



## Office of Hon Amy Adams

Member of Parliament for Selwyn

Minister of Justice

Minister for Courts

Minister of Broadcasting

Minister for Communications

12 OCT 2016

Marcus Cook  
fyi-request-4612-2550c935@requests.fyi.org.nz

Dear Mr Cook

### Official Information Act 1982 request: Hon Ian Callinan AC QC's report

I refer to your email of 16 September 2016 requesting, under the Official Information Act 1982 ("the Act"), the following information:

*"certain documents referred to in Schedule 1 of Hon I D F Callinan's 'Further Report' into David Bain's compensation claim, dated 24<sup>th</sup> December, 2015. Specifically, items: 18 to 29 (inclusive) of the items referred to in this Schedule."*

### Response

The **attached** table sets out the documents listed in that Schedule, and records whether the information is being released or withheld under the Act.

Where information has been withheld under s 9 of the Act, I do not consider that the grounds for withholding the information are outweighed by other considerations that render it desirable in the public interest to make the information available.

You have the right under section 28(3) of the Act to complain to the Ombudsman about the decision to withhold information.

Yours sincerely

Hon Amy Adams  
Minister of Justice

| # | Document                                                                                                                                                                                            | Release / deletions                                                                                                                                                                                                                                                                                                        |
|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | 18. Applicant's Response to the Draft Report dated the 16 <sup>th</sup> of October 2015                                                                                                             | Withheld in full under s 9(2)(ba) to protect information that is subject to an obligation of confidence<br><br>To the extent that any information contained in this document has been quoted or referred to in Mr Callinan's advice, that information is withheld under s 18(d) on the basis that it is publicly available |
| 2 | 19. Letter from the Minister to the Hon Ian Callinan AC dated the 20 <sup>th</sup> of October 2015 attaching a copy of letter from the Minister to Mr Karam of the 20 <sup>th</sup> of October 2015 | Withheld in full under s 9(2)(h) in order to maintain legal professional privilege                                                                                                                                                                                                                                         |
| 3 | 20. Letter from the Minister to Mr Karam of the 21 <sup>st</sup> of October 2015                                                                                                                    | Mr Karam's email address is withheld under s 9(2)(a) to protect the privacy of natural persons                                                                                                                                                                                                                             |
| 4 | 21. Letter from Mr Karam to the Minister dated the 29 <sup>th</sup> of October 2015                                                                                                                 | Released in full                                                                                                                                                                                                                                                                                                           |
| 5 | 22. Letter from Private Secretary to the Minister to Mr Karam dated the 29 <sup>th</sup> of October 2015                                                                                            | Mr McGilvray's mobile phone number is withheld under s 9(2)(a) to protect the privacy of natural persons                                                                                                                                                                                                                   |
| 6 | 23. Letter from Mr Karam to the Minister dated the 30 <sup>th</sup> of October 2015                                                                                                                 | Released in full                                                                                                                                                                                                                                                                                                           |
| 7 | 24. Letter from the Minister to the Hon Ian Callinan AC dated the 3 <sup>rd</sup> of November 2015                                                                                                  | Withheld in full under s 9(2)(h) in order to maintain legal professional privilege                                                                                                                                                                                                                                         |
| 8 | 25. Letter from the Minister to Mr Karam dated the 3 <sup>rd</sup> of November 2015                                                                                                                 | Mr Karam's email address is withheld under s 9(2)(a) to protect the privacy of natural persons<br><br>The attachment is withheld under s 9(2)(h) in order to maintain legal professional privilege                                                                                                                         |
| 9 | 26. Letter from the Hon Ian Callinan AC to Messrs Heron QC and others dated the 4 <sup>th</sup> of November 2015                                                                                    | Withheld in full under s 9(2)(ba) to protect information that is subject to an obligation of confidence<br><br>To the extent that any information contained in this document has been quoted or referred to in Mr Callinan's advice, that information is withheld under s 18(d) on the basis that it is publicly available |

| #  | Document                                                                                                                                                                                                                                                                | Release / deletions                                                                                                                                                                                                                                                                                                        |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10 | 27. Letter from the Hon Ian Callinan AC to the Minister dated the 6 <sup>th</sup> of November 2015                                                                                                                                                                      | Withheld in full under s 9(2)(h) in order to maintain legal professional privilege                                                                                                                                                                                                                                         |
| 11 | 28. Letter from Mr Karam to the Hon Amy Adams dated the 8 <sup>th</sup> of November 2015                                                                                                                                                                                | Withheld in full under s 9(2)(ba) to protect information that is subject to an obligation of confidence<br><br>To the extent that any information contained in this document has been quoted or referred to in Mr Callinan's advice, that information is withheld under s 18(d) on the basis that it is publicly available |
| 12 | 29. Letter from Mr Karam to the Hon Amy Adams (the "Letter") dated the 16 <sup>th</sup> of November 2015<br><br><b>NB:</b> This appears to be a typographical error. From the context, it is clear the letter referred to by Mr Callinan is that dated 16 October 2015. | Released in full                                                                                                                                                                                                                                                                                                           |



## Office of Hon Amy Adams

Member of Parliament for Selwyn  
Minister of Justice  
Minister for Courts  
Minister of Broadcasting  
Minister for Communications

21 OCT 2015

Joe Karam

s 9(2)(a)

Dear Mr Karam

### **Application for compensation for wrongful conviction and imprisonment: David Cullen Bain**

Thank you for your letter of 20 October 2015.

I am cognisant of the need for Mr Bain to consider his position. However, as outlined in my letter to you yesterday, my intention is that Mr Callinan be afforded the opportunity to complete his instructions and finalise his report having regard to the concerns you have outlined. In those instructions I asked Mr Callinan to complete his work within six months. While that is now not going to be possible, through no fault on the part of Mr Callinan, I nevertheless regard it as important to progress in a timely way.

My request was that you refer your concerns directly to Mr Callinan. If you intend to do so, I ask that you write to Mr Callinan directly as soon as practicable, asking for the further time you consider is required to be able to complete your submission.

Without in any way limiting your ability to raise your concerns directly with Mr Callinan, or to elect to not do so, I intend to refer your letter of 16 October 2015 to Mr Callinan myself on 30 October 2015 to enable him to begin the process of considering the concerns you have already raised with me and finalise his report in a timely way.

As indicated yesterday I will be considering what advice to take to Cabinet only once I receive the final report from Mr Callinan.

I am copying this letter to Mr Callinan and the Crown Law Office to keep them informed of developments.

Yours sincerely

Hon Amy Adams  
**Minister of Justice**

29 October 2015

Hon Amy Adams  
Minister of Justice  
WELLINGTON

Stuart.McGilvray@parliament.govt.nz

Dear Minister,

**Application for compensation for wrongful conviction and imprisonment: David Cullen Bain**

1. Thank you for your reply to my letter. I refer to all of our correspondence since and including my letter of 16 October to you and most recently your letter of 27 October and Mr McGilvray's email of 28 October 2015. These have been referred to the Applicant and after consultation I have instructions.
2. Your responses suggest I may not have been sufficiently clear in my letter of 16 October. Obviously you will consider the advice you receive, but it appears that the point of my writing to you directly has been overlooked.
3. I wish to make it clear that the Applicant completely rejects Mr Callinan's inquiry and report. He rejects it as an unfair one-sided process; and for its omissions, anomalies contradictions and lack of thoroughness. He believes his legal rights have been abused, both as to sections of the Bill of Rights Act and the Defamation Act in that his character has been improperly maligned as has that of other people referred in the report.
4. As far as the Applicant is concerned the judge's role was complete when his draft report was filed, subject only to corrections of basic facts. That is why I sent, on his behalf, the submission to Mr Callinan on 16 October informing him that no further submissions to him would be made, and why I wrote to you outlining the concerns.
5. The Applicant believes that you should also be taking this position. Certainly that was the position your predecessor took towards the author of the report she received, and her stance was vehemently defended by the Prime Minister, Crown Law and the Ministry both publicly and in the ensuing proceedings. We have alerted you to the problem that the draft report is irremediably not fit for purpose. Therefore you need to ascertain, independently of Mr Callinan, the quality and reliability of the report.
6. With respect, I wish to briefly make a couple of points about the course of action you have suggested I should follow.
7. When I stated that Mr Callinan's draft report is not fit for its purpose, beyond remedy and a 'train wreck', that was not rhetoric, hyperbole or bluster. It was a considered and informed assessment based on not only an intricate knowledge of the case, but also on the standards accepted by your government for such reports, as laid out by Dr Fisher.
8. The interests of justice are, of course, the primary consideration, in line with both the Ministry's primary aim and the Cabinet guidelines on compensation. Your letter of 21 October, however, appears to suggest that Mr Callinan is the primary concern, where you say he must "be given the opportunity..."

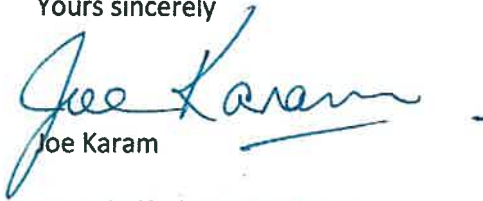
9. It is Mr Bain who should be the primary consideration, not Mr Callinan. It is Mr Bain whom the state wrongly imprisoned for 13 years. In 2003 it was the State's then highest Court who perpetuated that travesty by another four years with its defective decision and audacious conclusion that any jury would find him guilty beyond reasonable doubt. How wrong they were was shown by the jury's verdicts at the 2009 retrial.
10. Mr Callinan has accepted a commercial undertaking fully aware of the background controversy, the public interest and national significance of the case. His work fails to meet the standards for such work.
11. Mr Callinan has produced his report, subject only to submissions on matters of "factual or legal inaccuracies". His conclusions are made on a completed process. It is too late now for him to remedy those failures of process and thoroughness.
12. As to the inaccuracies, Crown Law has attended to those, as well as making pointed suggestions on a number of issues where the report misrepresents case theory and the evidence. In one instance, their advice appears to suggest adjustments to the report for the sole reason of deflecting potential criticism of apparent bias due to the over-emphasis of this evidence. I refer to the suggestions made by Crown law to make less of the letter and inadmissible evidence of Janis Clark (paragraph 1 [13] in their response).
13. Our position is that the defects are so voluminous and egregious as to be irremediable; and for the most part represent failures as to fairness and process, not 'inaccuracies' as envisaged by the instructions. As to inaccuracies of law, there is no law governing such inquiries, except, as stated, the inherent laws of natural justice. The only explicitly articulated accepted standards for such inquiries are those set out in Dr Fisher's report of 2012, which the current inquiry has breached on every front.
14. In your letter of 20 October, you say I should be making submissions to Mr Callinan on concerns about 'errors of substance or process', presumably to accommodate the wide ranging concerns that go far beyond factual and legal inaccuracies. With respect, "substance and process" is not what was agreed to. Had that been the wording of the instructions then we would not have participated. The process the Applicant entered into, in good faith, had a tacit expectation that the assessment and reporting of evidence and arguments relative to the claim would be fair, logical, thorough and of appropriate quality. It was expected that any inaccuracies would relate to dates, names, spelling and the like, rather than voluminous misapprehensions, misrepresentations and misreporting of central substantive matters.
15. For example, the omissions of evidence and the invention of scenarios that defy the actual evidence are not 'inaccuracies' They are failures indicating a total lack of comprehension, or prejudice, or a combination thereof, and which provide a false foundation for important conclusions.
16. I reiterate that my letter of 16 October includes only examples of the defects – similar problems exist on all the central points of the Applicant's claim.
17. You say you are going to give my letter of 16 October to Mr Callinan. While I have no problem with him being aware of my views, there are some issues with this course of action. First, the letter makes a number of references to Dr Fisher's report and also to Mr Binnie's. These, by virtue of your instructions, are explicitly ruled out for consideration by Mr Callinan. Secondly, as stated above, most of issues raised are not inaccuracies of fact or law. These include the issues of refusal to accept oral submissions and to interview witnesses;

misrepresenting the Applicant's case; contradictions in the report, misunderstanding of probability reasoning as set out by Dr Fisher; invented scenarios, and others. I see no grounds for these alleged procedural defects to be put to the judge.

18. As I said at the outset, you will do what you will. But in light of the history of this claim, I respectfully suggest that any further adverse impact on the Applicant by overreaching the instructions will only add fuel to the perception of unfairness inflicted on him by the state over the past 21 years.
19. Therefore I suggest it is proper that you redact those portions of the letter that do not relate to "factual or legal inaccuracies" or otherwise contravene the instructions, before forwarding it to Mr Callinan. I am willing to mark up a copy for your consideration if that would assist. You may well decide to forward this letter to Mr Callinan also. In the event you do, I would expect paragraph seventeen above to also be redacted (bar the first two sentences), on the same grounds.
20. The Applicant and his advisers have tried to co-operate at every level since the claim was filed in March of 2010. Through no fault of his or ours, the process has gone completely off the rails and well in excess of a million dollars of public money has been expended with no satisfactory outcome achieved.
21. The issue goes far beyond the matter of compensation for the Applicant. The case is of national and international significance. The guidelines for compensation are under scrutiny. In fact the New Zealand regime on compensation for wrongful conviction and imprisonment has been seriously questioned as to its suitability to the demands of fairness and transparency in the 21<sup>st</sup> century. Many right minded people including legal experts have expressed dismay at the requirement imposed on legally innocent people being forced to prove their innocence, especially in circumstances where the wrongful incarceration has usually left them impecunious of both real assets as well as the spirit needed to confront yet again a system that has wrecked their life.
22. The handling of the case has caused great embarrassment to every level of the Criminal Justice system in New Zealand. The work done by Mr Callinan is not of a quality that can finalise the case which will not fade away on the back of a sub-standard report commissioned in the circumstances where it was perceived by many as judge-shopping.
23. Even after Dr Fisher's and Mr Binnie's report were released at the end of 2012 accompanied by strident comments by your predecessor and others in government, the three main political pollsters reported that around 70 per cent of New Zealanders were in favour of paying compensation to Mr Bain, as I am sure you are aware. That has been a very consistent result over the years, and one which I suggest the Callinan report will not influence.
24. In one of the very first letters Mr McGill of Duncan Cotterill wrote to then Minister Simon Power in April or May 2010, he suggested that the "cabinet guidelines" as they stand were not designed or adequate to deal with a case as extraordinary as Mr Bain's. Mr Orr will have this letter on file. Mr McGill suggested that a public inquiry commissioned under the Act for such inquiries would be preferable. Events since then suggest it was a prescient observation, for Mr Bain has been treated as the proverbial political football ever since Mr Power left office.

