to him of a contaminated DNA sample for testing as an "unspeakable mess"<sup>314</sup>. Analysis of the "fingerprint blood sample" was of key importance to the defence. ESR rendered it impossible for the defence expert to do his work.

*Comment: ESR's conduct on this occasion, though presumably inadvertent, was seriously prejudicial to David Bain's fair trial rights. I would describe such negligent conduct by the*

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<sup>314</sup> JCPC Record p. 2264 para 38.

*authorities as misconduct. In this instance it was serious misconduct given the importance of the "bloody fingerprint" controversy and the serious consequences of his error in David Bain's ability to defend himself.*

## **CHAPTER XX: COMPLAINTS ABOUT THE POLICE INTERROGATION**

581. The Bain submission faults the Police for putting to him as “facts” during the interviews matters that were *not* facts. For example the Police put to David that blood on his clothing had been traced to Stephen even though at the time they had no basis for saying so. Results from forensic tests were not yet available. The Bain submission is that the Police should have stuck to the truth in the interviews.

*Comment: it is not wrong to put to a suspect various assertions and factual assumptions during interrogation. It is standard practice for Police to pretend that they know more than they do in order to persuade a guilty individual to confess. Such a tactic is not misconduct. David Bain made no confession.*

## **CHAPTER XXI: DENIAL OF DAVID BAIN'S RIGHT TO COUNSEL AT THE INITIAL POLICE INTERVIEWS**

582. As late as Tuesday afternoon the Police still considered the more likely scenario to be a murder/suicide. The decision to charge David Bain was not made until Wednesday evening and a direction was given that David Bain was not to be interviewed again until after he was formally cautioned (which was done on the Friday).

583. The Bain submission complain that the Police failed to notify David of his right to the assistance of a lawyer before detailed interviews began on Monday, 20 June 1994.

*Comments: the Police are at liberty to investigate crimes without calling in the lawyers. Such interviews do not in general violate the New Zealand Bill of Rights. In 1995, the New Zealand Court of Appeal in R v Donaldson [1995] 13 CRNSZ 438 (CA) looked closely at the impact of the Bill of Rights on Police investigations<sup>315</sup>. Generally speaking it seems the right to counsel in New Zealand arises only at the point of arrest, see s. 23(1)(b) NZ BORA.*

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<sup>315</sup> Crown Law Office Submission page 91 paragraph 344

## **CHAPTER XXII: THE CROWN'S ATTEMPT TO DRAW ADVERSE INFERENCES FROM DAVID BAIN'S RELIANCE ON SOLICITOR-CLIENT PRIVILEGE**

584. Midway through the final interview, after he was cautioned but before his arrest, David Bain asked for a lawyer. Michael Guest, a business acquaintance of David's uncle Bob Clark, and a former District Court Judge with limited experience in such serious criminal cases, was called to the Police station. He had never met David Bain before. He knew nothing about the case. As is usual and proper with defence counsel in these urgent and unforeseen situations, Mr Guest prudently instructed David not to answer further questions until he, Michael Guest, had had the opportunity to familiarise himself with the case.

585. At several points in its submission, the Crown Law Office now seeks to draw an adverse inference from the fact that David Bain refused to answer questions on his lawyer's advice<sup>316</sup>.

*Comment: I do not agree with the attempt of the Crown Law Office to draw adverse inferences from the exercise by a citizen of a fundamental right to consult a lawyer. An ordinary citizen is entitled to legal guidance and advice. Complete, candid and risk free discussion with the lawyer should be encouraged and David Bain cannot be faulted for doing what his new lawyer advised.*

586. The Crown Law Office also criticizes David Bain for failing to waive solicitor client privilege for the purpose of the compensation hearing. The Bain submission responds that the Crown Law Office has never requested such a waiver. "There has been no request and there has been no refusal."<sup>317</sup>

587. There had, however, been an earlier "limited" waiver for the specific purpose of David Bain's 1998 Petition to the Governor General for the exercise of the Royal Prerogative of Mercy based in part on "errors by defence counsel [Michael Guest] in the preparation and conduct of my defence." David Bain provided a limited waiver to permit Mr Guest to defend his conduct in discussions with "officials from the Ministry of Justice". A copy of this limited waiver is

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<sup>316</sup> Crown Law Office paras 165, 251 and 354.3.

