EVIDENCE SEEN AND UNSEEN:
A QUESTION OF BALANCE

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This paper draws attention to legal analysis and adjudication with specific regard to evidence in employment and criminal law, and the need for balance in collection and presentation of evidence pre- and at trial. The discussion considers institutional practices in education and law, and changing imperatives in the regulatory demands of neoliberal economies, and impacts of these demands on questions of evidence. Objects of analysis include the 2013 Federal Court employment law case, *National Tertiary Education Union v Royal Melbourne Institute of Technology* in Australia, and in criminal jurisdiction the *A.A. Thomas* and *David Bain* cases in New Zealand.

There is a requirement of transparency for both the probity and presentation of evidence. Without balance of mind, demeanour and respect to the probative value of evidence, there is a tripping-up of procedure and subsequent injustice. The key to evidence is that it be dealt with squarely and honestly. In light of present-day instrumentalism the aim is to raise awareness of these balances and concerns.

1 INTRODUCTION

1.1 The Paper

For the presentation of evidence and its probative value in employment law and criminal jurisdictions, this paper addresses the necessity for propriety and balance. It considers changing imperatives of institutional practices in context of the regulatory demands of neoliberal economies. From this, the paper addresses the retreat from ethical duties that underpin the values of a safe and orderly society.

In the employment law jurisdiction the object of analysis is the recent Australian Federal Court employment law case, *National Tertiary Education Union v Royal Melbourne Institute of Technology*. A perspective on the laws of evidence in two criminal cases in New Zealand follow, the *A.A. Thomas* case and *David Bain* case, both publicly and legally contentious. The paper shows the convenient omission of ethical concerns in the use of evidence and raises the matter of a Judge's duty to keep a rein on the presentation of evidence particularly from the Crown angle.

In a growing system that strives for over-expediency, the overall aim is to ignite further interest and to raise awareness to these concerns. This paper draws attention to the necessity for ethical approaches to the preparation and presentation of evidence, if justice is to uphold the rule of law for the political liberties of a safe and just society.

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1.2 Approaches

Grierson's focus in law relevant to this paper encompasses duty of care in all matters. Much of her work in educational management has involved employment matters in which legal and fiduciary duties come to the fore. Her approach to law emanates from the academic route, honed by work experience in criminal jurisdiction at the Magistrates Court of Victoria, Melbourne, and Supreme Court of Victoria Court of Appeal, and latterly in civil law from a law practice in Melbourne. She has a keen interest in the exercise and workability of fiduciary principles in educational and legal practice. She comes to this paper from these perspectives.

Gresson's focus is in criminal jurisdiction. His lifetime immersion in a family milieu of law gives him a keen insight into the workings of law and justice. His learning of legal principles and fundamental workings of justice comes from his father, Justice T.A. Gresson, his great-uncle, Justice Sir Kenneth Gresson, President of New Zealand's first Court of Appeal, and great-uncle, Justice Sir John Denniston, and great-great grandfather, Justice Henry Barnes Gresson. He has attended over 50 murder trials and done legal work for counsel, as well as working with the police against illicit drugs. From this he has a particular interest in evidence and the maintenance of the absolute incorruptibility of forensic evidence. He comes to this paper from this perspective.

2 EVIDENCE DEFINED

'If the procedures are unjust, the outcome of the process is likely to be unjust… To a very great extent, trial procedure is determined by the law of evidence' (Odgers 2012, p.1).

2.1 What is Evidence?

The Law of Evidence includes the rules and legal principles governing the proof of facts in a legal case or proceeding.

The presentation of evidence must support the argument around facts of the case.

Common law is based on incremental decision-making, with evidence being tested on both sides of a legal dispute, and with the Judge as umpire in the middle.

The Court demands rules of engagement to conduct a fair and impartial process. That is how the rule of law works.

2.2 What are the Rules of Evidence?

The Rules of Evidence determine what may or may not be heard and considered by the Court, and what must be withheld. Witnesses and counsel tend to say things in their own self-interest in Court, so relevance, reliability and probative value are crucial.

The Rules of Evidence serve several functions in juridical processes:

- Firstly, they regulate the material a court can bring forward in determining the facts at issue in a case;

- Secondly, they determine how that material may be presented and used in a proceedings; and
- Thirdly, they regulate the procedure by which a court goes about deciding an issue of fact according to that evidence.

Thus evidence is crucial to the procedural system of justice.

