

The Ethical Issues arising from the case of R v Keogh

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It is appropriate that I have been asked to address the ‘ethical’ issues arising from the case of *R v Keogh*. Mr Keogh’s conviction for the murder of his fiancée was overturned by the Court of Criminal Appeal (South Australia) in December 2014 after he had served over 20 years’ imprisonment.²

As I have explained in my first book on jurisprudence³ and in my most recent book on criminal appeals, significant debate about legal rules and the rule of law always and ultimately resolves into issues about the *values* which those rules represent. The same of course applies to human conduct. We can always analyze human conduct with a view to determining the values which they seek to protect or promote. In the case of legal officials, it is axiomatic that when acting in their official capacity, the values implicit in their conduct must be congruent with those which underpin the applicable legal rules.

Because legal rules are potentially defeasible or capable of being adapted or adjusted by the judges, judicial willingness to enforce the rules is an integral part of their status or standing. However, we have here to distinguish two very different sets of circumstances. One is a debate *about* the rules, and the other is debate *without* the rules or to use that most useful Scottish expression – *outwith* (meaning outside of) the rules.

Interestingly, the key ethical issues arising in the Keogh case, are not debates about the legal rules and how they should apply, but what I would suggest are the actions of legal officials which demonstrate a woeful disregard of the rules - and of the rule of law. And this presents for each of us a personal and unavoidable ethical dilemma. Once we have been made aware of the institutional failures which have occurred, do we, as institutional participants in that system have an obligation to act? It is my view that we do.

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² [R v Keogh \(No 2\)](#) [2014] SASCFC 136 (19 December 2014).

³ [Definition and Rule in Legal Theory](#) (1987) Blackwell, Oxford chap 7 ‘Law and Morality: How to do things with confusion’ and chap 8 ‘Continuing tensions in modern positivism’. [Miscarriages of Justice: Criminal Appeals and the Rule of Law](#) (2015) LexisNexis, Sydney chap 2 ‘Institution of law, rule of law and human rights’.

Does the fact that Mr Keogh's conviction has been overturned, and that he has been paid some \$2.57m by way of compensation mean that our obligations in respect of that matter have come to an end? I think not – for the following reasons.

The Chief Justice of England and Wales on a visit to Sydney stated that the prospect of the wrongful conviction of an innocent person represented a *catastrophic* failure of the legal system. Have we in South Australia said or done anything to demonstrate that we even recognize that such a catastrophe has occurred? Clearly not. In fact, quite the opposite.

It is well-known that it was Dr Manock who was the key witness in the Keogh trial and that it was his appalling evidence which resulted in the conviction being overturned.

In 1995 Henry Keogh was convicted of the murder of his fiancée Anna-Jane Cheney by forcibly drowning her in the domestic bath at their home in Adelaide.⁴ The prosecution case was that he had approached her whilst in the bath, grabbed one of her legs to pull them up and at the same time pushed her head under the water. He was sentenced to life imprisonment with a minimum of 26 years. There was a very high probability that even if he had served that time he would not have been released without a confession and expression of contrition – which is clearly difficult if not impossible for an innocent person.

In December 2014 the conviction was set aside and the court allowed for the possibility of a retrial.⁵

The crucial evidence in the case was comprised of bruise marks said to have been on the left leg of the deceased. They were said to have been in the configuration of a hand grip – as Dr Manock, the chief pathologist for the Crown said, he couldn't think of anything else they could be. The prosecutor told the jury that if those marks were a sign of a handgrip, then they must be the one positive indication of murder.

Manock said the lungs heavy with water, which was supposed to be indicative of drowning.

He said there was no mark on the outer surface of the brain, so that must indicate *consciousness* whilst being drowned which ruled out an accidental slip and fall accident.

⁴ See generally, the [Henry Keogh Homepage](#) at Networked Knowledge, Robert N Moles, [Losing Their Grip: The Case of Henry Keogh](#) (full text available online at NetK) 2006.

⁵ *R v Keogh (No 2)* [2014] SASCFC 136 (19 December 2014). See Bibi Sangha, Robert Moles, *Miscarriages of Justice* at 10.13 'The 2014 Appeal'.

Anna was said to have been fit and healthy - and the jury was told that fit and healthy people don't just drop dead.

