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INSTITUTIONAL REFORM IN THE CONTEXT OF CRIMINAL APPEALS IN SOUTH AUSTRALIA

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Following the introduction in May 2013 of the new statutory right to a second or subsequent appeal in South Australia, which Bibi Sangha discusses in her article in this issue, the conviction for murder in the case of Henry Keogh was overturned in December 2014. That case concerned the evidence of a forensic pathologist who had held the position as Chief Forensic Pathologist in South Australia for some 30 years.

Since the overturning of that conviction, further appeals in cases involving the same pathologist are being prepared. In the recent appeal lodged by Frits Van Beelen, the legal argument has been propounded by his lawyers that the pathologist was never suitably qualified to give evidence as an expert witness.

If that argument is substantiated it will necessitate an audit or review of all the other cases in which the pathologist had given evidence. That will place unprecedented demands upon the legal system of South Australia and require some innovation in terms of the institutional responses which may be required. In considering that issue, we may be able to learn something from other overseas jurisdictions which have had to resolve similarly difficult issues.

I INTRODUCTION

This article details some of the underlying circumstances which have given rise to the unfortunate state of affairs which has arisen in South Australia. Whilst the specific focus is upon the South Australian

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cases and the new statutory right of appeal there, the analysis may well have implications for other Australian jurisdictions where inadequate forensic evidence has been used. As Professor Edmond has said: 'Australian trials and appeals have not identified profound weaknesses in many forms of forensic science and medicine'.[1] If that is so, then the problems being discussed here may well have more general application:

> Australian forensic science and medicine and Australian legal institutions need to respond to the serious problems infecting forensic science and medicine evidence … there are serious implications for law and legal practice. It requires senior judges (and possibly legislatures) to modify rules, practices, assumptions and interpretations. For, too much insufficiently reliable forensic science and medicine evidence is admitted in Australian criminal proceedings.[2]

In the United States for example, a recent joint statement by the Department of Justice, the FBI, the Innocence Project and the National Association of Criminal Defence Lawyers has acknowledged that in cases involving microscopic hair comparison, some 90-96 percent of trial transcripts contained erroneous statements. The errors had occurred over a period of some 40 years and had only just come to light. Later in this article we will look briefly at some of the errors which have occurred in Ontario, and which are not dissimilar to those which have arisen in the USA, the UK and Australia.

In South Australia a situation is developing which will prove to be of considerable importance to the wider study and understanding of issues of wrongful convictions in Australia. On 27 August 2015, a media report stated that in the case of Frits Van Beelen, a fresh

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1 Gary Edmond, 'What lawyers should know about the forensic "sciences"' (2015) 36 *Adelaide Law Review* 33, 99. The recent discoveries of the extent of the fallibility of the forensic sciences and the applicability of those issues in the Australian context is discussed in Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law* (LexisNexis, 2015) ch 12.

2 Edmond, above n 1, 99. See the cases discussed in Sangha and Moles, above n 1, ch 9 particularly those of *Wood v R* [2012] NSWCCA 21 and *Gilham v R* [2012] NSWCCA 131 as recent rather striking examples in New South Wales.

appeal had been lodged. The case concerns a conviction which involved the rape and murder of a young school girl which had taken place in Adelaide in July 1971. The report said that the appeal will assert that the chief forensic pathologist in South Australia at the time, Dr Manock, 'was not qualified to give evidence at the trial'. It went on to say that the appeal application claimed that: '[i]t has now been established that between 1972 and 1994, Dr Manock was at all relevant times: unprofessional, incompetent, untrustworthy'.[3]

1972 was the date of the Van Beelen trial, one of Dr Manock's first major cases. 1994 was the date that he worked on the last of his major cases which led to the conviction of Henry Keogh for the murder of his fiancée by drowning her in a domestic bath. The appeal court in South Australia has already determined that the evidence of Dr Manock in the Keogh case amounted to no more than 'speculation' and the conviction has been overturned.[4] If it should now transpire that in one of his earliest major cases, he had given evidence which was 'incompetent', then obvious questions will be raised about the other cases in which he had given evidence between those two dates.

What the report did not explain was that during the time Dr Manock had remained in the position of chief forensic pathologist he had completed over 10,000 autopsies. He had also given evidence at many trials which, according to his public statements, had resulted in more than 400 criminal convictions.[5] If it transpires that he was not

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[3] See Bryan Littlely, 'Convicted murderer Frits Van Beelen wants conviction overturned, saying he has compelling new evidence', *The Advertiser* (27 August 2015) referring to *Frits Van Beelen v The Queen* 'Notice of Second or Subsequent Appeal Against Conviction' Ground 1 at [10].

[4] *R v Keogh (No 2)* (2014) 121 SASR 307, [37], [234], [235], [238], [240], [268], [271], [339], [343] ('*Keogh (No 2)*'). See Sangha and Moles, above n 1, 8.14.2: 'Speculation is not "evidence"', in the context of *Wood v R* (2012) 84 NSWLR 581.

[5] The figure of 10,000 autopsies is from the transcript of the trial of Henry Keogh: see Robert Moles, *Losing Their Grip – the Case of Henry Keogh* (Elvis Press, 2006) ch 4: '... he is the most experienced pathologist called in this trial, quite clearly; 30 odd years and 10,000 autopsies' at 72. For the full text see Networked Knowledge, *Losing Their Grip — the Case of Henry Keogh*

qualified to give evidence at a trial in the early 1970s, then it follows that he would not have been qualified to give evidence at any of the trials he had appeared in since he was appointed to his position in 1968. The question then arises as to whether he subsequently became qualified to give evidence at the many criminal trials he appeared in since then. The evidence indicates that he did not do so.[6] If that is established, then it points to a problem of great significance.

A *The Expert Witness Rule*

The general rule is that a witness may only give evidence of what the witness has seen and heard and may not express an opinion.[7] However, an exception is made for what is called 'expert opinion' evidence where such an opinion is necessary to assist the jury in dealing with things which they would not otherwise be expected to understand. Whether a death has resulted from an accident or a naturally occurring disease process or has been the product of some traumatic injury will obviously be relevant to any determination where a person has been charged with murder or manslaughter. Being able to determine the time at which they died might well be important to any consideration of who may have been responsible for that death. Determining the time or cause of death may well involve a consideration of many complex physical and medical issues, and trials involving those issues may well call upon a wide range of experts who are knowledgeable about such matters.

<http://netk.net.au/ltg/toc.asp>. The figure of 400 criminal convictions is from an interview with Dr Manock: see Channel 9, 'Reasonable Doubt', *60 Minutes*, 5 June 2011 available at <http://netk.net.au/Media/60 Minutes.asp>.

6 Networked Knowledge — Law Reports, *Re: Dr. Manock: Ian Maddocks reflections* (9 November 2004) <http://netk.net.au/MedicalBoard/Maddocks 18nov.asp> at the Medical Board Inquiry 2004. Professor Maddocks said that after several decades of work, Dr Manock had not 'up-skilled himself in any significant way'.

7 The propositions here are from *Bonython v R* (1984) 38 SASR 45; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar (2011)* 243 CLR 588 as discussed in Sangha and Moles, above n 1, ch 9.

However, before a person can give such opinion evidence at a criminal trial, it must first be established that they have 'specialised knowledge' through appropriate and relevant 'study, training or experience'.[8] In other words, it must be established that the person is in fact an expert. Once that is established, it has then to be determined whether the conclusions that they have drawn are based substantially upon that study, training or experience. This means that the opinion must be within the area of the specialist's expertise; that the facts upon which the opinion is based have been (or will be) proven by properly admissible evidence in the proceedings; the expert has explained or will explain by properly established principles how the opinion was arrived at.[9] The scientific principles that have been used in reaching those conclusions must be based upon properly validated scientific studies.[10]

These principles together are known as the 'basis rule' which are said to be part of an exclusionary rule in those jurisdictions relying upon the common law, and also part of the uniform evidence legislation in the other jurisdictions.[11]

If the witness is not properly qualified, then any opinion evidence which they might give is inadmissible, however reliable it might otherwise be. If the witness is properly qualified, then it must be established that any opinion evidence which they give is the product of proper scientific knowledge and not the result of their intuitions or subjective beliefs.[12] The requirements of 'properly qualified witness', and 'properly validated scientific knowledge' must both be established, and in that order, for the evidence to be admissible.

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8 *Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705,* [82] citing *HG v R* (1999) 197 CLR 414, [39]-[44]. See also *Uniform Evidence Act 1995* (NSW) s 79(1).

9 See Sangha and Moles, above n 1, 9.3.4 setting out the *Makita* principles from *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

10 *Tuite v R* [2015] VSCA 148 discussed in Sangha and Moles, above n 1, 9.4.8.

11 See Sangha and Moles, above n 1, 9.4.3 discussing *Dasreef Pty Ltd v Hawchar (2011)* 243 CLR 588 (Heydon J).

12 See *Honeysett v R* (2014) 311 ALR 320 discussed in Sangha and Moles, above n 1, 9.4.4-6 and in Gary Edmond, 'A Closer Look at *Honeysett*: Enhancing Our Forensic Science and Medicine Jurisprudence' in this issue.

Bearing these principles in mind, for our further discussion, the analysis will be developed in three parts.

Part one will review the Van Beelen case in the context of other cases in which apparently incorrect or unreliable evidence has been given by Dr Manock. The next question which will need to be addressed is whether there have been opportunities to identify problems with his work prior to the overturning of the conviction of Henry Keogh in December 2014.

Part two will deal with some of the institutional responses which have occurred in recent years and which may have amounted to missed opportunities to identify and to respond to some of those problems.

Part three will canvass possible institutional responses which might assist in resolving the consequential effects of these revelations.

II PART ONE — THE CASES

This part sets out the circumstances of a number of cases in which Dr Manock has given evidence which now looks to have been unreliable.[13]

[13] Cases in part one were discussed in Australian Broadcasting Corporation, 'Expert Witness', *Four Corners*, 22 October 2001 available at <http://netk.net.au/Media/2001-10-21-ABC4Corners.asp>; Robert Moles, *A State of Injustice* (Lothian Books, 2004). For the full text see <http://netk.net.au/soi/soi.asp>; Bibi Sangha and Bob Moles, Submission to Legislative Review Committee, Parliament of South Australia, *Inquiry Into Criminal Cases Review Commission*, November 2011 available at <http://netk.net.au/CCRC/LRCSubmission.pdf>; Sangha and Moles, above n 1, ch 10.