2.3 Why Rules of Evidence?

There is a need for ground rules in presentation of evidence, to expedite an outcome. Evidence law is basically addressing these questions:

- What are the things to take into account to make a decision in Court?
- What are the facts we will or will not accept?
- Will the evidence support the facts, or show the facts constitute another scenario?
- What are the elements of the cause of action? and;
- What evidence will prove or disprove these elements according to the facts of the case?

3 ECONOMIC RATIONALISM

3.1 Neoliberalism

Today education and law operate in a neoliberal context of economic rationalism. What does this actually mean?

Neoliberalism has its basis in liberalism as a metanarrative of political philosophy based upon the rational logic of progress.[2] Legal scholar, Margaret Thornton defines neoliberalism as, 'a constellation of values emphasising market freedom—competition, free trade and entrepreneurialism—in conjunction with profit-making and private good' (Thornton, 2014, p.2).

Today, market forces characterise the discourses of the institutions of society—education, policing, law and justice. For these institutions, 'commercial self-interest' and 'audit-culture' (Forsyth, 2014, p. 29) has become the norm. Results matter.

4 EMPLOYMENT LAW CASE

4.1 Object of Analysis: Background Facts

The key object of analysis in employment law is National Tertiary Education Union v Royal Melbourne Institute of Technology.[3]

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[2] For the term 'metanarrative' see J-F. Lyotard, 1984.

[3] *National Tertiary Education Union and Judith Carolyn Bessant v Royal Melbourne Institute of Technology* [2013] FCA 451. Cited in text as *NTEU v RMIT*.

The case raises a cause of action for statutory breach of the Fair Work Act 2009 (Cth) heard in 2013, in the Australian Federal Court, exercising its jurisdiction in the Fair Work Division.

On 16 May 2013, the first applicant, NTEU and second applicant, a university professor, alleged the university had terminated the academic's employment because of her tense relationship with the Dean of her work division. This tension related to complaints the employee had made against the alleged harassing and bullying behaviour of the manager towards her, which she was within her workplace rights to do. The bullying complaint was not proven although Worksafe did identify risk factors in the work environment (NTEU v RMIT, para. 73).

The university argued that the redundancy was directed solely by financial reasons.

4.2 Case finding

The case finding was that the university used the redundancy process unjustly to terminate the senior academic's employment.

Justice Gray found two serious contraventions of the *Fair Work Act:*[4]

> Firstly, in 'taking adverse action against [the employee] by dismissing her from her employment on 20 April 2012, for reasons that included the reasons that she had workplace rights, had exercised workplace rights, and proposed to exercise workplace rights' (*NTEU v RMIT*, Court Orders); and
>
> Secondly, by failing to comply with the Staff Union Collective Agreement, and failing to offer 'the option of participating in a voluntary redeployment process' (Court Orders).

The Court awarded $44,000 penalty costs, fined the university $37,000, and ordered reinstatement of the employee as that is what was sought—although Justice Gray pointed out that had she sought damages he would have awarded well in excess of AUD$1million plus interest—such was the seriousness of the negative effect upon her.

4.3 Questions of Evidence

Those are the facts and outcome of the case. But how did it get to this? How could a Court make this finding against a reputable university? These questions take us directly to the question of evidence.

The employee's direct manager and the Vice-Chancellor (VC) were called to give evidence. Both testified the redundancy was based solely on financial grounds.

There was an onus on the university to satisfy the Court that the reasons alleged in the statement of claim [exercising workplace rights] were *not* among the reasons for the dismissal of [the employee]' (*NTEU v RMIT*, para. 131, emphasis added).

[4] *Fair Work Act 2009* (Cth) s 340(1)(a)(ii); s 50.

The evidence presented by university witnesses did not satisfy the Court of this. Justice Gray said that his conclusion was based on,

> the failure of [the VC] to give explicit evidence that none of those reasons was operative in her decision… [and] indications that she had reasons other than those to which she referred explicitly… [and] the absence of any clear expression of a connection between the financial deficit … and the choice of [this professor] as the one who should be made redundant (*NTEU v RMIT*, para. 131).

The respondent case was not made out. His Honour adjudged, 'The dismissal amounted to adverse action, which was taken because [the employee] had, and had exercised, and proposed to exercise, workplace rights' (*NTEU v RMIT*, para. 132).