It is clear from the Court of Appeal judgment in overturning the Keogh conviction that all of the above was clearly false.

It accepted that the Keogh trial was 'fundamentally flawed' and that Dr Manock had 'materially misled the prosecution, the defence, the trial judge and the jury'.

There was no evidence to support the claim of a bruise to the inside of the left leg – the supposed thumb mark of the grip.

There was no evidence to support the idea of consciousness whilst drowning.

It was misleading for the prosecution to have presented Dr Manock as a person with 'vast experience'.

The court said that if the true position about bruising and consciousness had been revealed at trial it would have been clear that the 'grip theory' was no more than 'mere speculation' – it had 'no probative value'. There is clear High Court authority to explain that expert witnesses must not engage in speculation – including the case of *Straker* which involved Dr Manock's second in command, Dr James.⁶

Everyone was clearly shocked when it was revealed that the Crown had been in possession of a forensic report from 2004 which explained that this was most likely an accidental death.

The forensic evidence, it said, supported the view that there had been a collapse or fall in the bathroom followed by a blow to the head on the bath. There was no evidence of a homicidal assault.

The Court of Appeal rather blandly noted that the reason for the non-disclosure of the 2004 report 'was not explored on the appeal'.

When questions were asked about this in parliament, the Attorney-General (John Rau) unhelpfully explained that the person who was Solicitor-General in 2004 was not the Solicitor-General now. The Speaker who had been Attorney-General in 2004 (Michael Atkinson) intervened to render further questions out of order on the basis that the questioner was seeking legal advice which was not permitted.

⁶ See Sangha, Roach and Moles, *Forensic Investigations*, pp 43-44 'Speculation Not Permitted'

Three additional expert reports obtained as part of the appeal process which confirmed that there was no pathological evidence to support the murder hypothesis. Even the Crown's own expert said there was 'no evidence' to suggest the death was homicidal or to discount an accidental death.

The expert reports all said that the autopsy was 'seriously inadequate'. Further testing for hemosiderin in the bruises had been proposed but was not permitted in 2004. If hemosiderin was found to be present in the tissues, then any bruise at that site would have been unrelated to the time of death as it takes days and possibly longer for it to develop. The testing was eventually conducted by Professor Thomas prior to the appeal and he was able to confirm the alleged bruising had nothing whatever to do with the alleged cause of death scenario.

The important issue is that the inadequacies of the case were well known long before Mr Keogh had spent over 20 years in prison. Why did it take so long to respond to the fact that he had been imprisoned on the basis of a crime which had never occurred?

Expert opinion evidence is only admissible if the facts on which it is based are proved by admissible evidence and the principles used for the interpretation of those facts are part of a body of established knowledge. This case clearly failed both those tests. So how can someone be convicted of a serious crime on the basis of opinions which are unsupported by any evidence and which are not in accordance with any established scientific principles?

Forensic Science centres are supposed to undertake peer review of reports and evidence since the mid-1980s, so how could someone turn up at court in major criminal cases and state things which have no scientific support?

As has been widely reported, so much was known about the inadequacies of Dr Manock that it was an affront to our legal system that such a trial could ever take place.⁷

1971 - Dr Manock's Fellowship of the College of Pathology – given to him without any form of study or any written examination.

1973-1978 - Dr Manock's civil litigation – it was said that Dr Manock was not qualified to certify cause of death and he had no expert qualifications.

1978 - Dr Manock's public desecration of a deceased person

1981 - The findings of the High Court in *R v Mrs Emily Perry* – Dr Manock's evidence 'not

⁷ 3 September 2018, Bibi Sangha, Robert Moles, [Report to Budget and Finance Committee](#) Parliament of South Australia.

fit to be taken into account' and prosecutors should use people who are substantially and not just nominally expert in their field.

1995 - **The Findings of the Coroner in the Baby Deaths Report** – Dr Manock's reports achieved the opposite of their intended purpose – closed off inquiries – he said he'd seen things which couldn't have been seen, he gave answers on oath which were not honest.

The report, although completed prior to Mr Keogh's trial was concealed under after it was concluded. It was released two days after Mr Keogh was convicted. I say that he was entitled to have his conviction overturned from that date.