A *Frits Van Beelen (1972)*

Mr Van Beelen was convicted of the murder of a school girl on a beach near Adelaide.[14] In this case the timing of death was crucial. The girl was known to have gone to the beach at 4pm. Van Beelen was known to have left the beach by 4.30pm. In order to establish culpability, it would be necessary to determine that the attack occurred no later than 4.30pm. On the basis of an examination of stomach contents Dr Manock said it was 'virtually certain' that the young girl was dead by 4.30pm and no later. His analysis was based upon his estimation of the length of time the young girl had been alive since eating her last meal. A few years afterwards, he agreed in another case, that estimates of time of death on the basis of stomach contents were 'very unreliable'.[15]

Another person had confessed to the murder saying he had raped the girl and then drowned her. Dr Manock said that 'it was more likely than not' she was raped *after* she died as the lack of bleeding indicated (to him) a post mortem injury.[16] That scenario would have required a greater post-mortem interval than could have been possible in this case if Van Beelen had been the perpetrator.[17] There

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[14] The facts of this case are set out in *R v Van Beelen (No 3)* (1973) 7 SASR 125, 126-31. See also Moles, above n 13, ch 5; Networked Knowledge, *The Frits Van Beelen Homepage [1972]* <http://netk.net.au/VanBeelen/VanBeelen.asp>.

[15] See cross-examination at trial re death of Mrs Cooke, autopsy 14 April 1984, transcript at 829 as cited in Moles, above n 13, 91. Professor Derrick Pounder, an expert witness in the 2014 Keogh appeal published an earlier scientific article to explain that Dr Manock's degree of accuracy in the Van Beelen case was not scientifically valid: M Horowitz and D J Pounder, 'Gastric emptying: forensic implications of current concepts' (1985) 25 *Medicine, Science and the Law* 201. Stephen Truscott's 1959 conviction in Ontario was overturned for a similar error: see *Truscott (Re)* 2007 ONCA 575. He was subsequently awarded $6.5 million. See Networked Knowledge, *The Steven Truscott Homepage* <http:// netk.net.au/TruscottHome.asp>. The Privy Council in a New Zealand case overturned the convictions of Mark Lundy for the murder of his wife and daughter on similar grounds: see *Lundy v R* [2013] UKPC 28. He was subsequently convicted for both murders at a retrial in April 2015.

[16] See Trial Transcript, 704 at 9-17.

[17] Post-mortem bleeding was discussed in Northern Territory, Royal Commission of Inquiry into Chamberlain Convictions, *Report* (1987) ch 10, 'Staining on Azaria's Clothing' at 189–90 ('Did bleeding which caused the blood staining

was also physical evidence which appeared to be inconsistent with the prosecution scenario. The young girl's transistor radio, in working order, was found next to the body which was located below the high-water mark. The high-tide on the evening she went missing was at 9pm. If Van Beelen had left the body there at 4.30pm, then the high-tide later that evening would have covered the body and the radio to a depth of nearly one metre. If that had occurred then the radio would not have been in working order the following day.

Van Beelen served over 17 years' imprisonment which was nearly twice as long as a standard life sentence at that time.[18] He was not considered suitable for parole earlier, because his claim to be innocent of the crime meant that he would not show remorse.[19] His application for leave to appeal under South Australia's new right to a second or subsequent appeal was filed on 25 August 2015.

B *David Szach (1979)*

Mr Szach was convicted of the murder of a well-known criminal lawyer in Adelaide, Derrance Stevenson, with whom he had been in a relationship for several years.[20] His subsequent appeal was unsuccessful.[21] It was the prosecution case that after being shot in the head, Stevenson's body was placed in a freezer where it was found

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occur before or after Azaria's death?'). Professor Plueckhahn expressed the view that considerable oozing of blood could occur after death, perhaps up to some hours after the baby had died. Professor Nairn, Dr Jones, Mr Raymond, Professor Ferris and Dr Snodgrass agreed it could have been post-mortem bleeding.

18 His appeals to the Full Court, High Court and Privy Council were all unsuccessful as was his Petition to the Governor of South Australia: *R v Van Beelen (No 3)* (1973) 7 SASR 125; *Van Beelen v The Queen* (1973) ALJR 666n; *In the Matter of a Petition by Frits Van Beelen* (1974) 9 SASR 163.

19 A similar situation currently applies to the situation of Derek Bromley which we discuss shortly.

20 See Moles, above n 13, ch 6; Tom Mann, *Body in the Freezer, the case of David Szach* (Griffin Press, 2015). For the full text see Networked Knowledge, *David Szach Homepage* <http://netk.net.au/SzachHome.asp> with links to the expert reports.

21 *R v Szach* (1980) 23 SASR 504.

the following day. Dr Manock said he had 'calculated' a time of death which coincided with witness statements placing Szach at the scene at that time. At the trial, the prosecutor said, 'the objective and scientific evidence means that he was dead by 6.40, and the accused was there'.[22]

Dr Manock said that he had to 'adjust the formula' that he used by 40 percent because of the position of the body, which was bent round into a foetal position. The formula had been developed from bodies in the prone position. Professor Bernard Knight, a world-leading authority on the issue of timing death based upon post mortem cooling, said: 'all I can say is that in my opinion his reliance upon very speculative and tenuous calculations is ill-founded and that the degree of accuracy he offers cannot be substantiated'. He said of the 40 percent adjustment: 'this to me appears to be a figure snatched from the air without any scientific validation'.[23]

Szach was released from prison in 1993 after serving 14 years. He now suffers from motor-neurone disease and would like to clear his name for the sake of his children. The South Australian managing principal of Maurice Blackburn, Australia's largest class-action law firm, is reported as saying that he expects to file Szach's application for leave to appeal under South Australia's new right to appeal early in 2016.[24]

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[22] Trial Transcript, 1557; See also Networked Knowledge, *Petition of David Szach* <http://netk.net.au/Szach/SzachPetition1.asp>.

[23] Report of Professor Bernard Knight (Barrister, Professor of Forensic Pathology Wales Institute of Forensic Medicine, Home Office Pathologist) to Dr Byron Collins (Consultant Forensic Pathologist), 14 July 1994 available at Networked Knowledge <http://netk.net.au/Szach/BernardKnight.asp>.

[24] Meredith Booth, '"Flawed forensics" trigger murder appeals', *The Australian* (online), 25 November 2015 <http://www.theaustralian.com.au/news/nation/flawed-forensics-trigger-murder-appeals/news-story/8a36fc553d894439c5ab49b2e3dfe007>.

C *Mrs Emily Perry (1981)*

Mrs Perry was convicted of the attempted murder of her husband by the malicious administration of arsenic.[25] The prosecution, acting upon Dr Manock's evidence, alleged that between July and November 1978, and again between February and October 1979, she administered poison to him with the intention of killing him. Mr Perry renovated old pianolas and organs which often had rat or insect poison in them. The defence claimed the poison contained arsenic and the instruments contained dust from crumbling lead pipes. Dr Manock informed himself of Mr Perry's health problems by reading the reports of other doctors in the case. He had not examined Mr Perry or his workshop conditions. However, Dr Manock concluded that common accidental sources could be excluded.

There was no evidence directly implicating her in Mr Perry's condition. However, in seeking to establish 'a course of conduct' the prosecution relied upon 'similar fact' evidence of other cases from which it was said that inferences could be drawn that she had also been responsible for the poisoning deaths of three other people (her second husband, her brother and a de facto partner).

Mrs Perry was convicted on both counts of attempting to murder Mr Perry and sentenced to 15 years' imprisonment with hard labour. Her initial appeal was unsuccessful.[26]

In the appeal to the High Court, in overturning the conviction, Murphy J said that some of the evidence in the case was 'not fit to be taken into consideration'.[27]

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25 The circumstances of this case are set out in *Perry v R* [1982] HCA 75. See also Moles, above n 13, ch 7; Networked Knowledge, *Emily Perry Homepage 1981* <http://netk.net.au/PerryHome.asp>.

26 *The Queen v Perry* [1981] 28 SASR 417.

27 *Perry v R* [1982] HCA 75, 595.

Each of the judges was critical of the inclusion of the 'similar-fact' evidence in relation to the other cases. In addition, in referring to Dr Manock's evidence, Murphy J said that Mr Perry had had a history of motor-bike accidents, including severe injury to his facial structure and nasal passages which led to symptoms such as rhinitis. He said that the prosecution's expert witness had attributed this condition to arsenical or lead poisoning by Mrs Perry. The only problem with that theory was that this condition had existed years before Mr Perry had met her. It had in fact been the subject of a published medical article on facial reconstruction.[28]

Murphy J went on to say as part of his general criticism of the case:

> The evidence, particularly in relation to Duncan, but also of the other alleged poisonings including that of Mr Perry, revealed an appalling departure from acceptable standards of forensic science in the investigation of this case and in the evidence presented on behalf of the prosecution.[29]

He further added that:

> If the expert assistance available to the prosecution in this case is typical, then the interests of justice demand an improvement in investigation and interpretation of data and presentation to the court by witnesses who are substantially and not merely nominally experts in the subject which calls for expertise.[30]

Despite that, Dr Manock was called upon to give 'expert' evidence in other cases for the next 14 years.

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28 Ibid 599.
29 Ibid.
30 Ibid 600.

D *Derek Bromley (1984)*

Mr Bromley is an Aboriginal man who was convicted of the murder of Stephen Docoza who had been found dead in the river Torrens in Adelaide.[31] His appeals to the Court of Criminal Appeal and the High Court were unsuccessful.[32] Docoza's body had been immersed in water for five days. Dr Manock gave evidence concerning a number of injuries to the body which he variously described as resulting from blows, kicks, fists, contact with rough ground and possible karate chops. He said the injuries had occurred shortly before death which had been caused by drowning.[33] Professor Plueckhahn, a forensic pathologist with special expertise of drowning cases stated: '*it is my firm opinion* that there is no scientific basis in the post mortem findings for an unequivocal diagnosis of death from drowning'.[34] Also, where a body has been immersed in water for two days or more, the putrefaction means that it is not possible to distinguish between post mortem and ante mortem injuries and to identify particular causes of injuries.[35]

Bromley has served 31 years with a non-parole period of 22 years. The authorities say he cannot be considered for parole because his continued claim of innocence means that he demonstrates a lack of remorse.

Bromley's appeal is being prepared. It was reported:

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31 See Networked Knowledge, *Petition of Derek John Bromley To His Excellency Rear Admiral Kevin Scarce AC CSC RANR Governor of South Australia* (November 2010) <http://netk.net.au/BromleyHome.asp>.

32 *R v Bromley* (Unreported, Supreme Court of South Australia, King CJ) (16 July 1985); *Bromley v The Queen* [1986] HCA 49.