25. Accordingly, for the reasons contained in this letter and all the correspondence referred, the Applicant wishes to inform you that, with the exception of him being invited to reopen discussions of how to properly resolve his claim, he withdraws from the current process relating to his claim for compensation for wrongful conviction and imprisonment.

Yours sincerely

A handwritten signature in blue ink that reads "Joe Karam". The signature is written in a cursive style with a long horizontal stroke at the end.

Joe Karam

On Behalf of David Cullen Bain



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**From:** Stuart McGilvray  
**Sent:** Thursday, 29 October 2015 6:34:24 p.m.  
**To:** 'Joe Karam'  
**Subject:** RE: Bain Compensation claim

Dear Mr Karam,

Minister Adams is overseas presently. She has asked me to indicate that while it is of course your right to withdraw from the process, it is still her intention to provide Mr Callinan the opportunity to respond to any concerns you raise before taking these matters into account in any subsequent decision.

Given that the only statement we have of those concerns is your letter of 16 October, and that we intend to forward that letter to Mr Callinan to comment on, you are advised that no additional matters of concern about the report will be taken into account, as Mr Callinan will not have had any opportunity to respond or provide advice on any such additional matters.

Should you wish to review your position in light of that you need to advise us by close of play tomorrow, 30 October. In the absence of any such response, we will proceed as set out above.

Regards

Stuart McGilvray | Justice Private Secretary  
Office of Hon Amy Adams | Parliament Buildings, Wellington  
FDI: 04 817 9353 | Mobile: s 9(2)(a)

30 October 2015

Hon Amy Adams  
Minister of Justice  
Wellington.

[Stuart.McGilvray@parliament.govt.nz](mailto:Stuart.McGilvray@parliament.govt.nz)

Dear Minister

**Application for compensation for wrongful conviction and imprisonment: David Cullen Bain**

I include below the full contents of the email received yesterday evening on your behalf, which was in response to my letter to you, also of yesterday, and underline the passages on which I comment.

*Dear Mr Karam,*

*Minister Adams is overseas presently. She has asked me to indicate that while it is of course your right to withdraw from the process, it is still her intention to provide Mr Callinan the opportunity to respond to any concerns you raise before taking these matters into account in any subsequent decision.*

*Given that the only statement we have of those concerns is your letter of 16 October, and that we intend to forward that letter to Mr Callinan to comment on, you are advised that no additional matters of concern about the report will be taken into account, as Mr Callinan will not have had any opportunity to respond or provide advice on any such additional matters.*

*Should you wish to review your position in light of that you need to advise us by close of play tomorrow, 30 October. In the absence of any such response, we will proceed as set out above.*

*Regards*

*Stuart McGilvray | Justice Private Secretary  
Office of Hon Amy Adams | Parliament Buildings, Wellington  
DDI: 04 817 9353 | Mobile: 021 220 6451*

Assuming this is a correct representation of your intentions, it is very clear that fairness to the Applicant is not your primary concern but rather that political interests are being put before the interests of justice and fairness.

If you proceed as stated, then you are doing so without regard to and in blatant breach of the instructions you set down governing the inquiry and report of Mr Callinan.

First, the instructions are very clear that submissions on the draft report were not an opportunity for the parties to conduct a critique of it. In fact as stated in my letter yesterday, quite the opposite. But that is what you are now saying you expect us to do, and to do so for Mr Callinan's benefit. It must be clear to you that any such undertaking will not assist Mr Bain, which is why I say the procedure above is politically motivated.

Secondly, the instructions explicitly require Mr Callinan to complete his task without reference to the reports of Mr Binnie and Dr Fisher. My letter of 16 October contains many references to those reports, which were included for your benefit, not Mr Callinan's.

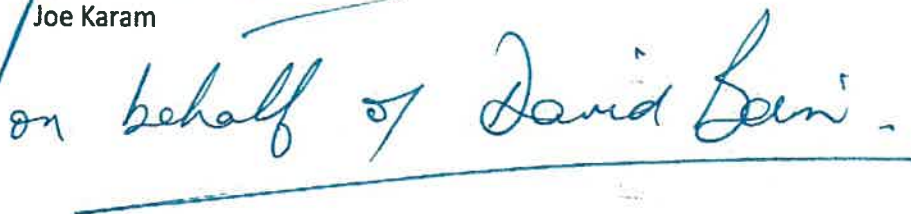
Since my first letter to you on 16 October of October, and when considering your responses, I have been concerned that you have not read them in earnest, or are treating this as some kind of game. This is extremely disappointing. I thought the dismissal of the previous Minister had put an end to that attitude to justice in New Zealand.

Your response reinforces the reasoning behind Mr Bain's decision to withdraw from the process.

Yours sincerely

A handwritten signature in blue ink that reads "Joe Karam". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Joe Karam

A handwritten signature in blue ink that reads "on behalf of David Binnie". The signature is written in a cursive style and is underlined with a long horizontal line.



## Office of Hon Amy Adams

Member of Parliament for Selwyn  
Minister of Justice  
Minister for Courts  
Minister of Broadcasting  
Minister for Communications

03 NOV 2015

Joe Karam

s 9(2)(a)

Dear Mr Karam

### **Application for compensation for wrongful conviction and imprisonment: David Cullen Bain**

I acknowledge receipt of your letter of 30 October 2015.

Enclosed is a copy of a letter that has been sent to Mr Callinan today. You will see that as previously indicated, I have asked him to complete his report having regard to the matters raised in your letter of 16 October 2015.

At this stage I can advise that it is my intention to provide the parties with a copy of Mr Callinan's finalised report before I consider what advice I take to Cabinet on the claim. At that point the parties will be able to advise me of any matters that they believe I should take into account before determining my advice to Cabinet. This will not however be an opportunity to make detailed submissions about the evidence that would more appropriately have been raised with Mr Callinan.

I have copied this letter to representatives of the Crown Law Office so they are aware of how I intend to proceed once Mr Callinan finalises his report.

Yours sincerely

Hon Amy Adams  
Minister of Justice

16 October 2015

Hon Amy Adams  
Minister of Justice  
**WELLINGTON**

By Email: [a.adams@ministers.govt.nz](mailto:a.adams@ministers.govt.nz)

Dear Minister,

**Re: Bain Compensation – Mr Callinan draft report dated 26 September 2015**

- 1 My reason for writing to you directly is that on first inspection of Mr Callinan's draft report (“the report”), it was apparent that it is manifestly defective in so many ways, that it would not survive even the most cursory scrutiny and is not fit for the intended purpose.
- 2 Such is the concern at the volume and gravity of the deficiencies that after consultation with the Applicant and his legal advisors, it has been decided I should immediately alert you to the concerns.
- 3 This letter necessarily contains some detail, in order to ensure you are able to understand the gravity of our concerns and extent of shortcomings of the report.
- 4 We have had only a short time to provide a response to the report. I wish to make it clear that with such limited time and resources, this is not, and is not intended to be a list of every instance of every type of error in the report. This letter simply provides a few of the many examples of the errors and concerns, sufficient to illustrate their nature and significance.

**SUMMARY**

- 5 These errors include: fundamental errors of fact; misrepresentations and omissions of evidence; misrepresentations of the Applicant's submissions and case; misrepresentations of cited authorities; errors of reasoning; contradictions and inventions. In addition, it contains errors that Dr Fisher, in his review of Justice Binnie's report, noted were a misapplication of the law of New Zealand and the principles governing an inquiry of this type.
- 6 When considering the totality of the defects, it is clear that the report is beyond remedy, which is the reason for communicating with you rather than the Judge who wrote it.
- 7 The nature, number, extent and impact of the errors in Mr Callinan's report are such that it is obviously unable to support a just decision on the matter of the compensation claim. It should be remembered that the Applicant is legally innocent; has no conviction of any description; has suffered a declared “substantial” miscarriage of justice; suffered 13 years wrongful imprisonment for crimes of which he was acquitted, and as a direct result of the miscarriage inflicted on him in 1995, been deprived of an inheritance

including considerable property and other assets as well as a vast number of personal family artefacts and heirlooms.

## BACKGROUND

- 8 As you know, on receipt of the report from Justice Binnie in 2012, your predecessor had concerns about aspects of that report, which led her to commissioning a review of it by Dr Robert Fisher. Dr Fisher's review found that the Binnie review contained errors which rendered it unacceptable. The reasons given by your predecessor that it was unacceptable were:
- “... broadly that the report appeared to contain assumptions based on incorrect facts, and showed a misunderstanding of New Zealand law. It lacked a robustness of reasoning used to justify its conclusions...it would not be acceptable to make a recommendation to Cabinet based on a report that would not withstand the considerable scrutiny it would attract”.*<sup>1</sup>
- 9 The issues alleged of the Binnie report included that it contained factual errors, and ‘fundamental errors of principle’ described as “*contrary to the law of New Zealand*”<sup>2</sup>. Dr Fisher’s report spelled out the expected approach to assessment of this case.
- 10 On 28 September 2015, we received a copy of Mr Callinan's draft report on which to provide feedback as to factual errors and how they may impinge on conclusions, according to instructions.<sup>3</sup>
- 11 The Applicant’s claim of innocence was founded on 13 points, correctly identified in the report, which then purports to deal with each in turn.
- 12 It is now apparent that the report contains numerous fundamental errors on each of these points, as well as in other areas. These errors are compounded by being adopted and/or contradicted in other sections of the report, including, most importantly, in the conclusions.
- 13 Given the manifold and fundamental nature of the errors in Mr Callinan’s report we place our concerns before you directly as the Minister responsible for dealing with it.

## CONCERNS WITH THE CALLINAN REPORT

- 14 Mr Callinan’s draft report suffers in a most fundamental aspect for which the Binnie report was praised by Dr. Fisher:

*“The report is well organised, comprehensive and thorough. It is a valuable collation of the evidence currently available in relation to this claim.”*<sup>4</sup>

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<sup>1</sup> New Zealand Government Press Release: *Concerns with Bain report led to review*. 11 December 2012, 9:50 am

<sup>2</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012. p8, Para 15

<sup>3</sup> to provide submissions on “... *factual or legal inaccuracies which may appear in my draft report [and] contest my analysis or conclusions... to the extent that they may be affected by inaccuracies of these kinds*” Callinan, Draft Report: David Cullen Bain – Claim for compensation for wrongful conviction and imprisonment. Undated but received 28 September 2015. p4, para 21

- 15 The Callinan report, in contrast, is unfortunately superficial in its coverage, collation and analysis of the evidence, with many errors of fact, reasoning and comprehension.
- 16 Many of the multitude of more facile errors in the report have been identified by Ms Markham in her eight-page list submitted on 8 October 2015. She has also identified some incidences of more serious misrepresentations and factual errors.
- 17 However, Mr Callinan's draft report makes numerous transgressions, not identified by Ms Markham, of a similar nature to those alleged against the Binnie report.
- 18 This is not a complete or exhaustive list of issues with Mr Callinan's report, but a selection of examples to illustrate the extent of its shortcomings. Errors in the report include:

### 18.1 significant errors of fact

There are many factual errors in the report, the impact of some of which is such as to render the conclusions unsafe (see also section 29, below). For example:

- (a) The Applicant's submission was that an aerial spatter blood stain on Robin Bain's shoe, together with other blood spatter, was part of the evidence that on the Applicant's case, showed that Robin Bain shot himself. Mr Callinan repeatedly makes somewhat dismissive reference to this blood stain on the shoe, saying that whether it was even blood was "*inconclusive*",<sup>5</sup> "*no more than a possibility*",<sup>6</sup> "*unproved*";<sup>7</sup> and referring to "*any blood*"<sup>8</sup> and "*blood (if any)*"<sup>9</sup>. Finally, in support of his conclusion on who made the luminol footprints he states: "*Nor was there any blood on [Robin Bain's] shoes. If, as I doubt, there was in fact a microscopic spot of blood on one of his shoes, it is unproved*".<sup>10</sup>

Mr Callinan is incorrect. In fact, and clear in the evidence submitted to Mr Callinan, the expert witness Dr Manlove gave evidence at the retrial of finding these stains on Robin Bain's right shoe,<sup>11</sup> the testing that determined that the stains were blood,<sup>12</sup> and the DNA tests which showed that the bloodstain not only contained Robin Bain's DNA,<sup>13</sup> but that it could only be Robin Bain's DNA.<sup>14</sup> Furthermore, the Crown submissions to Mr Callinan acknowledged that the stains were blood.

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<sup>4</sup> Hon Robert Fisher QC; *Interim report for Minister of Justice on compensation claim by David Bain*. 13 December 2012. p6, Para 9(a)

<sup>5</sup> The report, p51, para 135: table of blood testing item 246 - states that the result is "inconclusive" for blood.