An important question arises here, concerning the fact that the Coroner, in subsequent years sat as a judicial officer but appears not to have brought this problem to the attention of relevant officials. Similar comments may he made concerning Dr Michael David QC who failed to raise the issue of the non-disclosure of the baby deaths report on the Keogh appeal.

2004 - The Findings of the Medical Board concerning Dr Manock – his work was hopelessly inadequate and failed to comply with standards which had been laid down in 1908.

2006 - The Solicitor-General's Inquiry – the scientific evidence supports an accident scenario, but there is no evidence of a homicidal assault.

2017 - The Frits Van Beelen appeal – Dr Manock's evidence concerning time of death was without any scientific foundation.

Other cases in which Dr Manock gave evidence which made no sense included:

1979 - David Szach – eminent international experts say his time of death had no scientific support

1984 - Derek Bromley – three eminent experts say his evidence was wrong – mirrors his errors in the Keogh case – but not sufficient for a grant of leave to appeal.

1990 - Terry Akritidis – Manock said he died two hours after his dead body was found by the police after a fall from a tower

1992 - Peter Marshall – Dr Manock failed to notice he'd been shot in the head and thought it was an accidental death.

1992 - Gerald Warren - clear signs of murder interpreted as an accident.

We have also pointed out that [in our parliamentary submission](#) that in applying for three jobs at the IMVS over a number of years, Dr Manock made statements concerning his prior experience in Leeds which were false and misleading. The number of autopsies which he said he had completed there went from 1,200 in his first application to 1,400 in his second

application and to 1,800 in his third application (at p 14). Clearly, at least two of those statements he must have known to be false.

In February 2015 Mr Keogh was re-arraigned on the charge of murder.⁸

At the time the prosecutor mentioned that he had only just received the police files and so at that time had not had the opportunity to read them. He said he would do so in the ensuing weeks. Perhaps it might have been more appropriate, and more in keeping with the prosecutorial code of conduct, if the DPP had read the files *before* the arraignment.

On 13 November 2015 the DPP entered a *nolle prosequi* and formally terminated the prosecution.⁹ He explained it was due to the ill-health of a Crown witness (not stated, but obviously Dr Manock). It is clear that a prosecution should not be abandoned merely because an expert witness becomes unwell. The Splatt Royal Commission made it clear that scientific findings and procedures should be properly documented so that another expert can follow the findings and reasoning and arrive at the same conclusion.

As we have stated in our submission to the parliament, since the overturning of his conviction, Mr Keogh had been restored to the presumption of innocence, and since a *nolle* is the termination of the proceedings in his favour, his legal status as an innocent person is quite clear.¹⁰

However, since then, some people have said things which are hardly consistent with an acknowledgement that Mr Keogh's wrongful conviction amounts to a catastrophic failure of the legal system.¹¹

1 November 2018 - Mr Koutsantonis: stated that Mr Keogh was 'the only suspect in an unresolved murder case'.¹² In the light of the expert reports on the appeal there is no evidence that a murder occurred, and Dr Manock's evidence to that effect was thoroughly discredited. There were many more such reports from a number of Labor politicians.

⁸ 2 February 2015, The Advertiser, "[Henry Keogh pleads not guilty, for the third time, to the 1994 murder of Anna-Jane Cheney](#)"

⁹ 13 November 2015, ABC, "[Murder charge against Henry Keogh, accused of drowning fiancée in bath, dropped by SA DPP](#)"

¹⁰ See Sangha, Moles, *Miscarriages of Justice* 11.5 referring to *Beckett v NSW* [2013] HCA 17. See also, 5 November 2018 Oral statement to the Budget and Finance Committee of the Parliament of South Australia by Dr Robert Moles (and on behalf of Bibi Sangha).

¹¹ A list of media reports on this issue is available at [Henry Keogh Media Reports](#) on NetK.