33 See Committal Proceedings Transcript, 799-806, 834-835; Trial Transcript, 286-321 as detailed in *Petition of Derek John Bromley*, above n 31.

34 Preliminary Report of Professor Vernon Plueckhahn to Caldicott & Co Solicitors (5th March 1993), 2 pt 3 (emphasis in original).

35 Professor Derrick Pounder, (Forensic Medicine Lectures, University of Dundee, 29 September 2003) as cited in *Petition of Derek John Bromley*, above n 31.

> Aboriginal Legal Rights Movement lawyer Chris Charles said Bromley's team had worked for at least two years on building fresh evidence to appeal and had instructed former royal commissioner and former NSW Supreme Court judge Greg James QC to act for him in court.[36]

The appeal will be filed under South Australia's new right to a second or subsequent appeal.

E *Terry Akritidis (1990)*

Mr Akritidis was said to have committed suicide. Although the autopsy was performed by another pathologist, Dr Manock reviewed the autopsy notes and gave evidence at the coronial inquest. He said that Akritidis had jumped from a police radio communications tower, collided with the concrete roof of an adjacent building, bounced off that and landed on the ground.[37] When asked if he had read about the severity of injuries sustained following falls from heights Dr Manock replied that he had read some of his own previous post-mortem reports.[38]

As to the height of the fall, Dr Manock said if he knew what the height was he could estimate the speed: 'are we talking about 140 feet, 200 feet, 400 feet?' The coroner said the tower was only 150 feet high, so the maximum fall could have been no more than that. Dr Manock said in that case the velocity at impact would be around 100 kilometres per hour: the same as a moderate-speed head-on car crash, he explained, except that Akritidis would not have had the protection of a vehicle around him.

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[36] Booth, above n 24.

[37] See Moles, above n 13, ch 9; Networked Knowledge, *Terry Akritidis Homepage* <http://netk.net.au/AkritidisHome.asp>.

[38] Details are from the Coroner's *Finding of Inquest Concerning the Death of Elefterios Akritidis*, 22 June 1990.

The Coroner was told, by Dr Manock, the impact of the body had knocked a hole in the concrete roof about one foot square. It was made of 2.5 inch thick reinforced concrete. There were no substantial external injuries to the body despite the fact that it was said to be falling 'partially inverted' (head first). Dr Manock said the lack of injuries was not unexpected as the clothing, 'being interposed between the body and the surface that it struck', would reduce the severity of any injuries. Akritidis was wearing a shirt and a pair of jeans. As was explained in *A State of Injustice*, 'when bodies and concrete collide, the normal expectation is that the body will come off worst'.[39]

Dr Manock said the time of death was 12 hours before the body was undressed at the autopsy at 8.15am. This meant that Akritidis would have died two hours *after* his body, with rigor already advanced, was discovered by the police at 6pm the previous evening. Another pathologist had stated he had died 12 hours before his body was *discovered*. At that time, he would have been in the custody of the police at Yankalilla police station. Nobody, apart from Terry's father appeared to notice or be concerned about the obvious problem in Dr Manock's timing.

A *Gerald Warren (1992)*

Warren was an Aboriginal boy, aged 15 years, who was found dead on a dirt track outside Port Augusta.[40] Dr Manock attended at the scene and initially concluded the boy had died after falling from a moving vehicle whilst intoxicated. He said some injuries to his hand and face had been caused by the fabric of corduroy (his trousers). Subsequently, two men were convicted of his murder on the basis that they had beaten him with a metal pipe with a threaded end, and then driven their vehicle backwards and forwards over his body.

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[39] Moles, above n 13, 130.

[40] See Moles, above n 13, ch 6; Networked Knowledge, *Gerald Warren Homepage* <http://netk.net.au/WarrenHome.asp>.

During the trial, Dr Manock was questioned about whether Warren had fallen from the vehicle or had the vehicle driven over him:

> Counsel: That damage [to Warren] could possibly have been caused by the body being run over by a motor car, could it?
> Dr Manock: Yes.
> Counsel: Or it could have been caused by the body leaving a motor vehicle?
> Dr Manock: Yes. The forces involved in either scenario are very similar.[41]

In a later exchange Dr Manock responded to defence counsel in cross-examination as follows:

> Counsel: The possible cause that you gave for those marks [on the back of Warren's hand and face] was the fabric of corduroy, wasn't it?
> Dr Manock: Yes.[42]

Warren happened to be wearing corduroy trousers. Dr Manock said that Warren had tumbled from the vehicle and 'the tumbling was required to bring corduroy in contact with hands, face'. This was how the corduroy could have been 'impressed' against the back of his hand, or indeed his face. Defence counsel continued:

> Counsel: I take it that's still, in your view, a possible cause of those marks?
> Dr Manock: It would certainly produce a patterned mark.
> Counsel: So, while you agree with my learned friend that those marks may have been caused, as she asked you to hypothesise, by the thread of a piece of iron, and you agreed that's consistent with that?
> Dr Manock: Yes.
> Counsel: But also consistent, you would still say I think, with the pressure from the corduroy of the pants?
> Dr Manock: Yes.
> Counsel: You'd have no reason to resile from that view?
> Dr Manock: Correct.[43]

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[41] See Trial Transcript 129, 33-130 XXN as available at Networked Knowledge, *Gerald Warren Homepage* <http://netk.net.au/WarrenHome.asp>.

[42] See Trial Transcript 138, 13-15 XXN as available at Networked Knowledge, *Gerald Warren Homepage* <http://netk.net.au/WarrenHome.asp>.

The suggestion that a blow to the face with the threaded end of a metal pipe would leave the same marks as corduroy being impressed against the skin is clearly not correct. Likewise, the proposition that the 'same forces' are involved if someone 'leaves' a moving vehicle, as having a vehicle driven backwards and forwards over them is also not correct — the injuries would have been quite different. Being thrown out of the vehicle would have caused impact injuries and grazing; being run-over would have caused crushing injuries.

Evidence of being beaten by a metal pipe would strongly suggest that Warren had been seriously assaulted by another. Evidence that his corduroy trousers had been 'impressed against his skin' might be more consistent with an accident. The two interpretations open up the possibility of it being either an accident or a crime. The same can be said about falling out of the vehicle or having the vehicle driven over the top of him. Clearly the inferences concerning the injuries from corduroy and for falling out of a vehicle were not equally valid inferences from the available evidence as Dr Manock had stated.

G *Peter Marshall (1992)*

Mr Marshall was found dead at his home, lying on the floor next to his bed, with blood pooling around his head.[44] Dr Manock attended at the scene and concluded that he had died by falling out of bed and hitting his head. 'There being nothing suspicious' the body was taken to the mortuary where nothing further was done until the following day. During the routine x-ray at the autopsy, a bullet-hole was found in his head and a bullet was lodged in his brain. It appears he had been shot through the open window at his home.

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[43] See Trial Transcript 138, 20-32 XXN as available at Networked Knowledge, *Gerald Warren Homepage* <http://netk.net.au/WarrenHome.asp>.

[44] See Moles, above n 13, ch 9; Networked Knowledge, *Peter Marshall homepage* <http://netk.net.au/MarshallHome.asp>.

The press reports said that the police 'smarted' over the delay.[45] The crime-scene tape was put back up.

H *The Baby Deaths Inquiry (1995)*

This Coronial Inquiry involved the deaths of three babies variously aged three months, three months and nine months in separate incidents.[46] Dr Manock had determined that they had each died of bronchopneumonia. The Inquiry found that was not correct.[47] The Findings were discussed on the ABC *Four Corners* program with Dr Tony Thomas who had provided independent expert advice to the Coronial Inquiry:

> Sally Neighbour: Dr Manock's findings were later reviewed by Dr Tony Thomas, associate professor in anatomical pathology at Flinders University. Did the evidence support the diagnosis of bronchopneumonia?
> Dr Tony Thomas: In my opinion, no. Examination of the lungs didn't show any evidence of bronchopneumonia whatsoever.
> Sally Neighbour: No evidence at all?
> Dr Tony Thomas: No.
> Sally Neighbour: So how could a pathologist possibly come to that as the cause of death?
> Dr Tony Thomas: I find that difficult to answer. I can't answer that. Given that bronchopneumonia is a basic inflammatory disease, perhaps I could answer by saying that I would have expected a first or second year trainee in anatomical pathology to be able to diagnose that down the microscope.[48]

One of the babies was found to have 15 broken ribs, two serious skull fractures and a serious fracture of the spine:

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45 'Intruder theory in shooting and bungle over shooting victim', *The Advertiser*, 7 February 1992.

46 See Moles, above n 13, ch 10; Networked Knowledge, *The Australian Baby and Toddler Deaths Homepage* <http://netk.net.au/BabyDeaths/BabyDeaths.asp>.

47 Finding of inquest into the deaths of Storm Don Ernie Deane, William Anthony Barnard, Joshua Clive Nottle by the Coroner for South Australia, Mr Wayne Chivell, 25 August 1995.

48 Australian Broadcasting Corporation, above n 13.

> Sally Neighbour: What was the conclusion anyone else would have drawn?
> Dr Terry Donald: That it was inflicted. That it was recent. That someone had done it and that this child was dead. Therefore is it possible that what produced that fracture killed him? So therefore, you know, you're looking at an investigation into a potential murder.[49]

The Coroner stated Dr Manock had said he had seen things which could not have been seen (such as signs of bronchopneumonia) because they didn't exist. He also said Dr Manock's autopsy reports had achieved the opposite of their intended purpose — they closed off inquiries instead of opening them up. He said some of the answers by Dr Manock to the Coroner, on oath, were 'spurious'. The *Macquarie Dictionary* defines spurious to mean 'not genuine or true; counterfeit; not from the reputed, pretended, or right source; not authentic'. The *Oxford Dictionary* states it to mean 'illegitimate' or 'false'.

Although the Coroner had completed his Findings prior to the conclusion of the trial of Henry Keogh, he decided not to release them until after the trial concluded:

> The Coroner said he was sensitive to the fact that Mr Keogh's trial was proceeding at the time he was ready to publish his Findings. He knew that Dr Manock was a principal Crown witness. So as to avoid a mistrial he decided, of his own volition, to delay publishing the Findings until after the trial had concluded.[50]

The Findings were released two days after the jury delivered their verdict in Keogh's case.

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[49] Ibid. Dr Donald was the Director of Child Protection Services at the Women's and Children's Hospital, South Australia.

[50] Affidavit of Michael Sykes, Solicitor, dated 7 November 1996 copy available at <http://netk.net.au/Reports/Affidavits_Sykes.asp>.