<sup>317</sup> Karam reply dated 15 August 2012 p. 1.

attached to this Report as Appendix A. It is this waiver that enabled Sir Thomas Thorp to interview Mr Guest for the purpose of the Royal Prerogative proceedings mentioned earlier.

588. The Ministry has raised two questions with regard to this limited waiver: (1) is it correct that there is no waiver of privilege in respect of this compensation inquiry and (2) does the privilege apply to me in light of the fact I am not a court or other formal proceeding and can consider evidence otherwise inadmissible in court.

589. In my opinion both questions were authoritatively answered by the Court of Appeal in *R v Bain* [2008] NZCA 585. At issue (amongst other controversies) was whether the prosecution at the 2009 retrial could rely on a handwritten note by David Bain to Mr Guest regarding the “gurgling noise” from Laniet’s body. According to the Court of Appeal Judgment, the existence of this note (identified as “page 101”) was made known by Mr Guest to Ministry lawyers (para 55) and provided to the Ministry under the terms of the limited waiver. Page 101 was referred to in the Thorp Report.

590. The Court of Appeal held that

[72] As noted, we accept that the original release of page 101 by Mr Withnall to the Ministry was covered by the limited waiver. That release is therefore not inconsistent in itself with the appellant [David Bain] maintaining privilege in the document at the retrial. Whether the appellant can maintain that privilege turns on what happened downstream of that release.

591. The Court went on to hold that while David Bain’s waiver was limited to the purpose for which it was given (the Royal Prerogative proceedings), privilege in relation to p. 101 was lost “downstream” because the evidence on p. 101 had been referred to in open court and incorporated in the court record “now subject to the relevant [public] search rules”.

592. There is no such “downstream” waiver relevant to my inquiry. There has been no subsequent waiver of privilege requested by the Crown Law Office or volunteered by David Bain. I conclude therefore that for present purposes Mr Guest remains subject to solicitor client privilege.

593. A disbarred lawyer does not, by reason of his disbarment, cease to be subject to the obligation of confidentiality to former clients.

594. As to the second aspect of the Ministry's enquiry, the compensation inquiry has no authority to compel the disclosure of solicitor client confidences. Solicitor client privilege is a rule of substantive law not a mere rule of evidence applicable only to judges and courts. Otherwise a lawyer could broadcast his clients' confidences to anyone anywhere *except* in court, which would destroy the ability of members of the public to obtain legal advice on matters other than court proceedings (tax planning for example) secure in the knowledge that private matters will remain private.

595. David Bain was entitled to and did limit earlier restricted waivers to their intended scope and purpose except to the extent referred to by the Court of Appeal in 2008. The exception therein noted ("page 101") has already been incorporated in my analysis of the "gurgling noise". Both the Crown Law Office and the Bain team have proceeded on the basis that for purposes of my inquiry there has been no waiver of solicitor-client privilege. I agree with that position. **The Crown Law Office is therefore quite correct to insist that a negative inference be drawn against David Bain on account of his failure, in the special context of a compensation claim, to volunteer a waiver.**

596. I also take it to be correct that unless solicitor client privilege is waived the rule in New Zealand is that a court will not entertain allegations of incompetence or inadequate representation against trial counsel. The Crown Law Office cites *R v. Rue* (CA 113/2009) [2009] NZCA 554 at para 43. This is because absent a waiver the lawyer is unable to defend himself or herself. The result is that as Michael Guest is not free to discuss whatever passed in confidence between him and his former client, David Bain cannot rely on his criticism of Michael Guest as giving rise to "extraordinary circumstances" based on "errors of defence counsel". In the absence of a volunteered waiver, I am prepared to assume that whatever concessions were made by Michael Guest at the 1995 trial were made with David Bain's approval and that the present criticisms of Mr Guest levelled by the Bain submission should be disregarded.

### **CHAPTER XXIII: THE POLICE RUSHED TO JUDGMENT IN DECIDING TO CHARGE DAVID BAIN WITHOUT ADEQUATE INFORMATION AND ANALYSIS**

597. David Bain was formally charged with five counts of murder at 1.46 pm in the Dunedin Police Station on Friday, 24 June 1994. He protested his innocence.<sup>318</sup> He did not emerge from custody again until granted bail on 15 May 2007.

598. It is the Bain submission that following his arrest 4 days after the murders the Police abandoned any semblance of objectivity and devoted all their efforts to proving him guilty, regardless of other evidence which he says should have been investigated, and *might* have led to proof of Robin's guilt.