¹² 1 November 2018, The Advertiser, 'Keogh to face payout grilling'

15 August 2018 - Police Commissioner Grant Stevens: "To use the phrase person of interest probably creates the wrong impression – that we're looking for more material that would result in a charge," he said. "Henry Keogh has been charged. From that point of view, it's an understatement to describe him as a person of interest."¹³ This would appear to ignore the fact stated in the previous paragraph about there being no evidence of murder and the fact that a *nolle* has been entered. However, this case emphasizes the point we made in *Forensic Investigations* about the role of prosecutorial stays of prosecutions, rather than bringing the case back to court to formally offer 'no evidence' and allow for an acquittal to be entered, as was recommended in the Canadian Judicial Inquiries.¹⁴

Kevin Foley: (former police minister and acting Attorney-General who rejected the third petition of Mr Keogh) – "it makes me want to vomit quite frankly. He is playing us all for mugs and fools... he has not been found 'not guilty'. I have no doubt he committed this horrible murder and he's playing us all for a bunch of fools... the advice of the Solicitor-General was that the case was conducted correctly and that the finding of guilt was a very well sustained finding."¹⁵

The program continues to make the point that the Solicitor-General's advice appears to have ignored the findings in the report he commissioned on the forensic issues. In the context of the appeal determination that the findings of the 2004 report (supported by the subsequent expert reports) constitute a sufficient basis for the appeal to be allowed, the advice given by the Solicitor-General at the time was wrong. This is an ongoing issue. The application before the court to have the report released is awaiting judgment from the Court of Appeal constituted by interstate judges.¹⁶

We are continuing to press for a Royal Commission into the work of Dr Manock. We know of no other case in Australia, Britain or Canada, where a person declared by the State to be incompetent to certify cause of death has been allowed to conduct 10,000 autopsies. We know of no other case where a person declared to be devoid of expert qualifications has been allowed to appear as an expert witness in over 400 criminal trials.

¹³ 15 August 2018, *The Advertiser*, "Keogh is more than 'of interest'"

¹⁴ See Sangha, Roach and Moles, *Forensic Investigations* pp 109-110.

¹⁵ 2 September 2018, *The Sunday Project*, Channel 10, [report on the case of Henry Keogh](#).

¹⁶ 14 January 2019, *InDaily*, "[Vic judges brought in to avoid 'conflict of interest' in Keogh stoush](#)"

We refer to your interview on [ABC Radio Adelaide on 2 July 2018](#). During the course of which you mentioned the following points: Dr Manock's evidence as an expert was relied upon. It was completely unreliable, in fact manifestly so, for the purposes of making it simply unsustainable to have a conviction be maintained. He was discredited and his evidence wholly rejected. You asked how many other cases there might be where he's given an expert opinion that might come to the surface? You said, "we don't know the answer to that". The answer, according to Dr Manock (if he can be believed) is "around 400 - 400 plus". [Chanel 9 60 Minutes, 5 June 2011, "Reasonable Doubt"](#) You also made reference to cases which had not resulted in criminal proceedings, such as the baby death cases where Dr Manock had referred to pneumonia as cause of death, but there was found to be extensive bruising over the body. We should point out that the mother of one of the babies (that of Joshua Nottle) regularly makes inquiries to determine if anyone will be held to account for the unlawful killing of her 9-month-old baby.

[In her letter of 19 February 2019](#) the AG stated: "While Dr Manock's conduct has been subject to criticism, I do not consider that those criticisms go so far as to render his work wholly unreliable." In the light of what is now known about Dr Manock and his work over the years, I regard that statement by the AG as being quite astonishing.

[In our reply 24 February 2019](#) we pointed out much of the above and added that Professor Pounder, an expert witness on the Keogh appeal, had stated to the Parliamentary Inquiry concerning Manock's work on the Keogh case:

The breadth and depth of critical misinformation within the autopsy report is shocking. Some misinformation is such that it is potentially open to an allegation of deliberate misrepresentation, as opposed to simple error or error based upon incompetence. I have no views on the guilt or innocence of Mr Keogh, but I feel most strongly that the pathology evidence used to convict him was shameful in its content and shameless in its presentation to a jury.

I consider these responses by the AG as an example of 'institutional capture'. She must feel bound to support her department which has now taken this line over many years. We have suggested that she seek independent advice from advisors from outside South Australia.

Principles about justice miscarriage

The principle of liberty: *Spautz v Butterworth* [1996] NSW reminded us that ‘Liberty is one of mankind's most important rights. To deprive a person of their liberty is very serious. In one sense the right to liberty is *priceless*.’¹⁷

The principle that we should not bear false witness: *Beckett v NSW* [2015] stated ‘The fact that a person has been imprisoned on the basis of evidence which is false to the knowledge of [those], whose duty it is to uphold the law, is an unspeakable outrage.’¹⁸

And the consequences of doing so?