I *Henry Keogh (1995)*

Mr Keogh was alleged to have been involved in the homicidal drowning of his fiancée in a domestic bath at their home in Adelaide.[51]

Dr Manock's evidence was that someone (presumably Keogh) had gripped the woman's left leg with their right hand, lifted her legs in the air, then they pushed her head under the water with the left hand. The death resulted, in his opinion, from forcible drowning which he inferred, in part, from three bruises to the outer left leg and one on the inner leg which were caused close to the time of death. He said they constituted a grip mark, which the prosecutor said was 'the one positive indication of murder'.[52] Dr Manock also said that histology (the examination of tissue slides down the microscope) confirmed that all the marks were bruises. As we will see, he acknowledged at the Medical Board in 2004 and at the Medical Tribunal in 2009 that this was not correct.[53]

Dr Manock said at trial that aortic staining with the weight and appearance of the lungs was a 'classical' sign of drowning. He later acknowledged at the Medical Board that there was no scientific support for this in the literature. However, he explained, this was only because 'the rest of the world hadn't caught up' with him.[54]

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[51] See Moles, above n 13, ch 11, 12; also Moles above n 5 especially ch 4, 11 which discussed Dr Manock's 'recantations' before the Medical Board which were important to the successful appeal. For a detailed analysis of the Court of Appeal judgment, see Sangha and Moles, above n 1, ch 10 pt B. See also Networked Knowledge, *The Henry Keogh Homepage* <http://netk.net.au/KeoghHome.asp>.

[52] *R v Keogh (No 2)* [2014] SASCFC 136, [59] where it was said that, 'although Dr Manock's evidence was not conclusive, it strongly supported the prosecution case of murder. The prosecutor, during the course of his address, returned repeatedly to Dr Manock's evidence. The following extracts demonstrate the considerable weight placed on that evidence …'.

[53] This is discussed in Ibid [213]-[227] and summarised at [343].

[54] See Transcript, Medical Board Hearing, 339. The full exchange is set out in Ibid [276]. See also Sangha and Moles, above n 1, 10.14.2.4.

Dr Manock stated at trial that the absence of damage to the outer surface of the brain at autopsy correlated to the woman being conscious whilst drowning. This ruled out an accidental slip-and-fall explanation. He subsequently acknowledged in 2009 before the Medical Tribunal that this too was not correct.[55] The appeal court found that there was 'no proper basis' for this — 'he was wrong'; Dr Manock's misconception led him 'inappropriately' to rule out an accident and conclude that the death was an 'assisted drowning'.[56]

As we will see, when the appeal was eventually allowed the court acknowledged that Dr Manock's 'mechanism of murder' was no more than 'prejudicial speculation'.[57] It even said that there was no convincing evidence that the deceased had drowned.[58] From 2002 until the appeal was allowed in 2014 Keogh constantly had a petition before the Attorney-General.[59]

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55 *Medical Board of South Australia v Manock* [2009] SAMPCT 2.

56 *R v Keogh (No 2)* [2014] SASCFC 136, [343]. See also Sangha and Moles, above n 1, 10.14.2.2.

57 *R v Keogh (No 2)* [2014] SASCFC 136, [274]: 'Dr Manock's recantation in respect of the mechanism of murder is fresh evidence that is compelling and should be admitted in the interests of justice. The recantation reveals that Dr Manock's opinion and demonstration at trial were no more than prejudicial speculation and not probative of any issue in the trial'. The court summarised its critique of the pathology evidence at trial at [343]; see Sangha and Moles, above n 1, 10.15.

58 *R v Keogh (No 2)* [2014] SASCFC 136, [285] where the court found that 'there was nothing else about Ms Cheney's presentation, not even the condition of the lungs, that mandated a conclusion of drowning'.

59 See Networked Knowledge, *The Henry Keogh Homepage* <http ://netk.net.au/KeoghHome.asp> for the second and third petitions and submissions.

III PART TWO — THE INSTITUTIONAL FAILURES

A *Introduction*

In his article on comparative factors in this issue Professor Roach has emphasised the fact that the Australian analyses of wrongful convictions predominantly emphasise issues of individual error and the Canadian analyses focus more on institutional error.[60] He recommends the need to combine those two analytical approaches to develop a more rounded view of the issues involved. This section looks to some of the institutional failures which have contributed to the failure to rectify the unfortunate wrongful conviction cases now being revealed in South Australia.

B *The appointment procedure*

It can be seen that by looking to the procedures which were involved in the appointment of Dr Manock in South Australia, they were clearly problematic.

Dr Manock graduated from Leeds University Medical School, as Bachelor of Medicine and Bachelor of Surgery in 1962.[61] He had a number of six-monthly placements in toxicology, cardiology, neurosurgery and obstetrics. He was then appointed in 1964 as assistant lecturer, and in 1966 as lecturer in the Department of Forensic Medicine at Leeds University. In the four years he was there he said he carried out 1200 autopsies 'of which 30 were murder cases for which I was personally responsible'.[62]

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60 Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' in this issue.

61 Dr Manock's background is set out in Moles, above n 13, ch 5.

62 Dr Manock's letter of application was dated March 1968 and addressed from Morley, near Leeds in Yorkshire.

In 1968 Dr Manock was appointed as the Chief Forensic Pathologist in South Australia despite having no formal qualifications as a forensic pathologist. In 1971 he was given a Fellowship of the Royal College of Pathologists of Australasia after being exempted from the five years of study and the very demanding examinations.

In the ABC *Four Corners* program in October 2001 this extraordinary circumstance was explained as follows:

> Dr David Weedon (RCPA): Well, it was the practice in those days for members who held very senior positions in Australia, and who had British qualifications, to be given a viva examination — that is, an oral examination only.
> Sally Neighbour: But Dr Manock didn't even have British qualifications.
> Dr David Weedon: So I believe.
> Sally Neighbour: So why would he have been given this oral-only examination?
> Dr David Weedon: Because of the seniority of the position he held. It would probably have been about 20 minutes, and he would've been asked questions related to forensic pathology.[63]

It became clear that his employer had expected Dr Manock to study and obtain his examinations in the usual manner but this had not occurred. In the 1970s, his employer attempted to appoint a senior director of forensic pathology by advertising such a position in the British Medical Journal. Dr Manock took action in the courts to prevent this from happening. The legal proceedings took place over six years in the action which was against the State of South Australia and the Institute of Medical and Veterinary Science (the IMVS was a government instrumentality).[64] Dr Manock argued that the new appointment would be 'an unlawful deprivation as against him in relation to the office or position to which he is entitled and the rights attached to that office or position'.[65] He said his appointment as

63 Australian Broadcasting Corporation, above n 13.
64 *R v Keogh (No 3)* [2014] SASCFC 137.
65 *Manock v South Australia and IMVS* [1978] SASC 2355, 1.

Director meant that he was Head of Department.[66] The Director of the IMVS said Dr Manock's title as director was a courtesy title, and not meant to indicate he was the departmental head.

The Director of the IMVS pointed out that it was in an 'awkward situation':

> I tried to encourage Dr Manock — 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.[67]

He said:

> We had to make other arrangements for the work, particularly the histopathology which *he was unable to do certifying the cause of death because of his lack in histopathology* …[68]

The court upheld Dr Manock's claim. His position as the head of the department of forensic pathology was confirmed.[69] However, succeeding in an action for breach of contract did not make him any better qualified as a pathologist. What has not been satisfactorily explained is how he was allowed, over the next 30 years, to conduct over 10,000 autopsies.[70] In a television interview he also claimed to have given evidence in relation to over 400 criminal convictions:

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66 'Senior pathologist appeals over job', *The Advertiser*, 23 March 1978.

67 Transcript of Proceedings, *Manock v South Australia* (Supreme Court of South Australia, SASC 2355, 1978) 117–25 (emphasis added).

68 Ibid (emphasis added).

69 Ibid; 'Judge rules on status of forensic director', *The Advertiser*, 8 June 1979.

70 In the Keogh trial much was made of the fact that Dr Manock was the most experienced of all the pathologists giving evidence, so the fact that other pathologists disagreed with him did not necessarily mean that he was wrong: see Moles above n 5, ch 4. However, as Rohan Wenn pointed out in an interview with the DPP, just because you do a job often doesn't necessarily mean that you do it well: see Channel 7, *Today Tonight* (Adelaide), 27 June 2002 available at <http://netk.net.au/Media/2002-06-27-DPPUnedited.asp>.

> Karl Stefanovic: How many convictions did you get?
> Dr Manock: I've no idea. I don't keep count.
> Karl Stefanovic: How many cases?
> Dr Manock: 400, 400 plus. South Australia is Australia's dumping ground for dead bodies.[71]

Later in the same interview:

> Karl Stefanovic: Is it a worry do you think for you and also the legal establishment, that if they did review this case and Henry Keogh was released from prison, that they would look at all of your cases?
> Dr Manock: I really don't know. I'm too old to worry like that (laughter).

Now that Keogh's conviction has been overturned, the Van Beelen appeal is directly addressing the issue of Dr Manock's competence in those other cases.

However, in terms of institutional failures, the question arises as to why it was necessary for Keogh to spend 20 years in prison before his conviction was overturned. If proper procedures had been followed in relation to the Baby Deaths Inquiry, and the Findings were published when they were completed, Keogh's lengthy imprisonment, and possibly his conviction may well have been avoided.

C *1994-5 — The Baby Deaths Inquiry*

Brief details of this inquiry were set out in part one. As noted there, after completing his Findings the Coroner decided, because the trial of Henry Keogh was under way, and the same pathologist was to give evidence at that trial, he would withhold his Findings until the Keogh trial had been resolved. Two days after Keogh was found guilty the Coroner published his Findings. It was put to the Legislative Review Committee that: 'the failure to disclose the Coronial Findings in this case ... amounts to a serious prosecutorial

[71] Channel 9, above n 5.

non-disclosure ... that alone would totally justify the verdict in the Keogh case being set aside'.[72]

The serious adverse findings concerning Dr Manock's credit and expertise set out in the Coronial Findings were not mentioned in the course of Keogh's first appeal.[73] His defence counsel explained that:

> ... he had considered them, but could not see how they could assist the appeal. As the Findings only came out after the trial he said he did not have time to consider them at more than an embryonic level and was without the opportunity for an in-depth analysis prior to the appeal being heard.[74]

There were three months between the date the Findings were issued and the hearing of the appeal and they consisted of 72 pages. It is interesting to note that the Findings were not admitted as part of Keogh's 2014 appeal either, although counsel did attempt to tender them during their reply to the prosecution's response to the application.