599. David Bain's wrongful conviction was, on this view, due in large part to Police loss of objectivity beginning early in the week of 20 June 1994 and culminating in the wrongful conviction on 25 May 1995, then continuing to and including the 2009 re-trial.

600. The decision to charge a suspect in a critical watershed in any criminal case. There will be an inevitable shift of focus as the Police make every effort to justify their very public accusation – a justification made all the more important for their reputation in a case subject to massive media interest, as was the Bain case.<sup>319</sup>

601. The *Detective Manual* contemplates an early arrest if there is a risk of the suspect re-offending, or destroying evidence. Neither of these justifications applied here. Evidence was only destroyed when, with the Police consent, the house at 65 Every Street was burned to the ground less than 3 weeks after the crimes.

602. The *Detective Manual* states that before a decision to charge is taken the Police should have pursued relevant inquiries and awaited the result of forensic tests. This was not done. To some extent this was the fault of ESR, as Det. Sgt Weir complained:

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<sup>318</sup> Lowden statement, page 419

<sup>319</sup> Of course the downside is that a wrongful conviction may do considerable damage to the reputation of the authorities, as did the decision of the Privy Council in this case criticizing the process as an "actual miscarriage of justice".

So, and a lot of the information we didn't – like the ESR examinations that took place back in Christchurch, for example, we didn't get it for months - <sup>320</sup>

**(i) Det. Sr Sgt Doyle explained in the interview that the early days of Bain inquiry were chaotic.**

603. Det. Sr Sgt Doyle explained:

In every inquiry pretty much there's a problem with just the administration of getting the thing going and invariably the 2ICs [i.e. Mr Doyle's] role, he's very often right behind the ball game for 24 even 48 hours on occasions. This particular inquiry would have been no different. (p. 52 ll. 15-20)

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Everything that was available on the Monday probably wasn't available for me personally until the Tuesday and perhaps early Wednesday. People were still to be interviewed. Like I think that [Cst] van Turnhout, for example wasn't interviewed until that afternoon. (p. 51 ll. 24-29)

**(ii) Kim Jones had made an oral report regarding David's fingerprints on David's gun, but blood tests were not done until months later.**

- (i) Mr Cropp was awaiting receipt of samples to test – the rifle “blood” samples were not given to him until 4 August 1994.
- (ii) Dr Alex Dempster had completed his post-mortem but had yet to make his report.
- (iii) Det. Senior Sgt Doyle was impressed that the washing machine had finished its cycle when the Police arrived at 65 Every Street but (1) David had told Police the cycle took 45 minutes to an hour to run; (2) 45 minutes was consistent with the evidence of his return time around 6.45 am; and (3) the Police did not run a “reconstruction” of a wash cycle with the repairman Mr Preston until 25 June – after the arrest.

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<sup>320</sup> Weir interview p. 31 ll. 13-16. Section 30.32 of the Detective Manual, says “Before making an arrest i) read and evaluate witness’ statements, ii) consider evidence, identification, fingerprints... and, “iii) evaluate results from specialists, e.g. fingerprints, cause of death from pathologists, scientific analysis from DSIR. If scientific or other expert opinion is the main evidence against a suspect, obtain reports in writing.” (Emphasis added) The main evidence against David Bain was the forensic evidence collected at the scene and under (lengthy) consideration by ESR.

- (iv) Dean Cottle had been interviewed on 21 June but no follow-up to the incest story had been (or would be) undertaken by the Police until after the issue was flagged in the 1997 Police/Police Complaints Authority review.

*Comment: the evidence establishes, in my view, that the Police rushed to a premature decision. There was no urgency to lay the charges and publicly commit themselves to David Bain's guilt. They decided to announce that the case was solved and all that remained to be done was for them to prove it. This was not consistent with the "open mindedness" required by the Detective Manual at the early stages of a complex investigation.*

## CHAPTER XXIV: IMPROPER PRESENTATION OF EVIDENCE AT THE 1995 TRIAL

### (i) Misleading Evidence Regarding the Finding of the Left Lens

604. The Privy Council held that Det. Sgt Weir had misled the 1995 jury regarding the location where the left hand spectacle lens was found in Stephen's bedroom. As stated, Det. Sgt Weir has freely acknowledged the "photo 62" error.