The principle that giving false evidence is criminal: In *Landini* [2010] NSW it was said that ‘The fabrication or manufacture of evidence .. with a view to charging a person with an extremely serious offence ... amounts in itself to an extremely grave criminal offence. Such conduct is calculated to undermine the rule of law and is inimical to the administration of criminal justice. Conduct .. that seeks to undermine the rule of law by orchestrating the basis for criminal proceedings by fabricating evidence constitutes a species of criminality at the extreme end of the spectrum of official corruption.’¹⁹

Important to bear those points in mind here as we discuss what unfolded in the Keogh case. But there are also important principles of prosecutorial responsibility.

Prosecutorial principles

The fact that the Crown is an “indivisible entity” *Button* [2002] is very important. It means that what is known to the Crown in one capacity (forensic science centre, Coroner or police) must be known to the Crown in another capacity (prosecutor).

In *Grey v R* the High Court said the prosecution was obliged to disclose to the defence all material available to it which was relevant or possibly relevant, in order for there to be a fair trial.²⁰ The duty of disclosure includes the obligation to make inquiry to ascertain whether discoverable material exists and to ensure its preservation.²¹ ‘Discoverable material’ includes

¹⁷ Cited in *Beckett v NSW* [2015] at [686-690].

¹⁸ *Beckett* at [691-696] citing *Thomas Royal Commission* at (482).

¹⁹ *State of New South Wales & Or v Landini* [2010] at [528]

²⁰ *Grey v R* (2001) 184 ALR 593; 75 ALJR 1708; [2001] HCA 65 (*Grey*) at [46], referring to the consideration of this matter by the New South Wales Court of Appeal. This point was reinforced in *Mallard* (HCA) at [17].

²¹ In *Cooley v Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160 at [57].

material which goes to the credit of prosecution witnesses. It may include, for example, a previous inconsistent statement, or any other matter adverse to the character of a prosecution witness.²² The duty of disclosure is ongoing,²³ and continues even after the trial and any appeals.²⁴

Martin Hinton QC (later Solicitor-General of South Australia) said that:

The resources that are mobilised by the State ... are immense by comparison to those generally available to the accused ...²⁵

That everybody who comes before the courts is entitled to a fair trial is axiomatic ...²⁶

... the right of every citizen to unimpeded access to a court is a basic right²⁷ ... an accused's right to fair disclosure is an inseparable part of his right to a fair trial.²⁸

And as Kirby J said in *Mallard*²⁹

the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses.

The courts do not draw any distinction between the prosecution, the police or another government agency for the purposes of prosecution disclosure.³⁰ As *Button* and *Mallard* made clear, once information is known to the police, the accused is entitled to it, and one does not need to inquire as to whether it was known to any particular prosecutor.

²² *Cooley* at [65].

²³ Director of Public Prosecutions Act 1986 (NSW) s 13 states: 'Prosecutors are under a continuing obligation ...'. See also Director of Public Prosecutions South Australia, Statement of Prosecution Policy and Guidelines, October 2014, Guideline Number 9: 'duty to disclose is an ongoing one'.

²⁴ See, for example, Criminal Procedure Act 2009 (Vic) ss 42, 111 and 185; see generally *Cannon v Tahche* (2002) 5 VR 317; Aust Torts Reports 81-669; [2002] VSCA 84.

²⁵ M Hinton, 'Unused Material and the Prosecutor's Duty to Disclose' (2001) 25 Crim LJ 121 ('Unused Material') at 121.

²⁶ Hinton, 'Unused Material' at 122, citing Steyn LJ in *R v Brown* [1995] 1 Cr App R 191 at 198.

²⁷ Hinton, 'Unused Material' at 122, citing Wilberforce LJ in *Raymond v Honey* [1983] 1 AC 1 at 13; [1982] 1 All ER 756.

²⁸ Hinton, 'Unused Material' at 122.

²⁹ *Mallard* (HCA) at [83].

³⁰ *R v Farquharson* (2009) 26 VR 410; [2009] VSCA 307 at [212]: 'It was accepted by the Director that there is no distinction for disclosure purposes to be drawn between the prosecution in the present trial and the police.' See also *Thomas* at [27].