<sup>6</sup> The report, p 45, para 122

<sup>7</sup> The report p 137 para 392

<sup>8</sup> The report p 23, para 64

<sup>9</sup> The report p 120 para 344

<sup>10</sup> The report p 137 para 392

<sup>11</sup> 2009 retrial Notes of Evidence p 3392/line 10 - 3393/line 16

<sup>12</sup> 2009 retrial Notes of Evidence p 3416/lines 2-23

<sup>13</sup> 2009 retrial Notes of Evidence p 3416/lines 2-23

<sup>14</sup> Retrial Notes of evidence p 3399 line 14.

Mr Callinan contradicts himself by stating that the stains “*were never tested*”,<sup>15</sup> but including them in the chart of “blood tests”.<sup>16</sup>

- (b) The report dismisses the Applicant's Alibi by saying that various witness accounts, including the Applicant's, of where he was at various times are unreliable.<sup>17</sup> Mr Callinan states that “*the Applicant's claim was that he was at the gate at exactly 6.40 am.*”<sup>18</sup>

This statement is wrong, as Ms Markham has also identified. The correct statement by the Applicant was that he was near the intersection of Heath St. approximately 300 metres from “the gate”, and still in the process of returning home. This error demonstrates the author's misapprehension of the evidence when forming the views upon which he has founded his conclusions.

The statement appears in a list the author refers to as “some of the possible variables”. Of the 12 ‘possible variables’ listed, at least nine are questionable or uncontrovertibly wrong.

## 18.2 significant misrepresentations of the evidence

Evidence is frequently misrepresented to support a conclusion. For example:

- (a) The evidence of a witness who saw the Applicant at Heath St on his way home is summarised.<sup>19</sup> But when the Judge summarises the evidence, the summary omits the witness' testimony that the Applicant was walking towards his home, although this was highlighted in the Applicant's submissions and referred to in the Crown response.

Although the report accepts that the witness saw and identified the Applicant, in his conclusion and in rejecting the Applicant's claim, Mr Callinan says: “*Who knows, he could have sprinted up*”, contradicting his previous acceptance of the witness' evidence and depending on the omission of the observation that the Applicant was walking.

- (b) In reference to the evidence of sooty lines on Robin Bain's thumb from loading bullets, Mr Callinan says: “*It has to be kept in mind that Mr Joe Slemko reported that he had “forcefully dragged” his fingers across a magazine before taking inked impressions. None of the impressions revealed damage to the ridges*”.<sup>20</sup> This statement is the only reference to Mr Slemko, and completely misrepresents his expert opinion on the matter.

## 18.3 significant misrepresentation of the Applicant's case

<sup>15</sup> The report p 120 para 344

<sup>16</sup> The report, p51, para 135: table of blood testing item 246 - states that the result is “inconclusive” for blood.

<sup>17</sup> Callinan, Draft Report: David Cullen Bain – Claim for compensation for wrongful conviction and imprisonment. Undated but received 28 September 2015. ('the report') p40, paras 106 & 110

<sup>18</sup> The report, at Para 100 (i)

<sup>19</sup> The report, at paras 101 -102

<sup>20</sup> The report, para 201



There are several instances where key aspects of the Applicant's case are substantially misrepresented in the report then used to support a conclusion. For example:

- (a) Mr Callinan commits a blatant and flagrant misrepresentation of the Applicant's case as it relates to the reason(s) for Robin Bain to have been responsible for the deaths of the family and himself.

He states: *"Mr Robin Bain's motive is said to have been to kill Laniet in order to prevent the revelation by her of his criminally incestuous relationship with her."*<sup>21</sup> This statement is referenced to the Defence opening address at the 2009 retrial.

The actual quote from Mr Reed's opening address is:

*"The mere fact that she was telling everyone of it and Robin getting to hear of that, would be the trigger, that could be the thing that tipped him into doing what he did. So there is two aspects. There is the truth of the incest, or there is the fact that she has been telling everyone."*<sup>21</sup>

Moreover, in his closing address Mr Reed emphasised this point: *"There was a great risk for Robin. The mere fact of Laniet saying these things could be disastrous, it could be the last point to make him flip, and in that regard, we refer to what's called the signing out by Robin."*<sup>22</sup>

The Applicant's claim presented to the Judge actually states: *"damaging allegations to numerous people that he was committing incest with his daughter(s)".*<sup>23</sup>

Thus it is clear the Applicant does not and never has relied on the allegations of incest as being necessarily true. Nor has it been the case that the motive for Mr Robin Bain was *"to prevent the revelation by her of his criminally incestuous relationship with her"*. Rather the opposite, it is said in part at least to be, *"because those allegations had been made to numerous people"*, that he flipped.

The Judge's conclusion on this issue is that he is *"not satisfied that Mr Robin Bain had seduced Laniet into, and was maintaining with her, an incestuous relationship"*<sup>24</sup> and that even if such a relationship had existed, *"There is not the slightest suggestion ... that there was a shocking revelation of relevant carnal conduct."*<sup>25</sup>

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<sup>21</sup> The report, p 15 para 49

<sup>[1]</sup> 2009 retrial, Defence opening address, p 4 para 30

<sup>22</sup> 2009 retrial, Defence closing address, p 30 lines 19-21

<sup>23</sup> Applicant's submissions in support of claim of innocence, para 112.3

<sup>24</sup> The report, p 137 para 395

<sup>25</sup> The report, p 138 para 396

This misapprehension and reporting of the Applicant's case and the evidence, fatally undermines the conclusions drawn in the report on the entire issue of motive and cause, dealt with in considerable detail by the Judge.

In submissions to the Judge, the Applicant attributes Robin Bain's killing of his family to a form of extended suicide, typical in familicides, triggered by despair and shame.

- (b) In summarising the Applicant's case and discussing the injuries to Robin Bain's hands, the report says: *"It is not correct to say that Dr Dempster's evidence was unequivocally, if at all, to the effect that the injuries to the hand would have occurred within an hour prior to his death."*<sup>26</sup> This clearly implies that the statement that was 'not correct to say' had been said. But at no point in the Applicant's submissions was it said that Dr Dempster's evidence was that the injuries would have occurred within an hour prior to death. His evidence, and that of Dr Thomson, as stated in court and as submitted, was that they could have occurred in that timescale, and must have occurred within the preceding 12 hours.<sup>27</sup>

The Judge ignores the issue of the injuries having occurred in the previous 12 hours. Given this evidence, his conclusion that the injuries occurred in the course of repairing the house's guttering or working with the chainsaw that weekend<sup>28</sup> is logically unsustainable and contrary to the evidence.

#### 18.4 significant omissions, contradictions and inconsistencies

Mr Callinan draws conclusions which are in some instances only possible by omitting or ignoring evidence, and in doing so he frequently contradicts himself. For example:

- (a) The Crown pathologist, Dr Alec Dempster, provided an affidavit for the Applicant as to his position on the two sooty lines photographed on Robin Bain's thumb, being that there were no sooty lines or cuts on the thumb when he did the Post Mortem. This was, in the Applicant's submission, the most important evidence on this issue, because it completely refutes the Crown submission that the sooty lines in the police photographs were superficial cuts. The report dismisses the evidence without any comment on Dr Dempster or his affidavit,<sup>29</sup> other than that made in the Crown submissions (posted in the report in their entirety) which say *"The language of the affidavit is difficult to reconcile .....*", clearly impugning Dr Dempster.
- (b) Mr Callinan lists among his 'uncontestable facts' that David had said he hated his father,<sup>30</sup> drawing this from evidence given by Mrs Boyd.<sup>31</sup> The Judge later

<sup>26</sup> The report, para 143

<sup>27</sup> Applicant's Submissions in support of claim of innocence; 25 May 2015; paras 166-174

<sup>28</sup> The report, Para 143

<sup>29</sup> Appendix B: Affidavit of Dr Dempster

<sup>30</sup> The report, p115, para 327 (42)

extends and exaggerates this to stating that *"The Applicant disliked, to the point of hatred, his father."*<sup>32</sup>

The evidence cannot support this statement without omitting the further evidence about David saying this. The judge ignores that David had said this in the context of having just been told that his father had killed the family, despite quoting David as saying *"...that was only meant to express the anger I was feeling if he had done it"*<sup>33</sup> and despite David's explanation being verified by Mrs Boyd's evidence as submitted:

*"Guest continued: 'And did he say in the same part of the conversation, if my father has done this I can never forgive him and that is a terrible burden to carry around for the rest of my life?' Val Boyd answered, 'He did.'"*<sup>34</sup>

### 18.5 inventions

Mr Callinan introduces factors which are not in the evidence, which have never been suggested before, and for which there is no basis. For example,

- (a) When discussing David's alibi and the critical computer timing evidence, among possible variables he lists *"the clone as a complete and perfect replica."*<sup>35</sup> By this he is saying that the clone of the Bain computer might not be a 'complete and perfect' replica. This is a variable the Judge has invented: there is not and never has been any suggestion that the clone was unreliable in any way; in fact the evidence of the Crown witness who created the clone is to the contrary.

Mr Kleintjes, a forensic computer expert, the relevant witness for the Crown stated in evidence that: *"a clone of a computer is an exact copy of it"*<sup>36</sup> and *"there is no difference [between the cloned hard drive and the hard drive from the Bain computer]"*<sup>37</sup>

As further corroboration of the reliability of the clone, in Mr Kleintjes' initial report (which was also provided to Mr Callinan by the Ministry), he stated: *"Forensic computer cloning techniques available today have been developed to enable investigators to examine computer data in great detail and at the same time guarantee 100% data integrity and preservation of the original exhibit."*<sup>38</sup>

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<sup>31</sup> The report, p 96 para 270, p99 para 287

<sup>32</sup> The report, p 127 para 362

<sup>33</sup> The report p99 p 285

<sup>34</sup> Narrative submissions in support of claim of innocence. p 151, para 6.169

<sup>35</sup> The report, Para 100 (b)

<sup>36</sup> 2009 Retrial Notes of Evidence p720

<sup>37</sup> 2009 Retrial Notes of Evidence p748

<sup>38</sup> Kleintjes report (p 3) in Privy Council record, p 1266

- (b) Mr Callinan states that "*Mr Robin Bain had available to him his own white gloves which he kept and were found in his caravan in a clean state.*"<sup>39</sup>

As Ms Markham noted, this is incorrect. The gloves found in Robin Bain's caravan were leather, not white.

### **18.6 reasoning that is confusing, illogical, incomplete, and not supported by the facts**

The report confuses many of the issues which creates a lack of coherence and intelligibility. This most certainly applies to central issues of the Applicant's claim such as the footprints, the blood on Robin Bain's hands and each of the alibis.

Many of Mr Callinan's conclusions in the report depend on substantial logical errors and ignoring evidence, and cannot withstand scrutiny. For example,

- (a) The judge's rejection of the use of statistical evidence<sup>40</sup> denies the very nature of his task. He was asked to determine whether, on the balance of probabilities, David Bain is innocent of the murders of his family. That makes it necessarily a matter of probabilistic reasoning (which necessarily includes statistical probability), whether it's framed as such or not.

Mr Fisher, in his review of Mr Binnie's report, made it clear that the Bayesian approach to probabilities is that required under New Zealand law. (See 20.6 below) Thus by rejecting the statistical evidence, Mr Callinan is going against current prevalent thinking on the proper way to approach legal fact-finding. His justification for this significantly misrepresents the views of the authorities he cites (also noted at 18.7, and see 20.6 for more detail).

- (b) Mr Callinan's conclusion on the marks on Robin Bain's thumb depends on his omission of Dr Dempster's position (as outlined at 18.4(a) above), which cannot be accommodated. The conclusion is therefore logically flawed.
- (c) His conclusion on David's alibi and time of returning home depends on the omission of the observation that he was walking (as outlined at 18.2(a) above), and cannot accommodate this evidence. This conclusion is also therefore logically flawed. There are many more serious errors in the report on the collation and recording of the evidence about the alibis, but such detail is required that it is impractical to include herein.

In some parts of the report Mr Callinan's meaning is unclear. For example,

- (d) When and discussing the issue of whether the Applicant had worn a new pair of running shoes as he said he did, or an old, tattered mismatched pair, the Judge writes: "*I agree that on the balance of probabilities the Applicant was*

<sup>39</sup> The report, p 113, para 327 (17)

<sup>40</sup> The report, para 81 - 83

*not wearing the odd shoes on the morning of the 20th June 1994 when he conducted his paper round or when he was in the house.*"<sup>41</sup>

But then when summarising the Crown case, he says: *"He goes to his room....and taking off his new shoes, that is if he wore them as he claimed, rather than an old battered pair that he still kept in his room. All of this is plausible, except that he wore the old shoes."*<sup>42</sup> It takes considerable examination to determine from this whether he means that he thinks the Applicant did or did not wear the 'old shoes'.

### **18.7 incorrect summarising of the Applicant and the Crown cases**

In what appears to be an attempt to summarise and comment on the respective positions of the Applicant and the Crown in the report, the characterisation of the evidence and case positions is incorrect, counter-factual and speculative on many points.<sup>43</sup> For example,

- (a) Mr Callinan says that the Applicant's case is that Robin Bain's motive for killing himself and his family is that he was having an incestuous relationship with his daughter Laniet. The judge dismisses this because he says there is no evidence of any such relationship<sup>44</sup> (see 18.3(a) above).

This so badly misrepresents the Applicant's case as to completely change the meaning on this point. The submissions make it clear that the Applicant's case is that the deaths of the Bain family was an absolutely typical case of familicide by the family father, which is a form of extended suicide rather than murder, and that Robin Bain was absolutely typical of the fathers who commit familicide. The significant factor about any incestuous relationship between Laniet and her father is not whether it was really happening, but that Laniet was telling people it was and that may have been the trigger in combination with the other difficulties Robin Bain was experiencing.<sup>45</sup> The misrepresentation of the case means that any conclusions on this point are based on a fallacy.