605. It will be recalled that at the 1995 trial Det. Sgt Weir testified that while examining Stephen's bedroom on 23 June 1994, he noted:

"The photo 62 was taken on the Monday as Stephen's body is still there and the lens is on the underneath side of the skate" ... "on the Thursday the lens, as seen in photo 62, that is the position I found it when I found it on Thursday".<sup>321</sup>

Q. "And the lens was found partially under the ice skate?"

A. "Yes it was found as you can see it although I accept it is difficult to see it in photo 62, that is exactly how it was." (Emphasis added).

606. In fact, Det. Sgt Weir later admitted, when confronted with the analysis of the photograph by Mr Peter Durrant who was engaged in 1997 for the Police/Police Complaints Authority Joint Inquiry, that photo 62 did not show the lens exactly as it was. In fact photo 62 did not show the lens at all. It seems a piece of plastic created a "specular effect" that Det. Sgt Weir pounced on to portray the lens in a location that, as the Privy Council noted, was more favourable to the prosecution.

*Comment: Det. Sgt Weir saw what he wanted to see. I do not accept the allegation of deliberate wrong doing, but Det. Sgt Weir was clearly at fault in failing to review photo 62 in light of his own contemporaneous notes which told a somewhat different story.*

### (ii) Misleading Evidence Regarding Computer Turn-on Time

607. Det. Sgt Kevan Anderson told the 1995 jury that the message was saved at 14.16. He later told the Police/Police Complaints Authority that he recalled being told his watch was fast

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<sup>321</sup> Page 1193

when it was returned to him but he attached no significance to that point. [see Joint Report p. 53 para 120] He did not believe it was his responsibility to give accurate evidence of the two minute time error because he did not do the time check on his own watch.

608. The Privy Council was critical of the evidence respecting the computer switch-on time:

*“It is now clear that the jury should not have been told as a fact that the computer was switched on at 6.44 am... The jury might reasonably have considered this peg of David’s argument on timing to be strengthened had they known the full facts.”<sup>322</sup>*

*Comment: I find it surprising that a police officer would misstate the timing evidence on the basis that another policeman was in a position, if called, to correct the error.*

**(iii) Misleading Evidence Regarding the time of David Bain’s return after the paper route**

609. This was another instance of pre-trial evidence being treated as fresh evidence because the Police failed to put fairly before the jury what they knew *prior to the 1995 trial* to be the facts. The Privy Council pointed out that the jury:

*“never heard the full evidence and never heard Mrs Laney cross-examined, because the defence did not know her clock had been checked by the Police and did not know she had made a second statement... It is noteworthy that the trial jury asked to be reminded of what Mrs Laney had said, presumably because they were concerned about either her identification or her estimate of time. It may be that the fresh evidence would have allayed their concern. This fresh evidence could reasonably have been regarded as strengthening the second peg of David’s argument.”<sup>323</sup> (emphasis added)*

*Comment: Mrs Laney’s evidence was of central importance to David Bain’s attempt to defend himself. The fudging of this evidence, and the prosecution’s use of this fudge to obscure her clear identification of David Bain, was a serious failure to present evidence of the “possibility of innocence”.*

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<sup>322</sup> Paragraph 108

<sup>323</sup> Paragraph 109

## CHAPTER XXV: THE ADVERSARIAL ATTITUDE OF THE POLICE

610. Mr Joe Karam's book *David and Goliath* was undoubtedly provocative. He had become (and remains) David Bain's most ardent supporter and spokesman. Some of his concerns and allegations proved erroneous. Others proved to be well founded and indeed, laid the foundation for David Bain's eventual acquittal. The *Justice for Robin Bain* website provides a running commentary on Mr Karam's activities. Det. Sr. Sgt Doyle was outraged by the 1997 book.<sup>324</sup>

A. Well, we had written to the Police and asked them to initiate an independent investigation, refer the matter to the Police Complaints Authority because we felt that our names and our reputations were being unfairly sullied at that point in time and we wanted that clarified. To that end, a meeting was arranged with the then Commissioner Peter Doone who came to Dunedin and following that meeting -

Q. He was overall in charge of the New Zealand Police?

A. He was in charge of New Zealand Police.<sup>325</sup>

611. It appears the New Zealand constabulary closed ranks. According to the Joint Report of the Police/Police Complaints Authority the Police considered that the book alleged Police "*misconduct/impropriety/ineptitude... a virtual catalogue of allegations – express or implied – of professional mispractice which must in itself be regarded as a substantial complaint against the Police*"<sup>326</sup> even though Mr Karam had not in fact made a formal complaint. Accordingly, in May 1997 the Commissioner of the New Zealand Police "consulted" with the then Police Complaints Authority, Judge Sir John Jefferies. The Police self-initiated an inquiry into itself.

