

**Dr Bob Moles - Networked Knowledge – <http://netk.net.au>**

### **Judging for the Future**

23rd Biennial Conference of District & County Court Judges of Australia & New Zealand  
10 April 2015 -2pm.

### **A New Right of Appeal – The South Australian Experience**

I well understand the point which Professor Edmond makes about the normative standards which we employ, and whether they are sufficient and effective in ensuring that only credible and reliable – even demonstrably reliable - forensic evidence is put before the court in a criminal trial. I well accept the points he makes about the need to improve those standards to take account of the fragility of the scientific knowledge which is tendered by so-called experts, and to make proper inquiries into the claims which they make about their own expertise.

However, there is another side to that coin –one of which Gary and his team are well aware. It is to examine the extent to which the existing rules are properly, fairly and consistently applied.

There have over the years been many debates amongst lawyers and legal scholars about the extent to which judges should be involved in changing or developing the laws. Some will deny any interest in the topic, yet at the same time it would be hard to find any area of the common law which has not changed over the last 30 years or so.

Be that as it may, I am not aware of any judges who would assert that they are not involved or interested in the proper fair and consistent application of the law. If that is so, then it is my hope that if I can bring to your attention today some examples of legal decision-making which at least prima-facie appear to be exemplars of improper, unfair or inconsistent applications of legal rules, then we should have a common interest.

We hear much talk of prosecutors being Ministers for Justice, and of the state on whose behalf they appear being a ‘model litigant’. We have some things to say about that in our forthcoming book for LexisNexis on *Miscarriages of Justice, Criminal Appeals and the Rule of Law* which is due to be published later this year.

In our previous book [\*Forensic Investigations and Miscarriages of Justice\*](#) which was published in Toronto in 2010, we looked at the experiences of wrongful convictions in Australia, Britain and Canada. In terms of institutional responses it was clear that the UK

with its [Criminal Cases Review Commission](#) had a positive approach. It had been set up as a result of the exposure of the wrongful convictions in the [IRA bombing cases](#) – the Birmingham Six and the Guildford Four amongst others. Over roughly the same time that we have been examining cases of miscarriages of justice in Australia, the last 15 years or so, references from the CCRC based in Birmingham have led to the overturning of some 370 criminal convictions, around 100 of those being murder convictions. Four involved people who had been hanged.

It was Lord Igor Judge when he was in Sydney recently, who described the possible conviction of an innocent person as representing a catastrophic failure of the legal system. Yet it would appear, that despite having identified over 370 such catastrophes, the reputation of the CCRC and of the work which it has done is held in high regard. An important note of criticism in the last few weeks was from the report of the House of Commons [Justice Committee](#) which stated that the CCRC was perhaps being too timid in the exercise of its referral policy. *More* referrals they said, despite the prospect of some not being successful, would be the way to go. They also noted that the CCRC was suffering from funding problems. They said if they could secure an additional £1m they would be able to eliminate their backlog of cases awaiting review. It is interesting to note in this context that the Splatt Royal Commission in the early 80s sat for 196 hearing days. The recent Eastman Inquiry was said to have cost around \$12m. Roughly the cost of a CCRC for Australia for a year.

In Canada, they have had six major judicial inquiries. Interestingly, they are set up *after* a serious criminal conviction has been overturned to try and get to the root cause of the problem. They all involve international comparative studies. Their reports make interesting reading. They cover a wide range of issues dealing with tunnel vision, noble cause corruption, and the misuse of scientific and other expert evidence.<sup>1</sup> We could learn much from them.

The most recent of those, the [Goudge Commission of Inquiry](#), looked at the work of pediatric forensic pathologist [Dr Charles Smith](#) in Toronto. Counsel assisting, Professor Kent Roach, became the joint author with us of our last book. He had the good sense to commission Gary

---

<sup>1</sup> The Royal Commission on the Donald Marshall Jr. Prosecution (1989); The Commission on Proceedings Involving Guy Paul Morin (1998); The Inquiry Regarding Thomas Sophonow; The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken (2006); Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007); Report of the Inquiry into the Wrongful Conviction of David Milgaard (2008); Report of the Inquiry into Pediatric Forensic Pathology (2008).

and I (with Bibi Sangha) to provide some expert input into the work of the Commission, although, I hasten to add, Gary's role was far more influential than our modest contribution. With Bibi Sangha, I was asked to [provide a report](#) on issues arising from the [Baby Deaths Inquiry](#) in South Australia which I will mention shortly. To date, the Goudge Commission in Toronto has shown more interest in the South Australian Baby Deaths Inquiry than any of the South Australian authorities have done.