### **18.8 significant misrepresentation of legal and academic authorities**

Mr Callinan cites several legal and academic authorities in support of points he is making. However, he relies on material that is considerably out of date and has been superseded by later information, and he significantly misrepresents views of some authorities cited. For example,

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<sup>41</sup> The report, Para 129

<sup>42</sup> The report, Para 365

<sup>43</sup> The report, pages 116 to 133

<sup>44</sup> The report, p 60, para 168; p116 para 330

<sup>45</sup> Submissions in support of claim of innocence. 25 May 2015. p 79 para 333 - p92 para 377

- (a) He says that *"at the retrial, Dr Alexander Dempster...spoke of the statistical rarity in the texts of suicide by gunshot in the left temple by right handed people."*<sup>46</sup>

The text cited by Dr Dempster in fact says *"...our results support Knight's statement that "although, naturally, the right side is the most frequent with right-handed people, it is **by no means unknown and not particularly suspicious** if a right-handed person shoots himself through the left temple."*<sup>47</sup>

- (b) Mr Callinan writes: *"...the philosopher jurist Justice David Hodgson said this:*

*'I wish to contend that, while compliance with logical rules (including quantitative rules of probability, where they are applicable) is necessary for satisfactory inference drawing or legal fact finding, it is very far from sufficient, and that the most important and interesting aspects of satisfactory fact finding lie elsewhere.'*<sup>107</sup>

This significantly misrepresents Hodgson's thesis in the cited 1995 paper, which was that there are many aspects of legal cases to which Bayes theorem cannot be applied because the relevant probabilities are not or cannot be known, quantified and presented as probabilities. In the same paper, Hodgson (in contradiction of what Mr Callinan presents) advocates the use of Bayes when those probabilities are determinable, saying:

*"...the role for quantitative probabilities should be greatest where their common-sense probative force in particular cases is greatest, and/or where the party with the onus of proof cannot reasonably be expected to produce evidence bearing more directly on the particular case."*<sup>48</sup>

The statistical data presented in the Applicant's submissions fits both of these criteria: strong common-sense probative value, and the applicant (having the onus of proof) being unable to produce evidence because of the way evidence was collected one-sidedly to build a case against him and potentially exculpatory evidence ignored.

### 18.9 less significant errors of fact

Although mistakes of this nature have no bearing on the substance of the report or the author's conclusions and opinions, the volume of such errors is unfortunate, and suggests that the author has been careless when it comes to detail. Examples include:

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<sup>46</sup> The report, Para 81

<sup>47</sup> Eisele, J.W., Reay, D.T., Cook, A., 1981. Sites of suicidal gunshot wounds. J. Forensic Sci. 26, 480–5

<sup>48</sup> Hodgson, D., 1995. Probability: the Logic of the Law—a Response. Oxf. J. Leg. Stud. 15, 51–68

- (a) It is incorrectly stated that Stephen was shot three more times after nearly being strangled to death.<sup>49</sup> In fact it was only once. (Also noted by Ms Markham.)
- (b) References to Mr Robin Bates as a defence witness;<sup>50</sup> Mr Robin Bates was one of the Crown prosecutors at the retrial. (Also noted by Ms Markham.)
- (c) A quote by Mr Slemko, a highly respected international expert who provided his report on the Applicant's instructions, is referenced in foot-notes to the Crown submissions, giving the false impression that he was a Crown witness.
- (d) The reference to *David and Goliath*<sup>51</sup> is incorrect; it should be to *Trial by Ambush*.

**18.10** You will observe that Ms Markham has, in the Crown response, identified a number of assertions made that fall within the ambit of matters listed above, and these impinge on the validity of particular conclusions in the report. See for example her comments on paragraphs 100(i), 126, 136, 310, 364, 366, 368, and 378.<sup>52</sup>

## **ERRORS OF PRINCIPLE & PROCEDURE**

19 The process adopted by Mr Callinan to conduct his enquiry, and his subsequent analysis in his draft report, contained numerous examples of what Dr Fisher identified in his review of Justice Binnie's report as 'errors of principle' and which the then Minister said rendered the report unacceptable.

### **20 Approach inconsistent with New Zealand law**

20.1 In Dr Fisher's review of Justice Binnie's report, he criticises Mr Binnie's approach to assessing the cumulative effect of multiple items of evidence, saying:

*"More serious, however, was his decision to disregard any item of evidence that did not prove a subsidiary fact on the balance of probabilities. His approach was contrary to the law of New Zealand and to a proper understanding of probability theory."*<sup>53</sup>

20.2 Dr Fisher goes on to say that while the approach in New Zealand is common to many other jurisdictions including England, Canada and the United States, the Australian approach is anomalous, and he cites the 'De Gruchy' appeal as a specific example of the different approach taken.<sup>54</sup> Mr Callinan was one of the judges on that appeal and wrote a substantial section of the decision.

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<sup>49</sup> The report, Para 341

<sup>50</sup> The report, Para 385

<sup>51</sup> The report, Para 20

<sup>52</sup> Respondent's comments on draft report of Hon Ian Callinan AC QC; undated, received 8 October 2015

<sup>53</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012; P 8 para 15

<sup>54</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012; P 20 para 56

- 20.3 This was a significant ground relied on by the previous Minister to disregard the Binnie report, despite Justice Binnie having engaged two New Zealand Law Professors to provide advice on legal issues.
- 20.4 It is apparent in the report that Mr Callinan has used the approach that Dr Fisher declared '*contrary to the law of New Zealand and to a proper understanding*'. There are numerous instances demonstrating this approach and many examples in the report.
- 20.5 One such example is that Mr Callinan evaluates the evidence on the luminol footprints, and decides that it's more probable that they were made by David Bain than by Robin Bain.<sup>55</sup> He dismisses any probability of them having been made by Robin Bain, failing to accommodate the relative probabilities in his overall assessment of the evidence for and against David's innocence. Mr Callinan has misunderstood and misapplied New Zealand law on this issue.

## 20.6 Improper approach to probabilistic reasoning

- 20.6.1 Mr Fisher, in his review of Mr Binnie's report, wrote at some length on the required approach to probabilities, saying "*Although rarely articulated as such, Bayes' theorem underlies the way in which probabilities are assessed in legal cases.*"<sup>56</sup>
- 20.6.2 Mr Callinan conflates Bayesian likelihood ratios with 'statistics' and rejects submitted statistical evidence *en masse* (see 18.6(a), above), including published, peer-reviewed publications where the highly relevant and objective probabilistic results are a result of Bayesian analysis and presented as likelihood ratios.
- 20.6.3 He compounds this error by here, as elsewhere, misrepresenting the views of the authorities he cites as justification for his dismissal of 'statistics' (see also 18.8 (a) & (b), above). For example, he cites Ligertwood<sup>57</sup> as supporting his view on statistics. But Ligertwood is by no means opposed to the use of statistical or Bayesian information in the judicial setting: on the contrary, his argument (both in the paper cited by Mr Callinan and more recently)<sup>58</sup> is rather that where it is used, it is extremely important to avoid the 'prosecutor's fallacy'. That is, that the probability of that evidence arising if the person is innocent should be presented together

<sup>55</sup> The report, Para 374.

<sup>56</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012; p18, footnote 30

<sup>57</sup> Emeritus Fellow Andrew Ligertwood of the Law School at Adelaide

<sup>58</sup> eg, Ligertwood, a., Edmond, G., 2012. Discussion paper: A just measure of probability. *Law, Probab. Risk* 11, 365–369; Ligertwood, A., 2015. What lawyers should and can do now that they know about the forensic sciences: a response to Edmond's "What lawyers should know about the forensic 'sciences.'" *ALR* 36, 153–172



with the probability if they are guilty. All statistical information in the Applicant's submissions does this explicitly.

## 21 Refusal of oral submissions

- 21.1 As far as oral submissions are concerned, the process followed by Mr Callinan fell well short of the standard adopted by Justice Binnie and deemed appropriate in the subsequent critique by Dr Fisher.
- 21.2 For example, Mr Reed wished to address the “new evidence” about the marks on Robin Bain's thumb (which did not surface until after the retrial and completion of the Binnie report). We (the Applicant's team) had understood a full day had been set aside to explore various issues. However, the formal meeting was concluded after only about an hour, so although there was no time pressure, Mr Callinan refused to discuss the matter. He made it clear he was not interested in any face-to-face discussions and was dismissive of such requests, but the resulting report completely misrepresents the applicant's case and evidence on the issue.

## 22 Lack of engagement with parties on matters of evidence

- 22.1 Mr Callinan's report makes frequent reference to the inquiry being conducted as though it was a civil action. Yet the Judge failed to appropriately engage with parties.
- 22.2 For example, Mr Callinan initiated tangential enquiries of his own, such as the measuring exercise on the green jersey and another garment, and experiments he did with the weapon used in the killings. The Applicant's representatives were not offered any opportunity to observe the examinations or comment on the findings.

## 23 Lack of interviews and criticism of people with inadequate opportunity to respond

- 23.1 Dr Fisher's report criticised Justice Binnie for making adverse findings without giving proper opportunity to respond, saying:

*Natural justice requires that the person criticised be afforded an opportunity to comment over and above that offered at any antecedent criminal trial.<sup>59</sup>*

- 23.2 This failure to conduct interviews impacts on several people who are criticised in Mr Callinan's report. For example,
- (a) The most serious impact of this failure to conduct interviews is on David Bain himself. He can't pre-empt the findings that the inquiry may make. It was taken as a given that the Judge would be aware of the obligations of natural justice to put adverse findings to any person so affected. This is especially egregious on matters that have never, in the 21 years this case has been running, been put to the Applicant, such as the proposition that the Applicant

<sup>59</sup> Hon Robert Fisher QC; *Interim report for Minister of Justice on compensation claim by David Bain*. 13 December 2012; P 62 para 236

may have sprinted home. For its adverse finding, the report relies heavily on the Applicant's statements and on evidence from others attesting to his statements.

In light of the contents of the report and its conclusion, the failure to interview David Bain is an egregious breach of natural justice.

- (b) Submissions on behalf of the Applicant were made regarding the forensic psychiatrist, Associate Professor Philip Brinded, in respect to his evidence at the retrial and a report he had done for the Applicant's petition for the Royal Prerogative of Mercy.<sup>60</sup> In 1998, Dr Brinded wrote:

*"My sessions with David have shown him to be totally consistent in his recounting of what he does and doesn't remember regarding the day of the killings. I have never detected nor do I believe that there has been any attempt on his part to fabricate information. I believe the consistency of his story over a long period of time, is due to the fact that he is being truthful about events. Consequently I believe his period of amnesia to be entirely genuine and consistent with the descriptions of dissociative amnesia found in the psychiatric literature. This view I believe to be far more credible than the alternative, that is that he has been able to lie with great conviction, accuracy and credibility for over four years."*<sup>61</sup>

Dr Brinded is a forensic psychiatrist with extensive experience with violent criminals, including psychopaths. Today, 17 years later, his opinion remains the same: his professional opinion is that David is innocent.

An affidavit was also submitted in support of the Applicant's claim from Mr Arthur Wells. Mr Wells is a family violence expert and has made a study of family killings. In his affidavit, he says:

*"The Bain murders are a text-book example of a typical familicide [committed by the father].... If David did do it, it would be an anomaly in the entire history of familicide..."*

*I have met many psychopaths in my counselling work, in the prisons and in the community. I [know] what a psychopath looks, talks and thinks like.... David Bain is not a psychopath. I would place him at the opposite pole from a psychopath..."*

*I am convinced beyond any shadow of doubt whatsoever that David is innocent. I say this on the basis of more than twelve years of regular ...*

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<sup>60</sup> Appendix D

<sup>61</sup> Brinded, P (1998). *Human Reaction to extreme stress: a report in support of the Applicant's petition for the Royal Prerogative of Mercy*; Appendix D p 3

*visiting him in prison for five years... every six weeks ... for two hours or more on each visit.*"<sup>62</sup>

Both Dr Brinded and Mr Wells had been on the list of proposed interviews Mr Reed wished to discuss at the meeting.

Mr Callinan summarily dismisses their evidence and opinion with the suggestion that they had been 'charmed' and 'manipulated' by the Applicant.<sup>63</sup> This suggestion is highly insulting, seriously impugns their professional skills, and is contrary to other confirmatory expert evidence. To criticise Mr Wells and Dr Brinded in this way, but fail to provide them adequate opportunity to respond is, as identified by Dr Fisher, a breach of natural justice.

- (c) The report's conclusions on the matter of the marks on Robin Bain's thumb, and the dismissal of Dr Dempster's evidence carries the unavoidable implication that Dr Dempster is either incompetent, untruthful, or both.

This is a far more devastating finding against a professional than those referred to by Dr Fisher in relation to the Binnie report. On Dr Fisher's proposition above, Dr Dempster, Dr Brinded and Mr Wells have each been impugned personally and professionally in the report. The failure to deal adequately with their evidence also seriously undermines the conclusions reached on relevant issues.

#### **Breach of Natural justice and standard procedure**

- 23.3 The Applicant expected to be interviewed and tested on matters of contention, as he was by Justice Binnie, for a day under oath. At the meeting on 4 May 2015, Mr Reed wished to discuss a list of other witnesses whom he intended to propose were interviewed. However, at that meeting, Mr Callinan was adamant that he did not intend to conduct any interviews. We did not expect this to extend to excluding David Bain.
- 23.4 The Applicant is seriously aggrieved at the interpretations placed on his behaviour and utterings in the report. He disputes much of what has been said and feels his rights to natural justice have been seriously breached.<sup>64</sup>
- 23.5 The failure of Mr Callinan to interview him can be contrasted with the process followed by the Hon Robert Fisher QC when he was engaged to report on the compensation claim filed by Rex Haig. The Haig report was dated 17 December 2008. The report documents the procedural background to the report (para 8-19.) At 14 it is recorded that Dr Fisher proposed an "inquisitorial hearing" at which he would interview the Applicant, and outlined the steps taken with Mr Haig's lawyer to set up the protocols for that hearing. The hearing took place in Mr Fisher's

<sup>62</sup> Appendix C: Affidavit of Mr Arthur Wells

<sup>63</sup> The report, para 357

<sup>64</sup> Appendix A: David Bain Affidavit.

chambers on 15 October 2008. A full record of the hearing was included with the report as Appendix V, comprising 75 pages (P114 to 189).