D *2004 — Medical Board Proceedings Involving Dr Manock*

In 2004 proceedings were taken before the Medical Board alleging Dr Manock had been guilty of unprofessional conduct in the Keogh case.[75] Various defects in Dr Manock's evidence were revealed in the course of those proceedings. The 'recantations' as they became known subsequently established a basis for overturing Keogh's conviction in 2014.[76] However, if proper institutional arrangements

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72 Sangha and Moles, above n 13, 37.

73 *R v Henry Vincent Keogh* 1995 SASC 5397.

74 Affidavit of Michael Sykes, above n 50 discussed in Moles above n 5, 117-8, ch 7.

75 The various submissions to the Medical Board and the findings of the Medical Board are available at Networked Knowledge <http://netk.net.au/Reports/KeoghIndex.asp#MedicalBoard>.

76 *R v Keogh (No 2)* [2014] SASCFC 136, [154]: 'The recantations of Dr Manock with regard to significant aspects of his trial evidence also change the landscape'. In this context the court referred to the bruising to the legs which

had been in place in 2004 they would have led to the conviction being referred to the court by the Attorney-General at that time.

At the outset of their consideration of the complaint, the Medical Board refused to conduct any active 'investigation' into the matter as the Act seemed to require. It interpreted the words 'must investigate' in the Act to mean that they would listen to Keogh's submissions, but only if he was represented before the Board by legal counsel.

During the proceedings, Dr Manock admitted that he had not disclosed to the prosecutor or to the defence the result of a histopathology test, which would have helped the defence case. He said this was because the issue did not come up in his conversation with the DPP, although he should have known that all results should have been included in his written report. He also acknowledged a number of other important issues with regard to his defective understanding of the case. They were the subject of detailed submissions to the Solicitor-General[77] and they were broadcast to the wider community by Channel 7.[78] It was said in that interview:

> Dr Robert Moles: It seems to me that the only sensible thing that can be done now is for the Solicitor-General, who's already reviewing this matter, to make an urgent request to the Medical Board to be provided with a transcript of the hearings over this last week. I'm quite confident that if the Solicitor-General reviews that transcript he would then have to advise the Attorney-General that Mr Keogh be released pending the re-hearing of the matter before some appropriate tribunal.

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were said to be close to the time of death and occurred at the same time; the mark on the brain relating to unconsciousness; the fact that histology did not support the existence of a medial bruise: see Sangha and Moles, above n 1, 10.15.

77 See submissions at <http://netk.net.au/Reports/SG00List.asp>.

78 Channel 7, 'The case of Henry Keogh and the Medical Board Inquiry', *Today Tonight* (Adelaide), 8 November 2004 available at <http://netk.net.au/Media/2004-11-08-MedicalBoard.asp>.

Unfortunately, no such action was taken at that time. Indeed, the Medical Board subsequently issued a Finding stating that Dr Manock was not guilty of unprofessional conduct.[79]

It was only revealed during subsequent judicial review proceedings in relation to that Finding that some members of the Medical Board had expressed views which appeared to be inconsistent with those findings. One expert pathologist on the Board said in internal exchanges of memoranda prior to issuing the Finding of the Board:

> The autopsy was sub-standard. The information recorded was deficient in detail and substance. For example, the absence of organ weights and the minimal histological examination characterise an autopsy falling remarkably short of what might be considered a minimum data set appropriate for any autopsy, let alone a forensic autopsy. It is the absence of data that is the problem in this case because it renders the conclusions untestable … The documentation in the autopsy in question was manifestly inadequate, even by the lowest of standards … In my opinion the standard of the conduct of the autopsy and the quality of the resulting evidence was markedly sub-standard to the point of incompetence … Dr Manock merits reprimand and exclusion from further independent function as a forensic pathologist. If one takes this view then the charge of unprofessional conduct is proven.[80]

He pointed out in his memorandum that the autopsy failed to comply with standards which had been laid down in 1908. Subsequently the Chief Justice of South Australia stated that he did not see any necessary inconsistency between the opinions expressed by the Medical Board members in their memoranda, and the formal finding of the Medical Board.[81] He suggested that the members might have

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[79] Decision of the Medical Board in the matter of *HV Keogh v CH Manock*, 22 June 2005 available at <http://netk.net.au/Reports/MedBoardDecision.pdf>.

[80] Memorandum from Dr Mark Coleman to members of the Medical Board, 16 March 2005 available at <http://netk.net.au/MedicalBoard/Coleman 16mar.asp>. The other two medical specialists on the Board expressed their agreement with it. The memoranda of Professor Maddocks and Professor McDonald are available at <http://netk.net.au/Reports/KeoghIndex.asp# MedicalBoard>.

[81] *Keogh v The Medical Board of South Australia & Anor* [2007] SASC 342.

changed their minds or have been outvoted in the final report.[82] However, there was no evidence before the court on which to base such speculations. Mind-changing as to the inadequacy of the autopsy in this case would have been unlikely, as the views expressed were written months after the detailed evidence and submissions had been provided and with no further submissions during the two months between the communication of the opinions expressed and the issuing of the final decision. In addition, the three medical members of the Board who were in agreement as to the inadequacy of the autopsy could hardly have been outvoted by the two remaining members of the Board, a psychiatrist and a solicitor, who would have been unable to express an expert opinion as to the adequacy of the autopsy.

However, it is clear that the disclosure of such opinions could have provided a sufficient basis upon which to have the Keogh conviction set aside at the time at which they were disclosed. Indeed, similar views by other experts at Keogh's subsequent appeal 10 years later had precisely that effect.

E *2004 — the Solicitor-General's Inquiry*

When the Attorney-General was considering Keogh's third petition, he sought advice from the Solicitor-General who then requested the IMVS in Adelaide provide him with expert advice. The Director of the IMVS, Professor Vernon-Roberts, said he would do so. Vernon-Roberts was asked to consider some questions put to him by the Solicitor-General, and he provided a written report in response.[83] The report stated that the deceased had most likely died following a fall after she collapsed or fainted in the bathroom. He said it was possible that there had been a blockage of a small artery in her heart and that as she fell she struck her head on the bath and drowned whilst unconscious. The professor said there was a 'lack of essential

[82] [2007] SASC 342, [155], [157].

[83] *R v Keogh (No 2)* [2014] SASCFC 136, [33]. See Sangha and Moles, above n 1, 10.13.3.

pathological findings' to support the view that she was forcibly drowned by someone gripping her lower legs.[84]

He subsequently sought permission to do some additional tests the results of which (as it later turned out) would have been exculpatory. They would have impacted adversely on the 'mechanism of murder' put forward by the prosecution at the trial. However, 'the suggested testing did not then take place'.[85]

The report was not revealed to Keogh's lawyers at the time although it should have been.[86] It was only disclosed 10 years later after Keogh's application for leave to appeal was filed with the court under the new statutory right of appeal. In 2006 the Solicitor-General recommended and the Attorney-General accepted that the matter would not be referred back to the court of appeal:

> Acting Attorney General Kevin Foley says he has also declined to refer the petition to the Supreme Court, after considering advice received from the Solicitor General Chris Kourakis QC.[87]

The Government media release said the petition, 'did not disclose any arguable basis on which the Supreme Court could find that there had been a miscarriage of justice'.

The non-disclosure of the Vernon-Roberts' report prevented Keogh and his legal advisors from making any submissions about the

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84 *R v Keogh (No 2)* [2014] SASCFC 136, [343].

85 Ibid [187]. See Sangha and Moles, above n 1, 10.14.1.1.

86 The prosecution is required to disclose all material which might reasonably assist the defence or lead to a relevant line of inquiry. That duty is continuing, and would be expected to override any claim to legal professional privilege. See Sangha and Moles, above n 1, 8.5 and in relation to the case of David Eastman at 8.16.1.

87 Government of South Australia, 'Keogh's Third Petition for Mercy Refused' (Media Release, 10 August 2006) available at <http://netk.net.au/Keogh/NewsRelease.asp>. Mr Kourakis QC was subsequently appointed to be a Justice of the Supreme Court and is now the Chief Justice of South Australia.

findings of the report, or undertaking the further testing which had been requested. The media release stated: 'there was no deficiency in the prosecution's disclosure'. In retrospect, it is very unfortunate that this statement was made at the very time at which the Crown was failing to disclose this crucial report. It is clear that the reasoning behind the decision to reject the petition was in error as was made clear by the subsequent decision of the appeal court in 2014.

In 2004 the book *A State of Injustice* had been published detailing Dr Manock's background and the cases which had been dealt with in the ABC *Four Corners* program in 2001.

However, whilst the institutional failures abounded, in 2006 Dr Manock was given the 2005 Achievement Award for service by the South Australian Branch of the Australia and New Zealand Forensic Science Society. The citation said that it was not for employment, research or professional achievement, but for service to the local branch.[88]

In 2006 the book *Losing Their Grip — The Case of Henry Keogh* had been published. It provided a critique of the trial and of the post-trial statements which had been made in the parliament in response to the significant number of programs which had been aired by Channel 7 *Today Tonight* on this topic. It also set out the important 'recantations' which had been made by Dr Manock at the Medical Board proceedings, and which subsequently formed an important basis for the subsequent successful appeal in 2014.

In 2007 a judicial review of Medical Board decision took place and the decision of the Medical Board was set aside. Shortly after, another opportunity arose to consider the systemic failures which had occurred in a review of the conduct of Dr Ross James.

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[88] Rachel Lowe (ed), 'Dr Colin Manock wins 2005 ANZFSS Branch Award for Service' (2006) 87 *SA Forensic Science News* 1 available at <http://netk.net.au/Manock/Award.pdf>.

F *2008 — the Medical Board Proceedings involving Dr Ross James*

These proceedings involved a complaint about Dr James who had been a deputy to Dr Manock since 1973.[89] It was said there had been a failure to disclose the result of a histology slide in the Keogh case which would have helped the defence. The slide confirmed that what was thought to be a bruise was not in fact a bruise, a critical element in the case against Keogh. The Board determined that Dr James was guilty of unprofessional conduct in that he failed to disclose relevant information to the court concerning the histology of one mark.

The Board said that his evidence 'clearly articulated his flawed understanding of his role as an expert witness and that it was his ignorance or disregard of his responsibilities rather than a deliberate desire on his part to mislead the court which led to his conduct'.[90] However, on appeal to the Supreme Court, Debelle J said he rejected the submission that Dr James had an opportunity to disclose his belief that the slide of tissue sample did not confirm that the mark was a bruise, and set aside the adverse finding of the Medical Board. He said he was 'entirely satisfied that James is not guilty of unprofessional conduct'.[91]

The decision was affirmed by the Full Court on appeal. In the course of those proceedings, the Chief Justice of South Australia stated that the non-disclosure by Dr James of a potentially exculpatory forensic test result was not necessarily a breach of duty by an expert witness. The Chief Justice did not cite any legal authority to support this view.[92]

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89 The complaints and submissions in relation to this matter are available at Networked Knowledge <http://netk.net.au/Reports/KeoghIndex.asp#Medical Board>.