The Goudge Inquiry found that Dr Smith was lacking in qualifications, experience and expertise, and that he not infrequently fabricated, withheld or otherwise acted improperly in the provision evidence in criminal trials and parental custody hearings. A number of criminal convictions were overturned as a result. Amongst the most tragic of those was the conviction of [Bill Mullins Johnson](#), an aboriginal man, for the rape and murder of his 4 year old niece Valin. It subsequently transpired that Valin had not been either raped or murdered and that Dr Smith had misinterpreted post mortem changes for ante-mortem injuries. Mullins-Johnson had served 12 years before the error was dealt with. As he said at the Goudge Commission he woke up every day and asked himself; 'Is this the day they are going to kill me? Because that's what they do to people like me in prison.'

And did the discovery of this and the many other 'catastrophes' leave the Toronto forensic services with an indistinguishable legacy of shame? No, it didn't. They now boast a new \$1 billion forensic services facility which is the envy of the world. It has new educational training programs and innovative partnerships with universities.<sup>2</sup>

I should briefly mention the Tasmanian case of Sue Neill-Fraser in 2010 which utilized forensic evidence based upon preliminary screening tests without confirmatory tests. The same error as occurred in the Splatt and Chamberlain cases in Australia and the IRA bombing cases in the UK. The scientist said that she could tell whether the test response was to blood as opposed to 100 other possible substances by the quality of the glow or sparkle response to luminol. That, of course, has no scientific basis to it.

After the man had disappeared the prosecutor told the jury that you could tell by the injuries 'he would have had' that he must have been attacked by someone he knew – his wife was convicted of his murder. She must have used a heavy wrench to kill him - because there wasn't one on the boat. She must have weighed his body down with a fire extinguisher - because there wasn't one of those on the boat either. The majority of evidential inferences in

---

<sup>2</sup> 28 October 2013, [Toronto Star](#), "Ontario's forensic pathologists better equipped in 'search for truth'".

this case were derived from the *absence* of evidence. The scientist said that she didn't know anything about DNA statistics. But the judge pointed out that she had overheard others talking about it. The witness agreed. The judge then determined that her overhearing experts talking about something made the witness an expert in her own right, and so she could tell the court what she thought she had heard. She commenced her remarks by saying they were 'as not a DNA expert'.

### **The South Australian experience**

We commenced our public discussion of potential miscarriage of justice cases in South Australia with an ABC 4 Corners program "[Expert Witness](#)" broadcast in October 2001. It referred to the fact that a forensic pathologist had been appointed to be Chief Pathologist in South Australia in 1968. It appears that he had no formal qualifications as a forensic pathologist.<sup>3</sup> Sometime later, an advertisement was placed in the British Medical Journal to appoint someone as the Senior Director of Forensic Pathology. The pathologist, instead of applying for the job, brought legal action against the State of South Australia and the Institute of Medical and Veterinary Science (IMVS) for breach of contract.<sup>4</sup> He said that he took the advertisement to mean that he had been subjected to "constructive dismissal" because *he* had been appointed as the head of forensic pathology. The legal proceedings took place over six years. The Director of the IMVS, said in his evidence that it was an awkward situation:

I tried to encourage [the pathologist] - to study - and obtain his membership of the Royal College of Pathologists of Australia - because we had a man who had no specialist qualifications in a specialist's job, and without that this would have been a severe embarrassment.<sup>5</sup>

He added, "[the pathologist] was unable to do certifying the cause of death because [of] his lack in histopathology."<sup>6</sup>

Although the civil litigation ended in favour of the pathologist, it is hard to see that this made him any better qualified in forensic pathology. He was made a Fellow of the Royal College of Pathologists of Australasia in 1971. However, this was only because he was *exempted*

---

<sup>3</sup> [LRC submission](#) p28.

<sup>4</sup> *CH Manock v State of South Australia and the Institute of Medical and Veterinary Science* 1978 South Australian Supreme Court 2355 of 1978.