- 23.6 The hearing was called after Dr Fisher had completed an analysis of all the relevant written material, a process also followed by Justice Binnie when he interviewed Mr Bain in 2012. Justice Binnie explained this process in his reply to Dr Fisher's draft report:

*At para 111 and following Mr Fisher complains that I "relied heavily upon information sourced from David". This is true, so did the police and the Crown Law Office. He was the only source of much of the information relied upon by both sides, eg paras 112 to 114 -- I therefore had to decide whether, on the whole, I believed him or not. That was part of my mandate. In my opening summary of the Report I pointed out that I had completed my examination of the record and the analysis of the other evidence BEFORE I interviewed David Bain. Mr Fisher explains at para 117 that the "modern approach" is to "place greater weight on other considerations such as the inherent likelihood of the witness's story, consistency with his or her contemporaneous and subsequent behaviour, and independent sources of evidence." This is exactly the approach I took. David Bain's version of what he did on the morning of June 20 was inherently likely because it conformed to a long standing paper route routine to which there were independent witnesses. The Crown's alternative theory that he left the house unattended for over an hour with Robin due to walk in anytime was not. The fact he didn't change his bloody clothes was inherently unlikely "subsequent behaviour" if he was guilty. As to "independent sources of evidence", I found that in large part his credibility rested on its consistency with the physical evidence, not the other way around.<sup>65</sup>*

#### **Amenability to Judicial Review**

- 23.7 In his review report, Dr Fisher gave consideration to whether individuals criticised without adequate opportunity to respond may seek judicial review of such findings. He wrote:<sup>66</sup>

*Failure to afford a right of hearing to those whose reputations would be damaged by adverse comment can ... provide grounds for judicial review... Any exercise of power which is of a public nature or has public consequences is potentially amenable to review, irrespective of the source of that power. That is particularly so where the grounds for review involve a breach of natural justice, or where the reputation of a party may be*

<sup>65</sup> Justice Binnie's Response to Dr Fisher's draft report, 13December 2012, 6:12 AM, Para 9

<sup>66</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012; pages 63-65 paras 239 -248

*seriously damaged, and there is no other avenue by which the criticised person may seek redress.*

*Reputation is an interest which the Court will strive to protect through the use of judicial review. The fact that findings in a report may be mere expressions of opinion, and not determinative of any rights, does not preclude judicial review, particularly if the report involves matters of major public importance.... One of the factors weighing in favour of judicial intervention is the claim of serious damage to reputation coupled with the absence of any of the usual remedies for such damage by way of appeal or defamation proceedings.*

*Those criteria for intervention appear to be satisfied in the present case. The question of government compensation for David Bain is one of public importance. It is very much in the public arena [and has] already been the subject of much media scrutiny. There is no right of appeal or other obvious remedy.*

### **Conclusions**

*The Courts will not interfere over trifles. Consequently in assessing the likelihood of judicial intervention a realistic view must be taken as to the harm which the Binnie Report would cause to reputation... The criticism of the other two ESR scientists seems more significant. Public release of the Binnie Report could well damage their reputations, even if to only a moderate level....Damage to the reputation of the Police officers could be substantial. Two of the three have already been provided with some opportunity for response by way of interview. But that invitation was not extended to Det Sgt Anderson... it is sufficient to say that the possibility of successful [judicial review] proceedings by those criticised is a substantial risk. In the end the relevant object for the Government is ... to protect the reputation of individuals. The reputation of individuals has not been adequately protected in this case. It might well be thought that the proper course now is to take voluntary steps to remedy that situation rather than to react only if proceedings are issued and the courts so require it.*

- 24 The conclusions reached by Dr Fisher and his recommendation that-voluntary steps to remedy the situation would be a “proper course” of action suggest the same potential risk as expressed by him may apply to those individuals criticised directly or by obvious implication in Mr Callinan's report. It therefore follows that the same advice would apply.

### **25 Failure to consider all evidence**

- 25.1 There are numerous instances of Mr Callinan failing to consider submitted evidence. Early in the report, Mr Callinan says that *"Both sides said they did not require me to refer to the notes of evidence at the first trial or the evidence before*

*the Privy Council.*" but that submissions complicated his task by nonetheless referring to these sources.<sup>67</sup>

- 25.2 Our understanding was to the contrary: that the same material (including the Privy Council record) would be provided to Mr Callinan as was to Justice Binnie. We certainly did not say we did not require him to refer to those documents, and clearly the Crown also expected him to do so as they also referred to them.
- 25.3 This is of concern because it suggests that Mr Callinan's attention to or comprehension of detail may be faulty, and that would seriously impact on his analysis of a case as rife with important detail as this one.
- 25.4 There are numerous incidences in the report of Mr Callinan dismissing or failing to consider evidential detail.

### **IMPACT OF THE FAULTS IN THE REPORT**

- 26 As already stated, Dr Fisher complimented Mr Binnie's report for being well organised, comprehensive and thorough; and a valuable collation of the evidence. At this most fundamental level, the Callinan report undeniably and obviously fails. Other serious issues such as the failure to comply with New Zealand Law and breaches of natural justice render the report unfit for its intended purpose.
- 27 The faults in the report make it vulnerable to strong criticism, unreliable, and (if it were to be accepted and used to inform Cabinet) potentially leading to an egregious perpetuation of a miscarriage of justice and equally egregious further breach of natural justice.
- 28 The extent to which the errors, omissions, anomalies and other problems in the report such as those examples listed, impact upon and undermine the reliability of every section of the report cannot be overstated; most seriously the 13 points on which the Applicant's case was presented. The faults are so egregious and prolific that every conclusion is, through the faulty facts, omissions and unsupportable or contradictory reasoning, rendered at the very least questionable.

#### **The cumulative effect of errors**

- 29 The cumulative effect of errors on the conclusions can be substantial. To illustrate this, we give a single example: the effect of the defective representation of the stains on Robin Bain's shoe (at 18.1(a) above):
- 29.1 Mr Callinan made a basic error of fact in saying that there was no blood on Robin Bain's shoe; that tests on the stains had been inconclusive and that it was not known, if it was blood, whose blood it was. This is factually wrong: the testing *was* conclusive: it *was* blood, and it contained Robin Bain's DNA.
- 29.2 This bloodstain was part of the blood spatter evidence which showed how Robin Bain was positioned when the shot to his head took place.

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<sup>67</sup> The report, Para 23

- 29.3 Mr Callinan dismissed the other blood spatter evidence. As support for dismissing it he cites the Crown submission that Dr Manlove acknowledged *“that it is and was very difficult to draw definitive [sic] conclusions based on blood spatter”*.<sup>68</sup> While it is true that the Crown did make that submission to Mr Callinan, the submission itself was incorrect. The sources given by Crown law show that Dr Manlove was saying first that it was difficult to determine information from an isolated part of the total blood spatter pattern,<sup>69</sup> and second that it was difficult to choose which of similar positions best accommodated the blood spatter pattern “with the paucity of evidence available” but that it required one with the knee raised.<sup>70</sup> Neither of these sources carry the meaning that it is difficult to draw conclusions from blood spatter analysis per se, or relate directly to the blood on the shoe.
- 29.4 Thus a misrepresentation of Dr Manlove’s actual evidence is started through the Crown submissions, overlooked and promulgated by Mr Callinan in review of the evidence and his analysis. This is then combined with the factual error that the stain on Robin Bain’s shoe was not blood and used to justify a decision to dismiss the blood spatter evidence. The basic premise on reliability of blood spatter analysis is false; the premise that it was dubious that the stain on the shoe was blood was false, so the conclusion (to dismiss the blood spatter evidence on those grounds) is necessarily wrong.
- 29.5 It was not part of the Applicant’s case or submissions (nor, for that matter, of the Crown’s) that the blood spots on Robin Bain’s shoe had anything to with the luminol footprints made by the killer. However, Mr Callinan seems to be under the misapprehension that the two were in some way connected as he discusses the stains on the shoe under his analysis of the luminol prints.<sup>71</sup> On the matter of the footprints, he concludes that he does not think that *“any of the footprints exposed under luminol were Mr Robin Bain’s footprints.”*<sup>72</sup> Again, the Judge, uses his false analysis of the stains on the shoes to justify his conclusion on this unrelated matter of evidence.
- 29.6 Thus a single error of fact contributes to conclusions on two separate aspects of evidence. This single error is combined with other factual errors and with errors of reasoning, to justify conclusions on issues central to the Applicant’s case.
- 29.7 Mr Callinan then goes on to make the serious error which Dr Fisher described as *“contrary to the law of New Zealand and to a proper understanding of probability theory.”*<sup>73</sup> That is, having decided that the blood spatter evidence is to be dismissed, and having decided that Robin Bain did not make the footprints, he

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<sup>68</sup> The report, p 51, para 138

<sup>69</sup> Retrial notes of evidence p3389 lines 20-26.

<sup>70</sup> Retrial notes of evidence p3396 line 25 - p 3397 line 30

<sup>71</sup> The report, p45 para 122

<sup>72</sup> The report, p137, para 392

<sup>73</sup> Hon Robert Fisher QC; Interim report for Minister of Justice on compensation claim by David Bain. 13 December 2012; P 8 para 15

derives his final conclusion (that David Bain has not proved his innocence) without consideration of the relative probabilities.

- 29.8 The approach Dr Fisher determined as correct under New Zealand law requires consideration of the relative probabilities. In the case of these two points of evidence, these would be:
- (a) the probability of the blood spatter pattern (including the blood on Robin Bain's shoe) occurring if David Bain is innocent (and his father had committed suicide) compared with the probability of that same blood spatter pattern occurring if David Bain is not innocent; and
  - (b) the probability of the luminol footprints having been made by Robin Bain (if David is innocent) compared with the probability of them having been made by David Bain (if David is not innocent).
- 29.9 These relative probabilities should then be combined with the similarly derived relative probabilities for all the other of the 13 main points in the Applicant's case.
- 29.10 However, Mr Callinan does not do this. He instead takes a binary approach on the footprints, deciding they are not Robin Bain's, and he altogether omits the blood spatter evidence from the reasoning for his overall conclusion.<sup>74</sup>
- 29.11 Thus the error about the existence of blood on Robin Bain's shoe can be seen to be exacerbated by the errors of principle and reasoning, rendering the overall conclusion unsafely derived and unreliable.

## NEXT STEPS

- 30 As you will be well aware, there is immediate precedent for reviewing such a report if such concerns exist. The previous Minister claimed she initially reviewed the Binnie report herself after which she said:
- Put simply, it would not be acceptable to make a recommendation to Cabinet based on a report that would not withstand the considerable scrutiny it would attract.*<sup>75</sup>
- 31 I suggest that if you were to analyse, even relatively superficially, the contents of the Callinan report, in light of the information in this letter and compared with the claim and submissions which it purports to assess, you will see that it is extremely unsatisfactory and will not withstand scrutiny.
- 32 Accordingly, the report *must* either be discarded or independently peer-reviewed so that proper and detailed criticisms can be presented and answered.
- 33 It is our opinion that the report is so defective as a result of the errors described herein that a formal review would be a waste of further public money. In plain language it is a train-wreck.

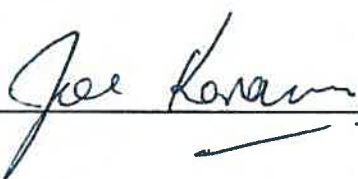
<sup>74</sup> The report, p 135-142, *Conclusion and Further Reasons For It*

<sup>75</sup> Parliamentary Press release. *Concerns with Bain report led to review*. 11 December 2012, 9:50 am



- 34 However, should you decide that a review is necessary, fairness would require that the Applicant and his representatives be properly consulted so that a comprehensive list of the specific concerns identified can be provided for the reviewer.
- 35 Your predecessor did not consult with Mr. Binnie until the review was completed, and that suggests the same course of action is appropriate in the current circumstances. As Mr Binnie was not involved in the review process until after the completion of Dr Fisher's report when he was given a day to respond, we would expect that Mr Callinan would be similarly excluded until a review was completed.
- 36 In the same precedent, when Mr Fisher was commissioned to review the Binnie report he was provided with a summary of concerns from the Police and a 'synthesis of concerns' from the Minister's legal advisors; while the opposing party, the Applicant, was not informed of the Minister's actions in appointing Dr Fisher to do a review.
- 37 We would therefore expect that we (the Applicant and his representatives) would be fully consulted and invited to provide details of our concerns.
- 38 Crown Law have not raised the significant issues we are raising here. However, as they have already provided feedback on Mr Callinan's report, we would expect that document to be accepted as their review of the report.
- 39 We respectfully request that prior to any determination of the Applicant's claim or publication of the report, to be consulted on future steps you may contemplate as a result of the concerns expressed herein.