90 Medical Board of South Australia, *Reasons for Decision*, Dr Ross Alexander James, 2 April 2008 available at <http://netk.net.au/Keogh/Keogh47.asp>.

91 *James v Keogh* [2008] SASC 156, [105].

92 *Keogh v James* [2009] SASC 258 (Doyle CJ, White and Layton JJ) discussed in Kevin Borick QC, 'Expert Witnesses and the Duty of Disclosure — *Keogh v James: Per incuriam*' (September 2011) 8 *Direct Link: NSW District and Local*

However, even if the non-disclosure did not amount to 'unprofessional conduct' under the Act, the failure of disclosure would be a sufficient basis upon which to set aside a verdict of a jury arrived at in ignorance of it. Although it was not possible to obtain a referral of the case to the appeal court on that basis, at that time, it did in fact prove to be one ground on which the appeal was allowed nearly six years later:

> Dr James' post-trial evidence makes it plain that he saw no evidence to suggest that any mark to the medial aspect of the left leg was a bruise. He was well aware that the histological evidence did not support a bruise. He saw no photograph of the so-called medial bruise. In his view, the grip scenario had not been corroborated. *These were matters not known to the jury*.[93]

It is clear from the judgment of the appeal court that they should have been.

G *2009 — Medical Board v Dr Manock at the Medical Tribunal*

In 2009 the Medical Board had clearly changed its view about the shortcomings of Dr Manock and it instituted proceedings against him before the Medical Tribunal. During those proceedings, a UK professor of pathology was brought to Adelaide to explain that black and white photos at an autopsy in 1994 would have been perfectly acceptable. It appeared to him that 'colour rendition' with colour photographs was not sufficiently reliable at that time.[94] However, there was an affidavit on file with the Medical Board from Associate Professor Gale Spring, a specialist forensic photographer who stated that it was his opinion that colour photographs should have been used.[95] Whilst the Tribunal found that there had been a number of defects in the manner in which the autopsy was conducted, they were not sufficient to raise significant concerns about Dr Manock's findings.

Courts Practice Newsletter available at <http://netk.net.au/CrimJustice/DirectLink5.pdf>.

93 *R v Keogh (No 2)* [2014] SASCFC 136, [256] (emphasis added).

94 *Medical Board of South Australia v Manock* [2009] SAMPCT 2.

95 See Networked Knowledge <http://netk.net.au/LTG/Affidavits-Spring.asp>.

On 5 May 2013, the new statutory right to second or further appeals came into effect and it was those provisions which eventually led to the further appeal.[96]

H *2014 — the Keogh appeal*

As has been explained, it turned out the Keogh appeal was in fact allowed on the basis of the information which was known or could have been ascertained by the Solicitor-General and the Attorney-General in 2004. The appeal court in 2014 stated that four key issues warranted the conviction being overturned:

- The haemosiderin relating to the bruise on the left leg; (this was the result of the test which the Solicitor-General was recommended to obtain but did not obtain in 2004-5 but which was conducted for the appeal).

- The recantations of Dr Manock and Dr James about bruising to the legs occurring within four hours of death (this is related to the next point).

- The acknowledgment by Dr Manock and Dr James that histology did not support the existence of the inside left leg bruise — they knew this at the time of the trial but did not disclose that fact (it was discovered by Keogh's advisers in 2000). It was disclosed by the pathologists at the Medical Board hearing in 2004.

- The recantation of Dr Manock that the absence of a mark on the brain indicated consciousness when being submerged and an assisted drowning. (There was never any scientific evidence to support that claim which he acknowledged at the Tribunal in 2009).[97]

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[96] For detailed discussion of this new right see Bibi Sangha, 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' in this issue.

[97] *R v Keogh (No 2)* [2014] SASCFC 136, [338].

The court said:

> If this fresh and compelling evidence had been available at trial, then the mechanism of murder postulated in evidence by Dr Manock could not have been advanced before the jury. The grip theory advanced by Dr Manock and supported by Dr James would be no more than mere speculation.[98]

It stated, that factor 'fundamentally changes' the evidential landscape of the trial:

> The recantations of Dr Manock with regard to significant aspects of his trial evidence also change the landscape. A consideration of the evidence now available concerning the ageing of bruises, the absence of a sign on the brain and the so-called mechanism of murder, all would suggest that the defence team may have approached the case in a fundamentally different manner. Issues at trial would no longer be issues. Other issues would have emerged. The change in the landscape may be very marked.[99]

One might also think that it would create an insuperable difficulty for a retrial.[100] The appeal court said that other evidence which had been given at the trial may now assume a different significance. The court made it clear that the evidence of Dr Manock and Dr James misled the jury, the court and the defence.[101] It stated that Dr Manock's view that a medical condition or accident could be excluded was 'largely discredited'.[102]

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98 Ibid [339].

99 Ibid [154]-[156].

100 See Sangha and Moles, above n 1, 11.5.2; Chris Corns, *Public Prosecutions in Australia: Law Policy and Practice* (Thomson Reuters, 2014) 210: 'even with a charge of murder, if there was a fundamental defect in the original prosecution, a retrial should not occur'. Where the accused would have to meet 'quite a different case' to that presented at the original trial, then a verdict of acquittal should be granted: *Parker v R* (1997) 186 CLR 494. The existence of four forensic reports by eminent experts stating that the forensic evidence provides no support for a murder hypothesis might be thought to at least raise a reasonable doubt that a murder has occurred.

101 See the summary of the court in *R v Keogh (No 2)* [2014] SASCFC 136, [343].

102 Ibid [340].

IV IMPROVING INSTITUTIONAL RESPONSES

It is clear from the foregoing that the system of checks and balances in Australia's criminal appeal system has not been working properly for some time now. As Bibi Sangha has pointed out in her article, the inability to have access to the courts to present compelling evidence of wrongful conviction has been a serious deficiency; but one which has seen corrective measures being taken in at least two states. As can be seen from Professor Roach's articles, he recognises the importance of these changes and would advocate for similar changes to be introduced in Canada. The words of Michael Kirby, former Justice of the High Court of Australia, should be acknowledged, when he says that 'the steps towards legal reform, begun in South Australia, are the *minimum* that is needed'.[103] What more then needs to be done?

A *Changing Attitudes: the prosecution's approach*

Despite the numerous and obvious errors which had occurred in the Keogh case, the prosecution opposed all of the claims put forward by the appellant on the appeal. The objections were unsuccessful on virtually every issue. Despite the four expert reports supporting only the accident hypothesis, including the two which had been obtained by the prosecution, the prosecution still argued that they were not compelling and that the conviction should be upheld. The appeal judges said that despite the vigorous cross-examination of the experts, the prosecution made little or no progress in their critique of that evidence.[104]

It should be noted that the Victorian appeal court in *R v Klamo* stated that where there is uncontroverted expert opinion, consistent with the innocence of the accused, a contrary jury verdict would necessarily be an unreasonable verdict.[105] It raises the question

[103] See Justice Kirby, 'Foreword' in Sangha and Moles, above n 1, ix (emphasis added).
[104] *R v Keogh (No 2)* [2014] SASCFC 136, [156].
[105] *R v Klamo* (2008) 18 VR 644.

whether the appeal court in *Keogh (No 2)* was wrong not to have entered a verdict of acquittal. It also raises the question as to whether it was appropriate to re-arraign Keogh on a charge of murder.[106] After a formal challenge by Keogh's counsel to obtain a permanent stay of the proceedings,[107] the prosecution formally abandoned the prosecution by entering a *nolle prosequi*, nine months after the re-arraignment.[108]

The explanation given by the prosecution was that the key prosecution witness, Dr Manock, had become ill and would not be available to give evidence at any further trial.[109] However, if the arguments being put forward on the Van Beelen appeal, that Dr Manock was never appropriately qualified as an expert, are made out, then his medical status would be irrelevant.

Perhaps the prosecution should reconsider its approach to post-appeal review. The correct approach must be consistent with the basic duties of the prosecution: a prosecutor should act as a 'minister of justice' and not unreasonably press for a conviction or oppose a claim where a person has been wrongly convicted.[110]

In the UK it is not unusual for a prosecutor to concede that appealable error has occurred at trial and to join with the defence in making a joint application to the appeal court for the conviction to be

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106 'Henry Keogh pleads not guilty, for the third time, to the 1994 murder of Anna-Jane Cheney', *The Advertiser*, 2 February 2015.

107 'SA court told Henry Keogh's third trial, for the murder of Anna-Jane Cheney, is doomed to fail', *The Advertiser*, 27 August 2015.

108 'Henry Keogh murder charge dropped by Director of Public Prosecutions in South Australia Supreme Court', *The Advertiser*, 14 November 2015.

109 'Henry Keogh: SA Police 'investigating no-one else' in Anna-Jane Cheney murder inquiry after charges dropped', *ABC*, 14 November 2015: 'The DPP said in a statement he reviewed the case after witness Dr Colin Manock fell ill and believed "it was not appropriate to proceed without the witness giving evidence and being cross-examined"'.

110 The prosecutorial duties are set out in Sangha and Moles, above n 1, 8.3-8.6.

set aside.[111] In a UK case with some similarities to the Keogh case an error at trial had resulted in a very different response by the prosecution. In *R v Causley,* Mr Causley's wife had gone missing and the prosecution alleged that Mr Causley had murdered her and disposed of the body.[112] It was established that the defendant had told lies over a long period of time about the whereabouts of his wife; he forged life insurances to take advantage of her disappearance; he established a relationship with another woman; conducted fraudulent transfers of title deeds to the matrimonial home and forged signatures on supporting documentation.[113]

In addition, at Causley's trial, the prosecution produced a jailhouse confession. However, it failed to disclose that the person to whom the confession was made had given evidence in another case, where he had been the recipient of a similar confession. The prosecution conceded that the prior confession should have been disclosed at trial:

> Recognizing that the ultimate responsibility lies with the court, the view taken on behalf of the prosecution is that the court should conclude that the conviction is unsafe and therefore needs to be set aside. If there is material that ought to have been available to the defence which might have caused doubt to be cast about [the witness'] evidence, then the fact that that evidence was not available at the trial must lead to the conclusion that the resulting conviction was unsafe. That is the proposition that the Crown have accepted in relation to the matter.[114]

It could be said that the same conclusion would be necessary following the non-disclosure of the Coronial Findings which undermined the expertise and integrity of Dr Manock.