### (i) The Joint Report of the Police/Police Complaints Authority (1997)

612. The Joint Report acknowledges that the Police conducted their own inquiry into the conduct of their Dunedin colleagues, albeit making "regular contact" with Sir John until his retirement" in June 1997, and thereafter "frequently discussed progress with the new Police Complaints Authority, Judge [N.C.] Jaine".<sup>327</sup> The report noted that "*the focus of this inquiry has*

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<sup>324</sup> Doyle interview p. 18.

<sup>325</sup> Doyle interview p. 18

<sup>326</sup> See P/PCA report paragraph 2

<sup>327</sup> P/PCA report paragraph 4

*been on the conduct of the Police in the investigation of these crimes and the subsequent presentation of evidence to the Court” and “it has to be understood that this inquiry and this report do not purport to reach a conclusion on whether David Bain was correctly convicted of the murders”.*<sup>328</sup>

613. Overall, the Joint Police/Police Complaints Authority Report congratulated the Dunedin CIB on a job well done:

The broad contention that the investigation was a bungled effort which led to a wrong conclusion being drawn and that officers then selected evidence to support that conclusion is rejected. We believe the original investigation was mounted and pursued with proper regard to standards, policy and procedures and that those involved acquitted themselves with integrity. (Emphasis added)<sup>329</sup>

614. The Joint Report is essentially a Police advocacy document that missed a valuable opportunity to get to the bottom of some of the serious problems with the Bain investigation, many of which it discussed but ultimately rejected. Some of Mr Karam’s criticisms it accepted but only by way of recommendations for the future. The Police found little fault with the Police except with the Police armourer who gave inaccurate evidence at the 1995 trial about the length of the rifle [he over-measured it by about 20 cms].<sup>330</sup> The Joint Report acknowledged that:

This point was clarified in cross-examination but was significant because it gave support to a defence contention that it was possible for Robin to have shot himself. While the error was corrected during the trial and adequately disposed of by Justice Williamson, it remains a matter of concern that a Police witness should have made such a serious mistake in his evidence.<sup>331</sup>

615. Other Police “mistakes” were more lightly treated. The performance of the Police Complaints Authority on this occasion illustrated some of the problems that were later the subject of a paper by the Auckland District Law Society’s Public Issues Committee, which

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<sup>328</sup> Ibid paragraph 6

<sup>329</sup> Ibid paragraph 329

<sup>330</sup> P/PCA report paragraph 261

<sup>331</sup> Ibid paragraph 261-3

advocated the establishment of a fully independent Police Complaints Authority, highlighting the following public concerns:<sup>332</sup>

- a) The use of Police officers to carry out PCA investigations may lead to the public losing confidence in the Police and the legal system;
- b) The collection of evidence by the Police concerning matters involving the Police but “under the supervision of the PCA” seems essentially an investigation of the Police by the Police;
- c) Individual Police officers might influence the evidence that is gathered, either consciously or subconsciously.

Another major concern of the Committee was the confidential nature of investigations. The public perception, it said, was that the independence of the PCA was “a facade”.<sup>333</sup> Det. Sr Sgt Doyle told me that even the people interviewed “were prohibited from getting any record of what we’d said.”

616. The Police Complaints Authority missed an opportunity to remedy an injustice – or at least start the ball rolling in that direction – more than a decade before the Privy Council finally put an end to the wrongful convictions.

**(ii) Defamation Action taken by Det. Sgt Weir and Det. Sgt Anderson**

617. One of the allegations in *David and Goliath* was that Det. Sgt Weir had perjured himself in describing to the 1995 jury where and how he had found the left lens in Stephen’s room.