Yours sincerely



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Joe Karam

Representative of David Bain, the Applicant

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**APPENDICES ATTACHED**

A: Affidavit of David Bain

B: Affidavit of Dr Dempster

C: Affidavit of Mr Arthur Wells

D: Report by Dr Philip Brinded for the Applicant's 1998 petition for the Royal Prerogative of Mercy

**IN THE MATTER OF:** Application for compensation  
by David Cullen Bain, before Hon  
Ian Callinan AC QC

**BETWEEN DAVID CULLEN BAIN**

**Applicant**

**AND THE QUEEN**

**Respondent**

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**AFFIDAVIT OF DAVID CULLEN BAIN**

SWORN 14 October 2015

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M P Reed QC & Joseph Francis Karam for David Cullen Bain  
email [j-karam@xtra.co.nz](mailto:j-karam@xtra.co.nz)  
Phone: +64 7 826 4224; + 64 21 801 601  
Postal: 235 Waerenga Road, Te Kauwhata. 3781 New Zealand

**I, David Cullen Bain, of Christchurch, SWEAR:**

1. I reside in Christchurch. I am employed full time in an engineering design and build workshop.
2. I am making this affidavit in respect to my claim for compensation for wrongful conviction and imprisonment.
3. I have been provided a copy of the draft report of Mr Callinan on my claim filed with the Ministry of Justice and on 28 October 2015, and swear this affidavit in response.
4. At no time during the inquiry was I contacted by Mr Callinan.
5. I have read the report and feel my rights have been completely abused. He has drawn conclusions from my behaviour and placed damning interpretations on things I said and on other statements about me.
6. He suggests I might have sprinted home when a witness stated in evidence she had seen me and said I was walking. I did not sprint home.
7. My Callinan also accuses me of hating my father. This is extremely hurtful. I did not hate my father, ever, then or now. I had said that in the context of having just been told by the police that if I didn't do it, then it must have been my father who killed everyone. I was reacting to that information, and I meant that I hated him "if he had done this".
8. These are just examples of where Mr Callinan has failed me and abused my right to natural justice by not giving me any opportunity to respond to the extremely negative slurs against me in his report.
9. I repeat what I have stated on many occasions under oath and in public. I did not kill any members of my family. I loved them and still grieve for them.
10. When Justice Binnie did his inquiry, he interviewed me under oath for almost an entire day. The Crown lawyers were present throughout.
11. I am disgusted that the present inquiry could presume anything about my innocence or guilt without interviewing me.

SWORN at Christchurch this <sup>14</sup> day of October, 2015

Before me:

Brett Peter Kilbride  
Lawyer  
Christchurch

A Solicitor of the High Court of New Zealand

**IN THE MATTER OF:** Application for compensation  
by David Cullen Bain, before Hon  
Ian Callinan AC QC

**BETWEEN** **DAVID CULLEN BAIN**

**Applicant**

**AND**

**THE QUEEN**

**Respondent**

---

**AFFIDAVIT OF ALEXANDER GEORGE DEMPSTER**

SWORN 13 May 2015

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M P Reed QC & Joseph Francis Karam for David Cullen Bain  
email j-karam@xtra.co.nz  
Phone: +64 7 826 4224; + 64 21 801 601  
Postal: 235 Waerenga Road, Te Kauwhata. 3781 New Zealand

**I, ALEXANDER GEORGE DEMPSTER of Dunedin pathologist SWEAR:**

1. I am a consultant pathologist employed by Southern Community Laboratories Limited in Dunedin,
2. I carried out the original *post mortem* examinations of the Bain family, including that of Robin Bain, in June 1994.
3. In 2013 I was interviewed by Hamish McNeilly, a reporter with the Otago Daily Times, concerning a matter which had arisen in relation to some sooty coloured marks visible in Police photographs on the thumb of Robin Bain's right hand at the time of his death. The photographs had been taken at the scene where Mr Bain died before his body was brought to the mortuary. I was aware the Police had stated publicly that these marks were cuts.
4. The interview was recorded by Mr. McNeilly on a voice recorder. Annexed hereto and marked "AGD1" is a copy of a transcript of that interview.
5. I confirm that the transcript correctly records my statements made at that time, and confirm my statements therein as true and correct.
6. I confirm that the marks visible in the police photographs were not present on Robin Bain's thumb when I carried out the post mortem on the evening of 20 June 1994.

SWORN at Dunedin this 13<sup>th</sup> day of May 2015

before me:



A Solicitor of the High Court of New Zealand

JENNIFER ANNE GUTHRIE  
Solicitor  
Dunedin

## "AGD1"

----- Original Message -----

**Subject:** Interview with Dr Dempster.

**Date:** Thu, 05 Sep 2013 17:46:03 +1200

**From:** Hamish McNeilly <hamish.mcneilly@odt.co.nz>

**Organisation:** Allied Press Limited

**To:** [mreid@mediaworks.co.nz](mailto:mreid@mediaworks.co.nz)

### Preamble

Q: If you recall any cuts on Robin's hands?

A: No, they were not mentioned in the report, (coughs) that was a long time ago. Anything that was observed would have been mentioned in the report.

Q: So just to clarify if you did notice the cuts you would have mentioned them in the report?

A: Absolutely, absolutely.

Q: And the reports contained nothing about cuts on his hand?

A: They contained nothing about cuts or marks of any kind

Q We can read into that what we will, right?

A: Yes.

Q: Have you been involved in this inquiry?

A: No I haven't. Well, not directly anyway.

Q: Indirectly?

A: I have heard indirectly the odd comment and so on, but I am in a totally neutral position and of course I don't want to get involved in any comments, particularly in the public arena . . . that is basically it as far as I am concerned.

Q: You don't mind if we put it on record though that you didn't note something because you only note something when you observe . . . ?

A: That is correct. Anything observed would have been noted in the report.

Q: I will put that on the public record because obviously police will come back with what ever and that will raise . . .

A: I think what they are referring to are not cuts in the usual sense as you would observe cuts, I think from what I may have seen in the media and so on, is minor damage to the fingerprint surface rather than a cut.

Q: Is that like an abrasion?

A: Even an abrasion would raise blood. But I think damage can occur to fingerprints quite superficially I think that may be some of their interpretation relating to these marks.

This is the copy Transcript marked "AGD1" referred to in the annexed affidavit of ALEXANDER GEORGE DEMPSTER sworn at Dunedin this 3<sup>rd</sup> day of May 2015 before me:



**A Solicitor of the High Court of New Zealand**

JENNIFER ANNE GUTHRIE  
Solicitor  
Dunedin



**IN THE MATTER OF:**

Application for compensation by  
David Cullen Bain, before Hon Ian  
Callinan AC QC

**BETWEEN**

**DAVID CULLEN BAIN Applicant**

**AND**

**THE QUEEN**

---

**AFFIDAVIT OF ARTHUR RUSSELL WELLS**

SWORN 20 May 2015

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M P Reed QC & Joseph Francis Karam for David Cullen Bain  
email j-karam@xtra.co.nz  
Phone: +64 7 826 4224; + 64 21 801 601  
Postal: 235 Waerenga Road, Te Kauwhata. 3781 New Zealand

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**I, ARTHUR RUSSELL WELLS, of Christchurch, retired counsellor SWEAR:**

1. My qualifications are M.A. (First Class Hons) from Canterbury University (1968 in English Literature), M.A. (First Class Hons) also from Canterbury (1981, in Religious Studies), Graduate Diploma in Social Work from University of Otago (2003).
2. I lectured in universities for 13 years, in English, then Religious Studies, then turned to social work. Early in my social work career I had seven years as a staff member of Lifeline counselling people who were suicidal and training the volunteer counsellors.
3. For many years after that I did marital and family counselling, counselled violent men in the prisons, sometimes with murderers and psychopaths, as an employee of the Family Help Trust, which I had helped to set up and for which I was secretary of the Board for many years.
4. For 25 years I ran rehabilitation groups for men who were ordered by the courts to do Stopping Violence Programmes in Christchurch, and in later years trained facilitators for this work and wrote manuals for the work.
5. I have co-edited two books of articles on family violence and criminal rehabilitation: *Innovative Approaches to Stopping Family Violence* (Edited by Ken McMaster and Arthur Wells, HMA Books, 2003) and as background textual editor of *Will they do it Again? Assessing and Managing Risk* (Edited by Ken McMaster and Leon Bakker, HMA Books, 2006).
6. I retired in 2008 from working as a counsellor and social worker with the Family Mental Health Service of the Canterbury District Health Board. I also retired in 2010 from a position that I held for eight years as Clinical Lecturer in Family Violence at the Christchurch School of Medicine, University of Otago.
7. This affidavit is in two parts. In Part One, I write as a social worker with experience in counselling murderers and as a lecturer in the area of family violence.
8. The focus of this section is my own research on familicide and my reasons for an endorsement of the report by Rowena Cave entitled *Understanding Familicide: What the Research Says: Literature Review* (January 2011). Attached hereto and marked as Exhibit "ARW1" is a copy of that report.
9. In Part Two, I offer observations about David Bain's character, based upon my connections with the Bain family spanning more than 50 years, and my knowledge of David over the last 12 years.

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## Part One.

10. In this section I report on my research into familicide and its relevance to the Bain murders, arguing that the Bain murders were a completely typical case of familicide. I will offer an interpretation of Robin Bain's behaviour based on the way in which familicides unfold, in terms of motivation and mental disturbance.
11. What I found in my research is in full agreement with Rowena Cave's review of the evidence about familicide, *Understanding Familicide: What the Research Says: Literature Review* (January 2011). Cave's report came out after I did my own study of familicide and I was astonished to find how thorough and accurate her work was and how fully her findings accord with mine. Her report stands as the most substantial and important literature review done so far anywhere in the world on familicide.
12. The one major book on familicide is by a forensic sociologist, N. Websdale, *Familicidal Hearts: the emotional styles of 211 killers*, New York 2010. Websdale's outstanding book sets the benchmark for any understanding of the phenomenon of familicide. Rowena Cave has summarised its findings very clearly, with a creative use of graphs, and again I endorse her interpretation of this very complex material.
13. Nobody understood or knew much about familicide in 1994 when David Bain was charged with the murders of his entire family. The police, the judges, the jury, even the forensic psychiatrists and the psychologists, were understandably working in the dark about the common patterns in familicide, or about the profile of a familicide perpetrator. If they had known then what we know now they would necessarily have been much more circumspect about drawing the conclusion that were drawn.
14. Now we are able to see that the Bain murders are a text-book example of a typical familicide in the following respects: *the murders were carried out by the senior male in the family who was an apparent "pillar of the community"; the perpetrator was psychotically depressed after prolonged, unresolved marital conflict; this conflict had led him into incest with his daughters and the murders were triggered by the sudden exposure of his sexual abuse; and the perpetrator after killing most of the family committed suicide. Very often the perpetrators are regarded as good people by their neighbours who express surprise and disbelief at the murders.*
15. In preparation to be called as a witness by the Defence in the 2009 retrial of David Bain (which was before Websdale's book appeared in print) I collected as much information as I could about approximately 300 cases of familicide that took place in Western jurisdictions over the last 50 years. I used my access to medical and legal journals available through the Christchurch School of Medicine where I was a clinical lecturer on family violence at the time. As it happened I was not called as a witness because of time constraints imposed on the defence team as the trial dragged out to three months.

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16. Many of the cases that I unearthed were richly described, but for many others I had to satisfy myself with a statistical compilation from the court records of various countries. Because different jurisdictions had varying definitions of familicide (as Rowena Cave also notes in her report) the true population of those who commit familicide was difficult to determine. Nevertheless, a useful picture emerged.
17. My approach was to assess how *probable* it was that David carried out the murders, by examining the probabilities within the relevant population. The relevant population here is the *perpetrators of familicide*, (i.e. less than 1% of all murderers). To get a large enough sample of familicide perpetrators I needed to cast the net wide, hence the 50 year time-span and the use of records from many countries.
18. I found, in agreement with Rowena Cave, that more than 90% of the perpetrators were the *senior male* in the family. Of the remainder, (i.e. familicides carried out by the mother or one of the siblings), I was unable to find, amongst about 300 cases of familicide, a case anywhere in the world in the last 50 years in which a young man killed his family *and was subsequently found to be sane*.
19. This could be expressed as a ratio of "sane young men" to "perpetrators," of 0/300. On this basis the likelihood that David Bain killed his family is extremely low. I put this to a Professor of Biostatistics at the Christchurch Medical School where I worked and was told that the possibility that David did it is less than 2% using either frequentist or Bayesian 95% confidence intervals. Technically this means we can be 95% sure that there is a less than one in fifty chance that David did the murders. This is going by these statistics that I have collected alone, and Rowena Cave's findings add a great deal to the strength of the view that David could not have done the crime. Taking a Bayesian approach, these statistics serve as a "prior" which should be taken into account in assessing the probability of an event to obtain a truer picture of its likelihood. This much is clear – there is exceedingly strong evidence that *sane young men do not kill their families*.
20. If David *did* do it, it would be an anomaly in the entire history of familicide. It is an important principle in science that if something is completely anomalous, in order to be persuasive the evidence must be much more robust than if the event was commonplace. I am sure this principle must also apply in legal argument.
21. In searching through the records I found that whenever a *young man* killed his family (and did not also commit suicide) he was found on psychiatric assessment to suffer from one of the following conditions: schizophrenia, severe depression with psychotic episodes, severe substance abuse, brain damage, another rarer type of delusional disorder, or severe personality disorder. Personality disorder is a category of nine disorders recognised in the DSM manuals, and the personality disorders that most often appear in the etiology of familicide are borderline personality disorder, paranoid personality disorder, narcissistic personality disorder and psychopathy which is now commonly considered to be a complex

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and extreme form of antisocial personality disorder usually with a mix of one or more of the other Personality Disorders.