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[111] The issue of 'prosecutorial concessions' is discussed in Sangha and Moles, above n 1, 8.6. Canadian prosecutors have also made appropriate concessions in some cases as Kent Roach mentions in his comparative paper in this issue.

[112] The facts here are from *R v Causley* [2003] EWCA Crim 1840.

[113] *R v Causley* [2003] EWCA Crim 1840, [30], [60].

[114] *R v Causley* [2003] EWCA Crim 1840, [2].

So, despite the fact that there was significant evidence which pointed to guilt in Causley's case, the existence of the non-disclosure was sufficient for the prosecution to concede that the conviction had to be set aside.[115]

It is also worth noting that British prosecutors have conceded to significant errors at trial in three cases where people had been hanged. In *R v Bentley (Deceased)* the Crown decided to make no objection to the reception of the fresh evidence on the appeal, which was allowed.[116] In *R v Kelly* '[t]he Crown … did not seek to uphold the conviction of Kelly for murder'.[117] In *R v Mattan* the prosecution accepted that the evidence of key prosecution witnesses was not reliable, and the appeal was allowed.[118]

In Australia, there seems to be a different attitude amongst prosecutors. In *Burrell v R*, Justice Kirby stated: '[d]uring more than 12 years on this Court I have seen joint support from the prosecution and the prisoner to permit the case of an accepted mistake in the reasoning of the intermediate court but once'.[119]

Perhaps the attitude in the UK stems from their extensive experience with the Criminal Cases Review Commission (CCRC) which contrasts with a marked lack of such experience in Australia. There may be a more tentative attitude towards recognising wrongful convictions in Australia which we need to acknowledge and address. So what has been the experience in owning up to error in other jurisdictions?

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[115] Causley was convicted at the retrial which followed: see Bob Woffinden, 'The Criminal Cases Review Commission has failed', *The Guardian* (online), 30 November 2010 <http://www.theguardian.com/commentisfree/libertycentral/2010/nov/30/criminal-cases-review-commission-failed>.

[116] *R v Bentley (Deceased)* [2001] 1 Cr App Rep 307.

[117] *R v Kelly* [2003] EWCA Crim 2957, [16].

[118] *R v Mattan* [1998] EWCA Crim 676.

[119] *Burrell v R* (2008) 238 CLR 218.

B *The British CCRC*

In terms of institutional responses it is clear that the UK with the development of its CCRC has a positive approach to dealing with potential wrongful convictions.[120] The CCRC was set up as a result of the exposure of the wrongful convictions in the IRA bombing cases which included the Guildford Four, the Birmingham Six, the Maguire Seven and the M62 bombing cases.[121] Since 1997 when it was set up, references from the CCRC based in Birmingham have led to the overturning of nearly 400 criminal convictions, around 100 of those being murder convictions. The convictions of four people who had been hanged have also been overturned.[122]

Lord Igor Judge was the Lord Chief Justice of England and Wales when he attended the Australian Institute of Judicial Administration conference in Sydney in September 2011. He said the possible conviction of an innocent person would represent a 'catastrophic' failure of the legal system. He was, of course, well aware of the cases which had been exposed by the CCRC including those where entrenched, systemic and systematic abuse had occurred. Those such as *R v Treadaway* (1996) and *R v Twitchell* (1999) had exposed abuse of suspects by the police amounting to torture and which involved 'bagging the suspect'.[123] As a result, the entire West

[120] For a discussion of the working of the CCRC see Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) ch 10.

[121] *R v McIlkenny & Ors* (1991) 93 Cr App R 287 ('The Birmingham Six'); *R v Richardson, Conlon, Armstrong and Hill*, 20 October 1989, CA Crim ('The Guildford Four'); *R v Maguire & Ors* (1991) 94 Cr App R 133 ('The Maguire Seven'); *Judith Ward v The Queen* (1993) 96 Crim App R 1 ('M62 and Euston Station bombings'). See Sangha, Roach and Moles, above n 120, 197-200 ch 7, 244-48 ch 8. Further details available at <http://netk.net.au/IRAbombings Home.asp>.

[122] In addition to the cases of Kelly, Bentley and Mattan discussed above, there is also the case of Timothy Evans of 10 Rillington Place who was eventually granted a full or free pardon. However, the CCRC refused to refer his case to the Court of Appeal as they found it was commonly accepted that Evans was innocent and therefore a referral would be uncecessary: see *Westlake v CCRC* [2004] EWHC 2779 discussed at Sangha and Moles, above n 1, 4.3.

[123] The placing of plastic bags over the head of the suspect: *R v Derek Treadaway* [1996] EWCA Crim 1457; *R v Keith Twitchell* [2000] 1 Cr App R 373.

Midlands Major Crime Squad had to be disbanded as it involved an established practice which had been approved up to senior levels in the police.

So, has the finding of 400 wrongful convictions meant that the British legal system has been regarded as an international disgrace? Clearly not. People travel from all around the world to visit the CCRC and to learn about their procedures. Bibi Sangha and Bob Moles have visited with them and have had many beneficial discussions with their commissioners and staff.[124]

Canada too has developed systemic responses to certain high profile wrongful convictions.

C *Canadian Judicial Inquiries*

Canada has had a number of judicial inquiries, similar to Australian Royal Commissions, except that they are set up after a serious criminal conviction has been recognised as a wrongful conviction. The Canadian practice is to undertake an international comparative study as part of the work of the inquiry. 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.[125] There is no doubt we could learn much from them.

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[124] David Jessel, a leading investigative reporter in the UK was appointed as one of the first Commissioners. He said that the Henry Keogh case had all the classic signs of a miscarriage of justice: Australian Broadcasting Corporation, 'Reasonable Doubt', *Background Briefing*, 18 July 2010 available at Networked Knowledge <http://netk.net.au/Media/ABC.asp>.

[125] Royal Commission on the Donald Marshall Jr. Prosecution (1989); Commission on Proceedings Involving Guy Paul Morin (1998); Inquiry Regarding Thomas Sophonow; 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).

The inquiry most relevant to present concerns is the Goudge Commission of Inquiry which looked at the work of paediatric forensic pathologist Dr Charles Smith in Toronto.[126] As Research Director for the Inquiry, Professor Kent Roach became aware of the South Australian baby death cases as part of his international study. He engaged Bibi Sangha and Robert Moles to provide a report to the inquiry on issues arising from the baby deaths in South Australia.[127] Gary Edmond and Stephen Cordner also contributors to this journal were closely engaged with the work of the inquiry and gave extensive advice as part of the inquiry deliberations. Indeed, it was a continuation of that collaborative process which gave rise to the *Forensic Investigations* book with Bibi Sangha, Kent Roach and Robert Moles and subsequently the symposium which in turn led to this collection of articles for this issue of the journal.

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 his evidence in criminal trials and parental custody hearings. Amongst the most tragic of the convictions overturned was that of Bill Mullins-Johnson who was convicted of the rape and murder of his four-year-old niece.[128] It turned out she had not been either raped or murdered. Dr Smith had misinterpreted post-mortem changes for ante-mortem injuries. There were many more such cases, some of which devastated families and the relationships between parents, children and other family members. The Chief Coroner and Deputy Coroner for Ontario who had improperly protected Smith's reputation resigned in disgrace and undertook never to practice again.[129]

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[126] Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, *Report* (2008). See also Networked Knowledge, *Dr Charles Smith - Homepage* <http://netk.net.au/SmithHome.asp>.

[127] Robert Moles and Bibi Sangha, Report to the Inquiry into Pediatric Forensic Pathology in Ontario, *Comparative Experience with Pediatric Pathology and Miscarriages of Justice: South Australia* available at <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/MOLES_SANGHA.pdf>.

[128] See Networked Knowledge, *William Mullins-Johnson Homepage* <http://netk.net.au/Mullins-JohnsonHome.asp>.

[129] 'Coroner probe dropped in Charles Smith saga: James Cairns agrees to never practise medicine', *Toronto Star*, 11 June 2010.

So, did the discovery of this and the many other 'catastrophic' cases 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.[130]

However, one can never rest content that such reviews and consequent institutional responses will provide assurance that all will be well for the future. The recently released Motherisk Hair Analysis Independent Review released in Toronto in December 2015 determined that child safety procedures being conducted at Toronto's Hospital for Sick Children 'did not meet internationally recognized forensic standards'.[131] In particular, it used unconfirmed results of preliminary screening tests as if they were confirmatory of the presence of drugs of abuse in the hair-strand tests conducted on both parents and children producing results which were 'inadequate' and 'unreliable'.[132] As the Motherisk Report pointed out, a 'presumptive test' is preliminary only and must be followed by a confirmation test. Without that, there is no identification of the substance being sought.[133]

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[130] 'Ontario's forensic pathologists better equipped in "search for truth"', *Toronto Star*, 28 October 2013. Bibi Sangha and Bob Moles visited the Centre in October 2015.

[131] Letter from the Hon Susan Lang, Independent Reviewer to the Attorney-General of Ontario on submission of Report of the Motherisk Hair Analysis Independent Review to the Ministry of the Attorney-General Ontario, 15 December 2015 available at <http://www.m-hair.ca>.

[132] Ibid 6.

[133] Ibid 52. A similar error occurred in the Tasmanian case of Susan Neill-Fraser, where presumptive luminol testing was used in evidence by the prosecution as if it were indicative of the presence of blood: see Transcript of Proceedings, *State of Tasmania v Susan Neill-Fraser*, 21 September 2010, 638-76 in the evidence of Debra McHoul, forensic biologist. This was despite the fact that such evidence had been ruled inadmissible in *R v Keith Smart (Ruling no 1)* [2008] VSC 79, and the error had been recognised as a 'common problem' in the experience of Britain, Canada and Australia, by a judge of the Supreme Court of Canada: The Hon Thomas A Cromwell, 'The Challenges of Scientific Evidence' (The Macfadyen Lecture, 2 March 2011); the Scottish Council of Law Reporting referring to Sangha, Roach and Moles, above n 120 ch 8 where the use of screening tests is discussed in the light of the forensic science issues

Perhaps the lesson to be learned from this is that it is the failure to correct error once it has been identified which is more likely to cause long-term damage to the legal system and the reputations of those who fail to respond appropriately. It is also clear that Australia needs to develop additional systemic responses which go beyond the establishment of the right to a second or subsequent appeal, important as that is.