618. Det. Sgt Kevan Anderson considered that he had been defamed by the allegations that his evidence regarding computer times was “fudged”, “palpably false” or “misleading.”<sup>334</sup>

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<sup>332</sup> Auckland District Law Society “Précis of a paper by the Public Issues Committee on the PCA” (June 2000) Public Issues Paper – Auckland Law Society <[www.adls.org.nz](http://www.adls.org.nz)>

<sup>333</sup> Simon Collins “Policing the Police – can we trust the system?” *The New Zealand Herald* (online ed, Auckland, 13 May 2000)

<sup>334</sup> Joint Report of the Police/Police Complaints Authority, p. 53 para 120.

619. Accordingly Messers Weir and Anderson, supported by the Police Association commenced a defamation action against Mr Karam.
620. The Auckland jury did not see things the same way as had the Joint Report.
621. Det. Sgt Anderson's claim was dismissed.
622. More significantly, the Auckland jury found in favour of Mr Karam that the defence had established underlying facts sufficient to support Mr Karam's honest belief in the allegation of perjury against Det. Sgt Weir as giving rise to the defence of fair comment. The questions posed to the jury in respect of Det. Sgt Weir and the jury's responses are set out below in a footnote.<sup>335</sup> The Jury found that Mr Karam's allegation of perjury was based on facts alleged in his book and **that such facts were proven to the jury's satisfaction to be true or not materially different from the truth.**

*Comment: Such a finding by an Auckland jury must inevitably have undermined public confidence in the work of the Police. Juries are the cornerstone of our justice system. When they speak people listen. The jury's verdict in the libel case is another example of why the Bain case is not one of the ordinary run of cases where an appeal is allowed.*

### (iii) Repercussions for Det. Sgt Weir

623. Det. Sgt Weir, as the officer in charge of the crime scene, has been at the centre of controversy since 1997. In my interview with him in Dunedin on July 19, 2012 I thought he spoke quite candidly, although much embittered by what has happened. The integrity of his

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<sup>335</sup> The Auckland Court record: extracts from

Issue 1 Do the words complained of in their natural and ordinary meaning, when read together and in the context of *David and Goliath* as a whole, mean that Mr Weir did not find but instead planted the lens in Stephen's bedroom? No

Issue 2 Do the words complained of in their natural and ordinary meaning, when read together and in the context of *David and Goliath* as a whole, mean that Mr Weir committed perjury at the High Court trial of David Bain for the murders? Yes

If the answer to the issue is "no", go straight to Issue 6

Issue 3 Is such meaning an expression in the book of "opinion" in the legal sense? Yes

Issue 4 If the answer to Issue 3 is "yes", is such expression of opinion based on facts alleged in the book? Yes

Issue 5 If the answer to Issue 4 is "yes", are such facts proved to be true or not materially different from the truth? Yes

Issue 6 If:

(a) the answer to Issue 1 is "yes"; and/or

(b) the answer to Issue 2 is "yes", and the answer to any one or more of the Issues 3, 4, 5 is "not", what sum by way of damages should be paid to Mr Weir?

\$ No answer request

work on the Bain case has been faulted by at least two independent sources – an Auckland jury in the defamation case just mentioned, and by his fellow Police officers whose suspicion and distrust, he says, led him to quit the Police altogether in May 1999.

**(iv) Mr Weir’s Premature Departure from the Police Force**

624. In my interview he said the repercussions from the Bain case “affected my career in the Police, obviously” and as an example:

A. 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 the inquiry, when it was, when the staff 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.

Q. So evidence on demand.

A. Yeah, I became the brunt of some Police humour which may or may not have been harmless but it certainly wasn’t for me. (pp. 78-79)

625. He left the police force many years before the normal retirement age afterwards.

**(v) Police Triumphalism**

626. After the Court of Appeal rejected David Bain’s appeal Det. Sgt Weir threw what seems to have been a victory party. Amongst other things he spray painted a sign over the door of his house proclaiming “**Hang Bain**”.<sup>336</sup>

*Comment: Det. Sgt Weir occupied a key position in what was one of the most significant criminal investigations in the history of the Dunedin Police. The HANG BAIN sign betrayed an unacceptable level of rancorous partisanship.*<sup>337</sup>

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<sup>336</sup> Retrial p. 1235 l. 30-31.

<sup>337</sup> Weir interview, p. 75 – to his credit, Milton Weir now describes it as “a moment of sheer stupidity.”

## CONCLUSION ON PART TWO

627. Of course in many cases where appeals are allowed there will be instances of Police investigative failures. It is the number and cumulative importance of errors here that might, in my view be seen as constituting extraordinary circumstances.<sup>338</sup>

628. The sheer length of David Bain's incarceration takes the Bain prosecution "outside the ordinary run of cases in which appeals have been allowed"<sup>339</sup>.