<sup>5</sup> Dr Bonnin, trial transcript, pp 117-125, cited in *A state of Injustice* [chapter 5](#), p 83, [LRC submission](#) p28, [ABC 4 Corners "Expert Witness"](#). ["LRC Submission" refers to the Sangha / Moles submission to the Legislative Review Committee of South Australia when looking at whether to establish a Criminal Cases Review Commission. The Bill, submissions and other materials [are available here.](#)]

<sup>6</sup> *Ibid.*

from the five years of study and examinations. A spokesman for the Royal College of Pathology said of the oral-only examination, “It would probably have been about 20 minutes, and he would've been asked questions related to forensic pathology.”<sup>7</sup>

The pathologist was later appointed to be an examiner of the College of Pathology.<sup>8</sup> Yet, he never undertook any formal written examinations in pathology or histopathology. He never published anything after the mid-1960s.<sup>9</sup> He went on to conduct over 10,000 autopsies.

Unfortunately the authorities in South Australia have refused to conduct any form of inquiry into the issues which we raised all that time ago.

### **The case reports**

We thought that we might be able to contribute further to the public discussion of these issues so we published two further books. *A State of Injustice* in 2004 covered a number of cases which we thought contained the clearest possible errors of a forensic nature, all from the same pathologist. *Losing Their Grip – the case of Henry Keogh* was published in 2006.

In one case, the pathologist said that he was ‘virtually certain’ he could determine a time of death to within half an hour by the visual inspection of stomach contents, after they had been frozen and stored for months.<sup>10</sup> A few years later in another case he admitted that this method was “very unreliable”.<sup>11</sup> The convictions in the Canadian case of *Stephen Truscott* (2007)<sup>12</sup> and the New Zealand case of *Mark Lundy* (2013)<sup>13</sup> have both been overturned because of the unacceptability of this type of evidence.

In another case where timing of death was crucial,<sup>14</sup> the prosecutor said “... the objective and scientific evidence means that [the deceased] was dead by 6.40, and the accused was

---

<sup>7</sup> [LRC submission](#) p29, *A state of Injustice* [chapter 5](#), p 83, Dr Weedon, [ABC 4 Corners](#) “Expert Witness”.

<sup>8</sup> [3 August 2006, Channel 7 Today Tonight](#) (Adelaide) “Graham Archer: [the] examiner for the College was none other than disgraced forensic pathologist Dr Colin Manock.”

<sup>9</sup> *Losing Their Grip*, [chapter 11](#), p 195.

<sup>10</sup> The case of Frits Van Beelen 1972: See [LRC submission](#) p32 and [chapter 5](#) “Time and Tide” *A state of Injustice*.

<sup>11</sup> In the matter of Wendy Cooke 1984, CH Manock XXN at [829].

<sup>12</sup> [Re Truscott 2007 ONCA 575](#)

<sup>13</sup> *Lundy v The Queen* (New Zealand) [2013] UKPC 28 (7 October 2013).

<sup>14</sup> The [David Szach](#) case 1979: See *A state of Injustice* [chapter 6](#), and [Report of Professor Bernard Knight](#), Professor of Forensic Pathology, Home Office Pathologist, 14 July 1994, cited in [LRC submission](#) p32.

there.”<sup>15</sup> A world-leading authority on the timing of death, based upon post mortem temperatures, said the calculations were ‘speculative’, ‘ill founded’, ‘cannot be substantiated.’<sup>16</sup>

In another case, in overturning the conviction in the High Court, Justice Murphy said that the prosecution should use people who are *substantially* and not merely *nominally* experts in their field.<sup>17</sup> He added, the case “revealed an *appalling departure* from acceptable standards of forensic science..” and that “the evidence was *not fit to be taken into consideration*”.<sup>18</sup>

In other cases, the pathologist has explained that ‘clothing’ can prevent serious injuries after a fall from a height, and that he learned about the severity of injuries in such cases by reading his own previous autopsy reports.<sup>19</sup> When he explained that a person died 12 hours before his body was undressed at the autopsy this turned out to be two hours after his dead body already stiff with rigor mortis had been found by the police. No one seemed to notice there was a problem with this.

He has also explained that the fabric of corduroy would cause similar injuries to those of the threaded end of a metal pipe. That a person falling out of a moving vehicle would have similar injuries to a person who had a vehicle driven backwards and forwards over their body. Apparently, “the forces involved in either scenario are very similar.”<sup>20</sup>

### Baby Deaths 1994

In 1994 the Coroner conducted an inquiry into three baby deaths.<sup>21</sup> Each died in separate incidents. Two were 3 months of age - one was 9 months of age. The pathologist said each had died of bronchopneumonia. The Coroner found that was not correct, there were no traces of bronchopneumonia. However, one of the babies had 15 fractured ribs, 2 serious fractures of the skull and a very serious fracture of the spine. The Coroner said that the autopsies had achieved *the opposite of their intended purpose* – they had closed off inquiries rather than opening them up. He said that the answers given to some questions at the inquiry, by the

---

<sup>15</sup> Trial Transcript p 1557 (emphasis added) cited in [Petition for David Szach](#) 2006 [35].