22. After the murders David was assessed by at least three highly qualified forensic psychiatrists. One of these, Professor Philip Brinded, continued to offer David therapy for a total of about 80 hours over a period of several years. Professor Brinded, (who was in charge of mental health services in Canterbury for a number of years), found David to have no serious mental disorder that could have caused the crime, although he did find post-traumatic stress (PTSD) symptoms, as should be expected if he was innocent and came upon his family's bloody bodies on his return from his paper run.
23. I also have decades of experience in carrying out mental health assessments and I too find no mental disorder in David that could have precipitated the murders.
24. I now turn to the behaviour of Robin Bain. During my research on familicide I found that "prolonged, unresolved marital conflict" lies behind most of the familicides in Australia and New Zealand. The typical pattern observed is that the marital breakdown "rumbles on without any resolution, repeatedly raising and dashing hopes, until the man becomes depressed and demoralised and finally cracks."
25. What evidence do we have that Robin Bain became depressed and finally cracked? We do have compelling evidence given in the 2009 trial that he was becoming increasingly depressed and dysfunctional in his work. For example a senior school inspector gave evidence that he had asked Robin if he was getting treatment for depression.
26. At the time of the familicide Robin Bain was reading a crime thriller about family murder, which was open, beside his bed in the caravan (on top of the .22 bullets left lying there).
27. We know that depression can be prodromal for psychosis, if severe stressors are present, and just such stressors were certainly increasingly present in the Bain household. Robin Bain did many erratic things in the weeks leading up to the familicide, such as publishing stories written by the children in his class about murder, and family murders.
28. There was also a widely attested *trigger event* that plausibly explains his erupting into a murderous rage. Again the Cave report confirms the importance of a trigger event in familicide. It seems extremely likely that the trigger event for the Bain murders was Laniet's disclosure of her father's sexual abuse to at least her mother. This happened on the night before the murders. I found a number of similar cases in the literature, and also that the frequency of incest prior to familicide is 20% in some studies.
29. However, there was something more at work than vengeful rage, or even the attempt to shut down a revelation, in Robin Bain's behaviour. His "suicide note," was the message he left on his computer screen for David to discover, saying "Sorry, only you deserved to stay." This chilling message shows unmistakably, to anyone familiar with psychotic states, the

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- condition of mind of a man who is lost in a very deep and dark depressive delusion, immediately prior to his own suicide.
30. There are several kinds of psychotic delusion. Some are artificially induced by drugs, others by the upset brain chemistry found in paranoid schizophrenia, and these have in common that the delusion is mainly distorted *perception* – as if the person is living in a fantasy world. In this kind of delusion the sufferer talks to people who are not there, hearing and seeing things that are only a projection of the mind. (When I worked in an acute psychiatric ward I used to sit with, or “special,” people, in order to ensure their safety, who were experiencing such delusional states in a very florid form, before they could be diagnosed and appropriately medicated).
  31. A quite different and more dangerous kind of delusion comes when depression tips into psychosis. The main distinguishing feature of *depressive* delusions is that the central obsession of the sufferer is *whether someone deserves to live or die*. Most commonly the focus is on the person’s own belief that they are no longer worthy to live and therefore should kill themselves.
  32. The majority of suicides involve this delusional belief. However, occasionally the tragic delusion, “I deserve to die,” is extended to include the belief that *others also deserve to die*. Here is the way in which the fundamental delusion that gives rise to familicide unfolds progressively from deepening depression. I believe it is not possible to understand familicide without appreciating the nature of depressive delusion and the related symptom of *dissociation*, which I shall go on to explain.
  33. Family violence always depends upon some degree of dissociation, usually sustained by angry arousal, for example, when a man punches a partner or child, whom in the past he has loved and respected, he has to be *disconnected* emotionally from the true nature of his actions, otherwise he could not do it. *The dissociation is necessarily much greater when a man is killing his whole family.*
  34. It is this condition that may provide an explanation for the white gloves used by the Bain murderer. The white gloves could have helped Robin Bain to maintain his dissociation, as if to say, “What I am doing is right and necessary.” The gloves may even have been the dress-ups to fit his delusion that he was God's avenging angel, or whatever idea matched his style of religious imagination as he tipped over into madness.
  35. As commented by the Privy Council in their decision, you should not expect a person in an irrational state to behave rationally. The white colour of the gloves is of course suggestive of purity and innocence -- the complete antithesis of the actions Robin was carrying out. At the same time the gloves would have served to mask the chilling horror of what he was doing, most of all from himself. In fugue or psychotic states the person’s actions take on multiple and even self-contradictory meanings, becoming like the symbolic language of events in our

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dreams -- so we should not expect the gloves to have only *one* meaning. As we have known since Freud, dream imagery is "overdetermined". The donning of the white gloves shows me that Robin Bain was almost certainly in a condition like sleep-walking, living out a dream that had now spilled over into his waking actions.

36. I think it very likely that when the gloves became soaked in blood during the terrible fight with his younger son, Robin Bain had a momentary return to near-sanity and grasped the awfulness of what he was doing. At this point he would have known he would have to follow through by killing himself – that he did not "deserve" to stay either. Robin then tore off the gloves and kicked them away, and later changed his own bloodied clothes which would also have been a stark reminder of the horror he had done – after all, he had been a genuinely loving father.
37. He then went to the computer and expressed his regret to David in the words "Sorry, you are the only one who deserved to stay." Having already killed Margaret, Arawa, Laniet and Stephen in the most florid phase of his psychosis, it was now too late to spare anyone except David. I have already explored the loaded meaning of the word "deserve" here.
38. Why did he spare David? Partly because he was beginning to wake up out of his madness and his delusional justifications for his self-righteous rage, but also because David was the only one in the family who had continued to demonstrate loyalty and love for him, to support him and to refrain from taking sides with Margaret in ejecting him from the home. These perceptions of loyalty and disloyalty – to a man who still saw himself as the rightful head of the household -- really matter in a situation strained beyond bearing like this.
39. Then why did he not also spare Arawa? From the common pattern of such abuse in families that are headed by a possessive and controlling male, in the context of a prolonged misery of failing marriage, we can reasonably infer that Arawa was also a victim. In fact I understand there is credible evidence that was indeed the fact. I think that having killed Laniet and then Margaret, even if he was coming round slightly from his delusional state, he still resented Arawa for she had too rejected him and his behaviour, and may well have become privy to Laniet's exposure that fateful night. I understand she was out babysitting but arrived home about 11pm just before Margaret went to the ATM machine at the bank.

**In summary, my findings on examining the literature on familicide are as follows:**

40. **In the last fifty years about 300 cases of familicide have been recorded in the United States, Canada, Britain, Australia and New Zealand.** In over 90% of these cases the perpetrator was the senior male in the family, who in the great majority of cases then committed suicide. The few who don't kill themselves are stepfathers. This may be because they are less emotionally connected with their children and may view the children as rivals for the mother's attention.

Arawa



41. **The literature on familicide tells us that family murder should be viewed as the most extreme form of family violence**, and therefore displaying very similar personality factors to other examples of family violence. Most notably, a familicide perpetrator is controlling and egocentric, failing to see family members as people with lives of their own independent of his, viewing them instead as extensions of his own ego. The familicide perpetrator thus perceives himself as entitled to decide who is to be punished and ultimately who deserves to live or die. That Robin Bain's family all deserved to die was a complete delusion.
42. **In most cases the perpetrator has become depressed** to the point of despair and can see no way out of his situation. His stressors have been most often marital conflict and/or personal failure. He is often religious and well-regarded in the community. Those around him, even family members, have often failed to notice signs of depression and despair.
43. **Scientific evidence supports the common-sense view that to murder one's family is an insane act.** In all known cases, people who have killed their family have been severely psychologically unwell—that is to say, they all have been severely depressed, grandiose, delusional and dissociated.
44. **Familicide is typically precipitated by a crisis or "trigger event."** A sub-type of familicide perpetrator is the sexual abuser who kills when his abuse is exposed or threatened to be revealed (20% of cases in some studies). The reaction of a man exposed for sexual abuse is intense shame and humiliation, which quickly turns into vengeful rage, directed first at the child who has complained of his behaviour, then at others who condemn his behaviour. I understand from evidence at the retrial that Laniet had told various people she was going home that weekend to spill the beans.
45. **Severe depression can tip into a delusional state.** "Depressive delusions" are a special kind of delusion, different from hallucinations (such as hearing voices or seeing someone who is not there). Depressive delusions typically involve harsh, unrealistically negative moral judgments on self and others. They are not delusions of *perception* so much as delusions about the *value* of life, and about whether people "deserve" to live, and this applies to themselves and also to others. The suicide message on the computer shows the precise nature of a depressive delusion, and is therefore unlikely to have been faked. The people in this family did not "deserve" to die—that is pure delusion.
46. **The wearing of the white gloves in the Bain case suggests the very common feature of "dissociation" in the killer.** A person is dissociated when they *block out of awareness the reality of what they are doing*. This is the mental state necessary for a person to carry out violent actions based on depressive delusions. To kill their family a person must act with tunnel-vision, holding firmly to the belief that the family must die. The white gloves may have assisted the killer to maintain a dissociated state of mind. A severely dissociated

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person acts out of character because their personality has begun to fragment. The gloves may have signified, "My actions are purer than the driven snow. What I am doing is right and justified."

47. **It is significant that the gloves were torn off in Stephen's room.** When they became covered in blood they evidently no longer served the purpose for which they were put on. It suggests that the blood-staining disturbed the killer, and his depressive delusion possibly collapsed at that point, the horror of what he was doing becoming apparent to him. He may have resolved then that he had to kill himself.
48. **Clothing can be oddly meaningful to a person in a delusional state.** I've seen patients in a psychiatric ward going through clothes like children playing with the items in a dress-up box, making changes every few minutes. Of course the patients in the psychiatric ward weren't finding it fun—the rapid changes of clothing came from their anguish about their fragmented identity.
49. **Young men who are psychotic or psychopathic** have very occasionally been known to kill their parents, but it is extremely rare for them to kill their siblings as well, and *there are no cases recorded anywhere of young men killing their entire family and then being found on assessment to have no psychotic or personality disorder or any other disorder relevant to possibly committing the murders.*

#### Part Two.

50. **This brings me to the personal part of my affidavit.** I am convinced beyond any shadow of doubt whatsoever that David is innocent. I say this on the basis of more than twelve years of regular and intimate contact with him that began with visiting him in prison for five years. During that time I saw him about once every six weeks, sitting alone with him for two hours or more on each visit because I was there as a Quaker Elder under an arrangement made with the prison chaplaincy. Since he was released I have continued to have close contact with him and with his wife Elizabeth, and I was the celebrant who conducted their marriage. (to the backdrop of roaring media-hired helicopters!)
51. I didn't know much about the murder case when I went out to the prison early in 2002 in response to David's request to the Christchurch Quaker Meeting to "send someone to talk to me about Quakerism." His family had become attenders at Quaker meetings and had run Quaker meetings in their house in New Guinea. I dreaded the first encounter with him, partly because I thought the courts must have got it right and he must be guilty. I also dreaded the encounter because when I was a young man I'd been a close friend of his mother's – more about that later. The Quakers who sent me knew nothing of this personal history I had with David's family.

Adel 5

52. I often hear from men who knew David in prison, and now in the community, that no-one who has met him thinks he is guilty, even if the encounter lasted only a few minutes. This is exactly how it was for me. I realised within probably less than a minute of first meeting him in the prison that nothing added up. This man did not at all resemble the murderers I had counselled in the prison. It was immediately obvious that he was inwardly at peace, and truthful and gentle by nature, as well as warmly empathic, exactly as I remembered his mother Margaret.
53. The moment I met David the notion I went in there with that he must be a psychopath was dispelled. Of course I am aware that what I am saying must raise the question of whether I am a gullible person. I did start out somewhat gullible thirty years ago in this work with extremely violent men, and often believed their minimising and the outright lies they would tell me on a daily basis about their violence to their families.
54. Since those early days I have met many psychopaths in my counselling work, in the prisons and in the community, including actual murderers and a lot of very hardened gang members who have committed cruel and punitive bashings of other men, as well as shooting and stabbing crimes.
55. I have known first hand, for many years, what a psychopath looks, talks and thinks like. I regularly used to have to throw the psychopaths out of my groups, as soon as it became apparent that they were going to disrupt everything positive we were trying to do. They would be set up with an individual programme instead.
56. With this background I feel qualified to say with a confidence amounting to complete certainty that *David Bain is not a psychopath*. I would place him at the opposite pole from a psychopath in terms of empathy. I expect that the formal assessments carried out on David by forensic psychologists and psychiatrists would have confirmed this with an empathy test such as the *Hare* that is used in the prison system to predict violent reoffending. Obviously, if David was guilty of this familicide he would have to be one of the most calculating and cold psychopaths who has ever lived.
57. So we are confronted with a stark choice – whether it is more likely that the murderer was the depressed older man with a full house of the problems and attributes of a perpetrator of familicide, or that the murderer was the son, who we know from multiple assessments by experts has none of these characteristics and who is considered to be innocent by everyone who knows him.
58. As I have said, David has an unusual level of insight into people's feelings and an unusually large capacity for empathy, very like his mother. How do I know this?
59. When I was a young man, fifty years ago, David's mother Margaret and I spent a lot of time together for about three years as we shared the leadership of a Presbyterian Bible Class in

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New Brighton, Christchurch. Margaret later went to Dunedin where she married Robin Bain, and I lost track of her, although my younger brother Graham stayed in close contact with Margaret as they were both Primary teachers living in Dunedin and used to go skating up at the Manorburn dam together.