629. This is not a case where my respectful recommendation, the Cabinet ought to say to David Bain "tough luck" and "move on". The state authorities and in particular the Dunedin CIB, were seriously complicit in this miscarriage of justice, in my opinion.

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<sup>338</sup> Dean Cottle statement (retrial pages 3683-5).

<sup>339</sup> Minister's letter paragraph 39

**PART THREE:**

**RECOMMENDATION**

630. I recommend that compensation be paid to David Bain in an amount to be fixed by the Cabinet in the exercise of its discretion with respect to *ex gratia* payments.

631. I do so on the basis that the state, through the acts and omissions of the Dunedin Police, played a significant role in his wrongful conviction.

632. In my respectful opinion these acts and omissions constituted so marked a departure from the requirements of the New Zealand *Detective Manual* of the day as to amount, in terms of the Minister's letter to me of 10 November 2011, to "serious wrongdoing by authorities" in "failing to take proper steps to investigate the possibility of innocence."

633. The prosecution that slowly but surely unravelled over the 15 years from David Bain's conviction in 1995 to his acquittal in 2009 cannot, in my opinion, be classified as one of "the ordinary run of cases in which appeals have been allowed."

634. It is on that basis, and not because of any criminality or wilful misconduct by the Police, that I recommend that consideration be given by cabinet to the payment of compensation to David Bain.

**BOOK OF DOCUMENTS**

Tab A: Decision of the Privy Council dated May 10, 2007

Tab B: Survey Plan of 65 Every Street

Tab C: Claim letter from the law firm of Duncan Cotterill to the Minister of Justice by letter dated 25 March 2010, supported by an affidavit sworn by David Bain on 10 December 2009

Tab D: Mandate letter to Honourable Ian Binnie

Tab E: Transcript of my Interview with retired Det. Sr. Sgt Jim Doyle at Dunedin on July 19, 2012

Tab F: Transcript of my interview with retired Det. Sgt Milton Weir at Dunedin on July 19, 2012

Tab G: Transcript of my interview with David Bain at Auckland on July 23, 2012

Tab H: Dean Cottle statement of 24 June 1994

Tab I: Martin Cox report regarding Computer Turn-on Time

Tab J: Legal Analysis of Crown Disclosure requirements in 1995 by Professor Paul Rishworth

# APPENDIX A

11/01/99 09:48 0'DRISCOLL MARKS DUNEDIN → MIN OF JUSTICE  
39/01/1999 11:28 3440711 KOTUKU UNIT  
10/12/92 17:25 MIN OF JUSTICE CJP → O'DRISCOLL MARKS

NO. 639 001  
PAGE 01 2010  
NO. 122 062

"VCS-1"

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In the Court of  
Appeal

No 19

Affidavits

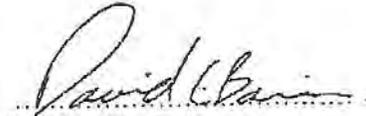
### WAIVER OF PRIVILEGE

Mr Michael Guest, Barrister and Solicitor  
Ms Jonelle Williams, Barrister and Solicitor

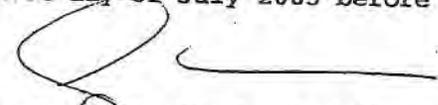
I DAVID CULLEN BAIN confirm that I waive privilege only as it relates to the inquiry by the Ministry of Justice into the following issues raised by my petition to the Governor-General for the exercise of the Royal prerogative of mercy:

- Errors by defence counsel in the preparation and conduct of my defence;
- Non-disclosure of certain material by the Police before trial and appeal;
- Unfounded prejudicial allegations by the Crown which were not seriously challenged by counsel; and
- Trial by ambush on the part of the Crown.

This waiver of privilege is only to the extent that you may discuss these matters with officials from the Ministry of Justice, and further that any discussions with officials concerning privileged information shall not be disclosed, in whole or in part, to any other person or the media without my authorisation.

  
David Cullen Bain

This is the exhibit marked "VCS-1" referred to in the annexed affidavit of VALERY CATHERINE SIM sworn at Wellington this 31st day of July 2003 before me:

  
A Solicitor of the High Court of New Zealand  
Deputy Registrar