<sup>16</sup> [Professor Bernard Knight Report](#) 14 July 1994.

<sup>17</sup> *A state of Injustice* [chapter 7](#) p 115.

<sup>18</sup> *A state of Injustice* [chapter 7](#) pp 115-6.

<sup>19</sup> The case of Terry Akritidis: *A state of Injustice* [chapter 9](#) p 132.

<sup>20</sup> The case of Gerald Warren: *A state of Injustice* [chapter 6](#) p 103.

<sup>21</sup> The details referred to here were set out in [LRC submission](#) p37.

pathologist, were “*spurious*”.<sup>22</sup> This means, “not genuine”, “not being what it pretends to be”, “illegitimate”.<sup>23</sup>

### **The Keogh case non-disclosures**

The baby deaths inquiry overlapped with the trial of Henry Keogh in 1995. He was charged with drowning his fiancée in a domestic bath. His trial involved the same pathologist. Unfortunately, the Coroner decided to ‘delay publishing the Findings’ in the baby deaths, until the Keogh trial had been resolved.<sup>24</sup> They were released 2 days after Keogh was convicted.

In 2004 the Medical Board of South Australia held an inquiry into the work of the pathologist in this case. He gave evidence which contradicted or undermined his evidence from the trial. The ‘recantations’ subsequently formed the basis on which the appeal was allowed – but only 10 years later, in 2014. The Medical Board Finding was that he was not guilty of unprofessional conduct.<sup>25</sup>

Yet in an internal memo a pathologist on the Board stated that the autopsy was sub-standard to the point of incompetence;<sup>26</sup> it failed to comply with standards which had been laid down in 1908; the documentation was - *manifestly inadequate, even by the lowest of standards*. That memo was only disclosed in later judicial review proceedings.<sup>27</sup>

The earlier civil proceedings in which it was said he was not qualified to certify cause of death and the High Court opinion to the effect that he was not an expert were also not raised at this time.

---

<sup>22</sup> *A state of Injustice* [chapter 10](#) “Seeing Things – the Baby Deaths Inquest 1994”.

<sup>23</sup> *Concise Oxford dictionary*.

<sup>24</sup> [Affidavit of Michael Sykes](#), solicitor, 7 November 1996; *Losing Their Grip*, [chapter 7](#) p118.

<sup>25</sup> 22 June 2005 [Report of the Medical Board](#) *Henry Keogh v Colin Henry Manock*.

<sup>26</sup> 16 March 2005, internal memo from [Dr Mark Coleman to members of the Medical Board](#). The other medical specialists on the Board expressed their agreement with it, (emphasis added).

<sup>27</sup> [Keogh v The Medical Board Of South Australia & Anor](#) [2007] SASC 342.

In 2004 the Solicitor-General obtained an independent expert opinion from the Director of the IMVS (a govt instrumentality<sup>28</sup>) in Adelaide. The opinion said that the forensic evidence does not support a homicide scenario and that the most likely explanation is a slip-and-fall accident.<sup>29</sup> The expert sought permission to do further very simple tests to determine whether the bruises were historical and not connected to the time of death. Unfortunately those tests were not done at that time. When undertaken nearly 10 years later, they did in fact confirm that a crucial bruise was historical and not related to the time of death. Three additional expert opinions have also agreed that the forensic evidence did not support a murder hypothesis.

So, by 2004 there are the Coronial Findings from the Baby Deaths Inquiry known but not disclosed in time for trial – and the opinions from the Medical Board and the Solicitor General in 2004 which are not yet disclosed. The petition for referral to the appeal court was subsequently rejected without explanation and without further disclosure. The case would have to languish for another ten years before finding its way to the appeal court.

The systemic problem was that despite the extensive evidence of possible wrongful convictions, the legal system was non-responsive. The procedural rules meant it could not see what obvious to everyone else.

Court of Appeal – will only allow one appeal<sup>30</sup>

High Court will not admit fresh evidence

Petition referral procedure involves an ‘unfettered discretion’ and ‘no legal rights’.<sup>31</sup>

In the following years we managed to persuade the Australian Human Rights Commission that the criminal appeal system, *throughout Australia*, failed [and still fails] to comply with Australia’s international human rights obligations.<sup>32</sup> It had done so for over 30 years since the ICCPR was signed in 1980.