60. As it happens David Bain came to my house today, the 17<sup>th</sup> of May, 2015, with his wife and new baby for afternoon tea and a walk in the park with my family, and I was able to observe yet again his great naturalness and warmth, his cheerful and generous nature, and his constant consideration for others – you will not see a more tender parent or sensitive husband anywhere. Nor have I seen a happier marriage anywhere. His chance to have a family again means everything to him.
61. Regarding David's mental health I am in agreement with the forensic psychiatrist, Dr Philip Brinded, who treated David for trauma in prison after he was sent up to Christchurch prison from Dunedin. Brinded stated in his evidence before the court that in his view David suffers from Post-Traumatic Stress Disorder, but has no other kinds of mental illness or personality disorder, meaning that he is not a psychopath, has no major depressive disorder, no schizophrenia or other delusional disorder, no brain damage and no substance disorder. I can confirm Dr Brinded's view of David because during his three month retrial I gave David periodic sessions of counselling to help him with the severe re-traumatisation caused by the trial itself.
62. I have never seen David deviate from strict truthfulness, even under severe pressure. David's approach to this entire ordeal has been that if he lied even a little bit, to make himself look better, he would be caught out eventually. He hates lies intensely, having seen the deviousness of police officers throughout his original trial, his many appeals and final retrial.
63. He said to me, "they stitched me up." I think this is perfectly true. David took the view that even if he did serve his entire 16 years he would have the self-respect of having told the truth. His strength baffled me until I understood that he could be at peace in knowing his own innocence, even if no-one else believed it.
64. I did not meet David until after he had undergone a considerable degree of recovery from his early years in prison, thanks largely to Dr Brinded who intervened when he was suicidally depressed in the first year. David said to me, "Phil put me together again". Nevertheless, even in the last six years of his sentence when I was seeing David I could still see the depth of traumatisation he has suffered. His fundamental trauma was of course from finding his family dead, but this was added to absurdly and cruelly by his experience in the trials and in prison, which came close to destroying him.
65. When I met David he was still suffering from periods of profound depression especially approaching the birthdays of his family members and at Christmas time, and he showed

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other classic signs of PTSD such as sweating hands and nervous hypervigilance. In PTSD a person's nervous system operates as if in a war zone, and the prison setting delayed his recovery, understandably, because in prison he was twice beaten up severely, losing some of his teeth on one occasion when a crazed prisoner forced his way into his room. Yet he never showed anyone violence or retaliation himself, as the guards attest.

66. Gradually David learned to cope with prison, steadying himself through developing warm relationships with the prison staff and other prisoners. His natural decency and kindness were obvious to everyone in the prison setting. I have often spoken with prisoners and warders who say many positive things about him, and I have never met anyone (who actually knew him) who has a bad word to say about him, including men who actually are murderers – they especially can see that he is innocent.

67. In summary, in all the time I spent alone with David talking with him about everyone in his family and every detail of his story, there was never even a momentary shadow of possible guilt in him that crossed our conversation, despite my asking many probing questions. As I watched him dealing with other prisoners and prison guards, and since he came out of prison watched how he interacts with his wife Elizabeth (who I've known for many years) and his wife's family and his many friends, I never saw even a momentary departure in David from his characteristic patience, gentleness, kindness and sincere interest in the wellbeing of others. In my view David is a fundamentally decent and gentle human being who could not possibly have committed the murders.

SWORN at Christchurch this 20<sup>th</sup> day of May 2015

Before me:



Arthur Russell Wells



A Solicitor of the High Court of New Zealand

Mark Douglas Saunders  
Barrister & Solicitor  
Rangiora

**REPORT - Human Reaction to Extreme Stress**  
**Re: David Bain**  
**Prepared by Dr. P.M.J. Brinded**

## Introduction

I was instructed by the defence a few days after the killings in 1994. I first visited David Bain in Dunedin prison on 7 July 1994 where we had a lengthy interview. I visited him again on 25.8.94 where we again had a lengthy interview. I did not see David Bain again until his appeal to the Privy Council was rejected. At this point I began visiting him regularly in Papanui Prison. Initially we discussed the likely purpose and usefulness of having regular sessions. For approximately the last eighteen months I have been seeing David Bain for periods of approximately one and a half hours every ten days in order to assist him with his symptoms of Post Traumatic Stress Disorder, occasional depression and to assist him in coping with his life in prison.

My qualifications are those of Bachelor of Medicine and Bachelor of Surgery Degrees from London University (1978) and I am a Fellow of the Royal Australian and New Zealand College of Psychiatrists (1986). I have been practising psychiatry since 1981 and have specialised in Forensic Psychiatry since 1984. Since that time I have frequently appeared on behalf of both Crown and Defence in criminal trials in New Zealand and overseas. I have held a variety of professional positions in the field of Forensic Psychiatry including Director of the Christchurch Regional Forensic Psychiatry Service, Director of the Wellington Regional Psychiatry Service, Director of Area Mental Health for Wellington and the Hutt Valley, Director of Psychiatry for Capital Coast, Wellington and Senior Psychiatrist at the Forensic Psychiatric Institute in Vancouver, Canada. My current position is that of Senior Lecturer in Forensic Psychiatry at the Christchurch School of Medicine, Otago University. I am also in private Forensic Psychiatric practice. I have published widely in the international literature on subjects pertaining to the practice of forensic psychiatry.

## Responses to Stress

Initially observed in soldiers and those exposed to the atrocities of war, it has now been long identified that human beings exposed to intensely traumatic or stressful events can suffer both immediate (or acute) and long term (or chronic) psychological effects. It is now recognised that the psychological effects seen in combat soldiers, sometimes now referred to as combat stress reaction are very similar if not identical to those exhibited by civilians exposed to other forms of extreme stress. From a psychiatric point of view this has been recognised by the inclusion of such features as syndromes in the widely used psychiatric diagnostic system established by the American Psychiatric Association. The current edition of the "Diagnostical and Statistical Manual of Mental Disorders Fourth Edition (DSM IV)" recognises these syndromes and gives clear criteria for their diagnoses. It recognises both acute stress reactions and chronic stress reactions. These are termed Acute Stress Disorder and Post Traumatic Stress Disorder respectively.

When considering the manner in which an individual responds to an intensely stressful event, one must in the first instance acknowledge the existence of Acute Stress Disorder and the types of symptoms that are typical of this Disorder. DSM IV describes the essential features of Acute Stress Disorder as the development of characteristic anxiety, dissociative and other symptoms that occur immediately after and at least within one month of exposure to an extremely traumatic stressor. It further goes on to describe that either whilst experiencing the traumatic event or after the event, the individual has at least three of the following dissociative symptoms:

A subjective sense of numbing, detachment, or absence of emotional responsiveness;  
A reduction of awareness of his or her surroundings;  
Derealisation;  
Depersonalisation;  
Or dissociative amnesia.

Following the trauma the traumatic event is persistently re-experienced and the individual displays marked avoidance of stimuli that may arouse recollections of the trauma and has marked symptoms of anxiety and increased arousal. The description of the Disorder then goes to highlight that disturbance should last for at least two days and that the person must experience clinically significant distress and have their normal functioning significantly interfered with for the diagnosis of the Disorder to be made. Associated features can be the development of a Major Depressive Disorder or Anxiety Disorders. In the longer term acute stress reaction can develop into Post Traumatic Stress Disorder (PTSD).

If these medical findings are applied to any particular case, it can be seen that a person experiencing a severe stressor may not respond in a way that might be "expected" by lay people. Most of these symptoms are "adapted" in that they effectively protect the sufferers mind from the overwhelming trauma that they are experiencing. The more serious the trauma therefore the more likely it is that the person will experience dissociative problems, appearing unaware of their circumstances, dissociative amnesia (with little or no recollection for certain periods during the experience of the trauma) and a numbing of emotional response which overwhelms intense feelings of sadness and grief and leaves the person appearing unresponsive. Indeed in his book on Traumatic Stress, one of the leading world authorities, Professor Bessel Vander Kolk describes that "the psychic numbing becomes so pervasive that it blocks not only pain, horror and grief but also the perceptions needed to make realistic judgements. And the fatigue, depression and withdrawal becomes so intense that they impair effective action."

In David's case it appears very clear that his description both given to myself in my initial interviews with him after the killings and in his subsequent descriptions to Professor Mullen and others contain a significant number of features which would identify him as experiencing an acute stress reaction. He describes a dissociative period accompanied by a dissociative amnesia. He also described intense fear and anxiety, feelings of helplessness and vulnerability, disorganisation and for days afterwards an emotional withdrawal blunting and feelings of guilt that he was not able to somehow prevent what had occurred. Over time this has progressed to the development of a Post Traumatic Stress Disorder with his suffering from

intrusive memories of the event, persistent avoidance of things that remind him of the event, diminished interest in some activities with feelings of significant detachment at times and estrangement from others and a restricted range of affect (or emotional response). He also experiences some difficulty with his sleep and some irritability and difficulty concentrating at times. All of these things are consistent with a diagnosis of Post Traumatic Stress Disorder as described in the DSM IV.

David's behaviours since the killings can be seen as entirely consistent with the development initially of an acute stress reaction followed by the longer term development of Post Traumatic Stress Disorder. Whilst one might ask "how do we expect somebody to behave after finding such a scene?," the answer must lie in the expectation that the person will suffer from a severe psychological reaction to being exposed to such enormous stress. Obviously it goes without saying that anyone who perpetrating an act in a cold and calculating manner and in a manner which was planned would not see the results as so devastatingly stressful and would therefore be extremely unlikely to exhibit such symptoms.

My sessions with David have shown him to be totally consistent in his recounting of what he does and doesn't remember regarding the day of the killings. I have never detected nor do I believe that there has been any attempt on his part to fabricate information. I believe the consistency of his story, over a long period of time, is due to the fact that he is being truthful about events. Consequently I believe his period of amnesia to be entirely genuine and consistent with the descriptions of dissociative amnesia found in the psychiatric literature. This view I believe to be far more credible than the alternative, that is that he has been able to lie with great conviction, accuracy and credibility for over four years.

References made above to the experience of dissociation and dissociative amnesia. Dissociation appears to be a psychological response to intense distress whereby the mind seems to disconnect itself from the person consciousness and behaviour. Consequently they appear to be "cut off from reality" during a dissociative episode and have no, or only fragmented memories for what took place during a dissociative period. This is termed a Dissociative Amnesia.

Professor Bessel Vander Kolk is one of the worlds leading experts in psychiatry on the phenomena of traumatic stress, dissociative phenomena and dissociative amnesia. He has reviewed these subjects extensively in a book entitled "Traumatic Stress" (1996). In order to understand dissociative amnesia one has to look at the current scientific knowledge regarding memory. It appears as if there are two sorts of memory, termed "Declarative" and "Non Declarative". Normal memories of every day events are put down in our declarative memory in a narrative way. That is when asked to recall what one did the previous day or how one arrived at a certain address, the declarative memory enables us to recall in a narrative way events and therefore describe them in words. What appears to happen during the experience of intense trauma is that memory is not put down in a declarative way but enters the non declarative memory system. This system appears to be mediated by other parts of the brain and is not narrative in nature. Consequently memories are not put down as words, but are somatic memories. This means that the event is "remembered" through somatic symptoms of

feelings, emotions, smells and hearing. When asked to recall what occurred during an intensely traumatic period, the person invariably has enormous difficulty in developing a narrative to describe what occurred because the non declarative memory is non narrative. What memories do return return to their senses as smells, sounds and feelings. Consequently they feel as though they are descending rapidly into the nightmare of the original trauma and will often resist vigorously retrieving such memories. It is due to this intensely disturbing revisitation of trauma that many of these memories become dissociated and not immediately retrievable.

The question arises as to whether dissociated memories (that is those clouded by amnesia) can be retrieved through questioning, provocation etc. The major problem with trying to retrieve dissociated memories is that, since they are non narrative in nature it is difficult for the person to retrieve them in the form of words. They often can only retrieve fragments and there is also little sequencing in what memories can be retrieved. Vander Kolk has described the process as follows.

"Our research shows that in contrast to the way people seem to process ordinary information, traumatic experiences are initially imprinted as sensation or feeling states, are not collated and transcribed into personal narratives. Our interviews with traumatised people, as well as our brain imaging studies of them, seem to confirm that traumatic memories come back as emotional and sensory states with little verbal representation. This failure to process information on a symbolic level, which is essential for proper categorisation and interrogation with other experience is at the very core of the pathology of Post Traumatic Stress Disorder.

The irony is that although the sensory perceptions reported in Post Traumatic Stress Disorder may well reflect the actual imprints of sensations that were recorded at the time of the trauma, all narratives that weave sensory imprints into socially communicable stories are subject to condensation, embellishment and contamination. Although trauma may leave an indelible imprint, once people start talking about these sensations and try to make meaning of them they are transcribed into ordinary memories - and like all ordinary memories they are then prone to distortion. People seem to be unable to accept experiences that have no meaning; they will try to make sense of what they are feeling. Once people become conscious of intrusive elements of the trauma they are likely to try to fill in the blanks and complete the picture.

Like all stories that people construct, our autobiographies contain elements of truth, of things that we wish had happened, but did not, and elements that are meant to please the audience. The stories that people tell about their traumas are as vulnerable to distortion as peoples stories about anything else. However, the question of whether the brain is able to "take pictures", and whether some smells, images, sounds or physical sensations may be etched on to the mind and remain unaltered by subsequent experience and by the passage of time still remains to be answered."

It can be seen therefore that invitations through interviewing, repeated questioning or any other quasi hypnotic interviewing techniques to encourage people to verbalise what has

occurred during a period of dissociation (and that has lead to a dissociative amnesia) will enter very firmly into this realm of distortion, embellishment and contamination. When a person has suffered a traumatic amnesia, any subsequent return of memory that has been verbalised must be treated as potentially inaccurate and unreliable unless there is clear objective evidence from other sources that it is indeed accurate.

In David's case any attempt to revisit the period of dissociation on finding the bodies of his family is characterised by an intense stress response involving David re-experiencing sounds, smells and other somatic symptomatology that leads him to avoid any further exploration. It is clearly intensely distressing. David's appearance and his own description of his subjective experience is consistent with the features of traumatic memory and dissociative amnesia described above. Given our current understanding of traumatic memory it would appear to me therefore that the issue with regard to the reliability and vulnerability of retrieved memory would apply in this case as with any other.