D *Recommendations for Reform*

As we saw earlier, South Australia has established a right to a second or subsequent appeal. The first two cases to be heard have had convictions overturned and a *nolle prosequi* entered. In the next appeal to be heard, in the case of Van Beelen, it is alleged that 'Dr Manock's evidence should have been inadmissible at trial because he was at all times "unprofessional, incompetent and untrustworthy"'.[134] It was made clear in submissions on the leave application that the challenge is to all of the cases in which Dr Manock gave evidence. The ABC has reported that 'A tidal wave of appeals could be set to crash on South Australia's legal system following a case discrediting the state's top forensic expert, Dr Colin Manock'.[135] In addition to his involvement in some 400 criminal convictions, there is the possibility of cases (such as the baby deaths) where innocent explanations may have concealed potential criminal acts. That would open up the prospect of a review or audit of all 10,000 autopsies which Dr Manock said he had undertaken. That being the case, additional institutional arrangements may be needed.

As Kent Roach has advocated in his comparative article in this issue, it may be beneficial to develop an analysis of individual fault factors with more systemic analyses so as to maximise the benefits

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which arose in the context of the IRA bombings in the UK and the *Chamberlain* and *Splatt* cases in Australia.

[134] Booth, above n 24.

[135] Australian Broadcasting Corporation, "Shonk' forensic expert could trigger legal crisis in South Australia', *7.30 Report*, 8 December 2015 available at Networked Knowledge <http://www.abc.net.au/7.30/content/2015/s4368496.htm>.

previously emphasised in the prior Australian and Canadian experiences. To achieve this a multi-faceted approach would be necessary.

There clearly needs to be a formal inquiry, with the powers of a royal commission, into the circumstances of Dr Manock's appointment and his continued engagement as Chief Forensic Pathologist, especially after the state of South Australia had determined that he was not properly qualified to certify cause of death.[136]

There also needs to be an inquiry into the type of continuing institutional failures which have been outlined in part two. It is clear that they had each identified various errors and deficiencies which had occurred at trial. Yet none of them resulted in any form of decisive action to correct or prevent further adverse consequences being inflicted upon those who were subjected to them.

In the setting up of such inquiries, it would be opportune to consider the terms of reference which are often incorporated into the Canadian judicial inquiries. In particular, an international comparative study to see what lessons can be learned from the recent inquiries such as the Runciman Royal Commission in the UK, which led to the establishment of the CCRC, and the inquiry of the type conducted by Justice Goudge in Ontario.

It would be important to the credibility of any such inquiries that they be under the direction of senior judges or former judges with no prior involvement with Dr Manock or the state of South Australia.[137]

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[136] See Part two 'The Appointment Procedure' in this article above.

[137] In the criminal trial of a former prosecutor in Western Australia for murder, the trial and appeal court judges, senior prosecutors and defence lawyers were all from outside Western Australia: see *The State of Western Australia v Lloyd Rayney* [No 3] [2012] WASC 404 (trial); *The State of Western Australia v Lloyd Rayney* [2013] WASCA 219 (appeal). It should also be noted that in the Royal Commission on the Donald Marshall Jr. Prosecution (1989) the

However, in addition to the examination of past individual and systemic failures, there will also be a pressing need to identify deficient cases which are suitable for further review by the appeal court, as that is the only means by which a wrongful conviction can be set aside. Given the particular types of cases discussed here, it might be timely to give further consideration to the recommendation of the South Australian Legislative Review Committee.

E *The Legislative Review Committee — Forensic Review Panel Recommedation*

South Australia has already had a parliamentary inquiry which has had the opportunity to consider some of the issues which are raised in this article as they formed part of the submissions to that inquiry.[138] Whilst the government implemented the recommendation of that inquiry to establish a right to a second or subsequent appeal, the additional recommendations of that committee should now be given some further consideration.

The most important of them was recommendation 5: that the Attorney-General consider the establishment of a Forensic Science Review Panel (FSRP). The committee said that this would enable the testing or re-testing of forensic evidence which may cast reasonable doubt upon the guilt of a convicted person and for results, where appropriate, to be referred to the Court of Criminal Appeal.[139]

Commission was composed of three senior judges all from outside Nova Scotia.

[138] Sangha and Moles, above n 13, fn 12.

[139] Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* (2012) available at Networked Knowledge <http://netk.net.au/CCRC/CCRCReport.pdf>. The committee was comprised of three government members, two members of the opposition and one independent member. The recommendations of the committee had the unanimous support of the members. Recommendation 5 commences at 84 of the Report.

The CCRC in the UK has a statutory right of access to files held by a public body and in Scotland the CCRC has an extended right to access files held by a private body.[140] There can be no doubt that the investigative and deliberative powers of the CCRC when compiled into the reports which are forwarded to the appeal court upon a referral have done much to facilitate the appeal court's assessment of the issues. The appeal court has frequently expressed its appreciation to the CCRC for its reports. There is no doubt that an already overworked appellate court would have much to gain from the proactive review of a case by a CCRC or an FSRP. In assessing the potential costs of second or subsequent appeals to the judicial and legal aid systems, undoubted efficiencies can be gained from the more structured approach which such proactive reviews could develop, especially where common factors are involved in a significant number of cases.

Of course, if the arguments being pursued in the Van Beelen appeal are made out, then it would have to be considered that the evidence of Dr Manock in any case in which he appeared would have been inadmissible, because he was not an expert, irrespective of whether his evidence was right or wrong. The question which would then need to be addressed would be whether the wrongful admission of such evidence was capable of having any influence on the outcome of the case.

In *Keogh (No 2)* the court determined that it could obtain sufficient guidance in interpreting the new right of appeal from the decision of the High Court in *Baini v R* (*Baini*), which was a decision under the revised appeal provisions in Victoria:[141]

> ... the High Court's decision in *Baini*, which considers the meaning of substantial miscarriage of justice as a basis for allowing a criminal appeal, provides authoritative guidance to this Court.[142]

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[140] *Criminal Appeal Act 1995* (UK) s 17; *Crime and Punishment (Scotland) Act 1997* (UK) 1997, c 48 s 25 194I.

[141] *Baini v R* (2012) 246 CLR 469. The discussion here is taken from Sangha and Moles, above n 1, 6.5.6.1.

[142] *R v Keogh (No 2)* [2014] SASCFC 136, [124].

The High Court in *Baini* said that any assessment may be affected by the strength of the prosecution case at trial; there may have been properly admissible evidence which, despite the error, required the guilty verdict.[143] But there will be many cases where an appellate court will not be in a position to decide, given that it will be proceeding 'on the record' of the trial, with the 'natural limitations' which that brings with it.[144]

Where it is claimed that a guilty verdict was *inevitable*, the appellant merely has to show that without the error, the jury might have entertained a *doubt* about guilt. As the High Court said, a distinction has to be drawn between a guilty verdict being *inevitable* and a guilty verdict being *open*. In cases where evidence has been wrongly admitted or excluded, the Court of Appeal cannot fail to be satisfied that there has been a substantial miscarriage of justice unless it finds that it was 'not open' to the jury to entertain a doubt as to guilt.[145]

This means that the expression 'substantial miscarriage of justice' includes errors which *possibly* affected the result of the trial, together with 'serious departures', where the impact of the departure cannot be determined. These considerations acknowledge the role of trial by jury and the fact that the prosecution must establish guilt beyond a reasonable doubt. Only the inevitability of conviction will warrant the conclusion that there has not been a substantial miscarriage of justice.[146]

If the evidence of Dr Manock, which is most likely to be dealing with cause of injuries, the time and circumstances of such injuries is ruled to be inadmissible, and there is a 'possibility' that such evidence affected the result of the trial, then there is a strong

[143] *Baini v R* (2012) 246 CLR 469, [28].
[144] Ibid [29].
[145] Ibid [32].
[146] Ibid [35].

argument, on the basis of *Baini* and *Keogh (No 2)* that any such conviction should be set aside.

The further recommendation of the FSRP was that there be a means by which the Attorney-General review the process of presenting scientific evidence in criminal trials. No doubt that can properly be dealt with as part of the work of the commission of inquiry.

V CONCLUSION

Clearly the processing of a significant numbers of appeals will make considerable demands upon an already overstretched appeal court system. However, in considering the size of this task we should bear in mind that the CCRC in the UK has already assessed over 20,000 cases in order to identify the 400 or so cases which have been successfully appealed.[147]

Dealing with those appeals will require a change of attitude by the prosecution authorities, who should be encouraged not to oppose appeals which are destined to be successful. It might be an appropriate time for such a change in view of the recent statement by the Attorney-General:

> the Attorney-General is currently pursuing system wide reform of the justice system (which) will need to include change in culture and behaviour of all parts of the justice system including SAPOL, the DPP, legal services commission, the private profession and the courts.[148]

That process might be assisted by a preliminary review of cases by a FSRP which has representation by forensic experts together with lawyers representing defence and prosecution perspectives. A report

[147] The current figures are available at <http://www.ccrc.gov.uk/case-statistics/>.

[148] 'SA's Breaking Bad Courts: You'll never face justice', *InDaily*, 16 December 2015.

from the FSRP recommending that an appeal be allowed could be seen as an equivalent to a grant of leave to appeal as is the case with the CCRC in the UK.[149]

In the task of assessing the appeal, no doubt the judges will bear in mind the words of the British appeal court judges when they said in the case of *R v Twitchell*:

> There is before the Court yet another appeal arising from the lamentable history of the now disbanded West Midlands Serious Crime Squad. During the 1980's a significant number of police officers in that squad (some of whom rose to very senior rank) behaved outrageously and, in particular, extracted confessions by grossly improper means, amounting in some cases to torture. During the 1990's, it has been the melancholy task of this Court to examine the safety of many convictions recorded during that period, and approximately 30 have been quashed. It is to be noted that the task of this Court is not to proclaim guilt or innocence. Our duty is to assess the safety or otherwise of the challenged conviction and to allow an appeal if we think the conviction is unsafe.[150]

When assessing the conduct of a witness of whatever rank who has behaved in an 'outrageous' manner and secured convictions by 'grossly improper means' the focus must not be on the guilt or innocence of the accused but the fairness of the process. As was said in the case of Derek Bentley who had been hanged:

> It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment the summing up in this case *was such as to deny the appellant that fair trial which is the birthright of every British citizen*.[151]

A person should not have a conviction maintained in the absence of a fair trial simply because the witness had been able to conceal their

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[149] See the discussion of the powers of the CCRC in Sangha, Roach and Moles, above n 120 ch 10.

[150] *R v Keith Twitchell* [2000] 1 Cr App R 373.

[151] *R v Bentley (Deceased)* [2001] 1 Cr App Rep 307 (emphasis added).

wrongdoing more successfully than others had done previously or because that wrongdoing had taken place on a greater scale.