---

<sup>28</sup> [R v Keogh \(No 3\)](#) [2014] SASFC 137.

<sup>29</sup> *R v Keogh* [2014] SASFC 20 p 5, “1.20 Report of Professor Vernon-Roberts to Mr Kourakis QC (as he then was) re causes of death dated 22.11.04, discovered 14.2.13”. The former Solicitor-General is now the Chief Justice of South Australia.

<sup>30</sup> The various rules are discussed in Sangha / Moles “[Post-Appeal Review Rights](#)” (2012) 36 Crim LJ 300

<sup>31</sup> See Sangha / Moles “[Mercy or Right](#)” 14 FLJ 292.

<sup>32</sup> The [Australian Human Rights Commission Submission](#) at [2.6].



We put a Bill to the parliament of South Australia to establish a CCRC. That Bill was referred to the Legislative Review Committee which sought public submissions.<sup>33</sup> The committee recommended:

- a new statutory right of appeal
- a Forensic Review Panel to refer cases to the appeal court
- and an inquiry into the use of expert evidence in criminal trials.

The [Attorney-General of South Australia](#) eventually accepted that the petition procedure was inadequate, because it lacked transparency. He said ‘it is mysterious’, it happens ‘behind closed doors’ - in creating a new right of appeal we are bringing it to the public forum –the courts.

The [Statute Amendment Appeals Act](#) (SA) 2013 was passed and came into force on 5 May 2013. It created a right to a second or further appeal where there is ‘fresh and compelling’ evidence. The ground of appeal is that there is a ‘substantial miscarriage of justice’. The Attorney-General of Tasmania has announced that Tasmania will follow the South Australian lead and enact similar legislation.<sup>34</sup> [She said](#) the petition procedure is ‘not the right process’ and ‘decisions should be made by the courts, not the executive government’. The consultation period closes at the end of April. [Our critique](#) of the Bill is that the requirement for fresh and compelling evidence is based upon a mistaken analogy with the double jeopardy provisions. It excludes many cases of wrongful conviction which may concern legal error but not fresh and compelling evidence. Indeed, the examples given by the appeal court in *Keogh No 2* mentioned judicial misdirection and wrongful prosecutorial submissions which can be established without the need for fresh evidence.

One of the major outstanding problems is that the South Australian pathologist had completed 10,000 autopsies and, as he said, contributed to over 400 criminal convictions.<sup>35</sup> If he was not qualified to certify cause of death, as his employer stated - or he was ‘not an expert’ as the High Court stated, then we have a problem which exceeds any we have come across on our previous studies of Australian, British and Canadian cases. Merely implementing a new statutory right of appeal and then refusing legal aid and leaving it to the

---

<sup>33</sup> The LRC Report, submissions and other documents are available at <http://netk.net.au/AppealsHome.asp>

<sup>34</sup> The draft Bill and media releases are available at <http://netk.net.au/TasmaniaHome.asp>

<sup>35</sup> 5 June 2011 – Channel Nine 60 Minutes “[Reasonable Doubt](#)”.

DPP's office to stem the flow by furious opposition to every attempt to exercise the new appeal right – must backfire eventually.

The DPP did oppose the admission of every item of evidence put forward by the appellant in the Keogh appeal. He was unsuccessful on every count. He even opposed the admission of the expert report which the prosecution had itself obtained in 2004 – again unsuccessfully. The judges on the appeal said that despite fairly vigorous cross-examination of the expert witnesses, the DPP hardly made any progress. The progress made on the appeal is now muted by the public statement by the DPP that he will now proceed with a further prosecution in the Keogh case – despite the fact that Keogh has served 20 years and the four experts are agreed that the forensic evidence indicates that this was an accident not a crime.

The appeal court has said that the evidence of the four expert witnesses was 'compelling' and that the evidence of the pathologist and his deputy in support of a murder hypothesis amounted to no more than 'unwarranted speculation'.<sup>36</sup>

The procedural rules in Australia mean that the system has effectively blocked all attempts to secure a hearing on the merits in any of these cases for around 15 years. Having secured a new right of appeal in one state and the promise of one in another, it seems that apart from upsetting the 'common form' provisions which have prevailed for the last 100 years – it might prove to be only a pyrrhic victory.

When I get back to Adelaide, I shall have to write the section for our new book called 'the way forward from here'. Given the title for this conference "Judging for the Future" – I am in need of inspiration.

End of paper.

---

<sup>36</sup> [R v Keogh \(No 2\)](#) [2014] SASFC 136.