4.4 Presentation of Evidence

Justice Gray found that the VC's

> approach to the processes involved in making [the employee] redundant suggests that she was setting out to achieve a *pre-determined* result and would not allow herself to be diverted by anything that might prevent that result from being achieved (*NTEU v RMIT*, para. 124, emphasis added).

This finding is based upon the way the witness evidence was presented.

The Court also found there was a lack of evidence of reasons for the redundancy. Other senior executive managers, relevant to the university's decision-making process, could have been called to give evidence. Had they been called they could have corroborated or shed light on the reasons for the redundancy.

Was their absence a forensic decision, knowing that whatever evidence they may give under oath or in cross-examination would not assist the university case?

4.5 Outcome of Evidence

Ultimately His Honour Justice Gray did not accept the argument of the university that the redundancy was based solely on financial reasons. His Honour adjudged,

> The process was conducted unfairly, with an attempt to narrow the focus of consideration to a financial situation which was alleged to exist, but not established by a rigorous process and not in accordance with reality' (*NTEU v RMIT*, para. 141).

5 DISCUSSION AND ANALYSIS

5.1 Evidence Seen

The case shows that the evidence presented by the respondent witnesses was addressing only one aspect of the rationale for the redundancy. The evidence as presented was prioritising economic imperatives to the exclusion of all else.

Not only was the respondent case not made out, but also the chief witness representing the university was the subject of harsh comments from the Judge.

His Honour found:

> There was no display of contrition on the part of [the university], particularly from [the VC]. She maintained to the very end of her evidence that the decision to make [the professor] redundant was fully justified. She made no concessions as to any impropriety (*NTEU v RMIT*, para. 143).

5.2 Evidence Unseen

Was the strategy to keep other evidence away from the Court appropriate in running this case?

'The contravening reasons for …[the] dismissal were kept secret' (*NTEU v RMIT*, para. 141).

If the named senior executives who had advised the VC had been called, what could have been their evidential weight?

Perhaps if these other witnesses had given evidence it would be likely to be fatal to the university case, but seen the other way, not giving evidence was equally fatal.

5.3 Economic Imperatives

Financial reasons were given as the sole rationale for the dismissal.

This focus is consistent with the economic imperatives of the managerialist university of today, but in this case, as His Honour stated, 'not in accordance with reality' (*NTEU v RMIT*, para. 141).

The priorities of economic rationalism, at the expense of duty of care and concerns of workplace rights, led to results for the employee that were, by any interpretation, unjust. The de-legitimation of the employee's position and perspective can be seen in no other way than unjust. (See Bessant account, 2014).

6 CRIMINAL JURISDICTION:

6.1 Granular Approach

The following two cases in criminal jurisdiction, *Arthur Allan Thomas*[5]and *David Bain*[6] go directly to the question of evidence seen and unseen. The cases invite a granular approach to the forensic investigation of evidence in this paper.

Both cases were heard in New Zealand courts, *Thomas* in the 1970s, and *Bain* in the 1990s and 2000s.

[5] *R v Thomas*: this case has a long chronology of court hearings and reviews culminating in a free pardon and compensation payment.

[6] *R v David Bain*: this case has a long chronology of court hearings and reviews culminating in a government 'ex gratia' payment.

6.2 Similarities

Both *Thomas* and *Bain* demonstrate a too-fluid approach to evidence, and a lack of adherence to the strict demands of forensic investigation and presentation on the part of the Crown, resulting in injustice for the relevant accused.

Each case leads to appeals, retrials, enquiries, pardons or acquittals, reviews, compensation or ex-gratia payments at considerable expense to the Crown. And each has been the subject of continuing public interest in New Zealand and further afield.

7 THOMAS: FACTS AND COURT HISTORY

7.1 Arthur Allan Thomas: Facts

In the early evening of 17 June 1970, a cold, wet and windy winter's night, Jeannette and Harvey Crewe were shot by a .22-calibre rifle in their farmhouse in the rural district of Pukekawa. Months later, their bodies were found in the Waikato River. Another farmer in the district, Arthur Allan Thomas was arrested on 11 November 1970, and convicted for the double murder in 1971.

The Thomas trials have been described as 'one of the country's most protracted legal struggles' (NZ History)—unquestionably one of the most divisive; and one that ultimately dented the reputation of the entire criminal justice system, including the police investigation team. Tactics were employed by the police that can only be described as unethical, if not iniquitous to the workings of justice.

7.2 *A.A. Thomas*: Court Chronology

11 November 1970, A.A. Thomas arrested for the double murder.

15 Feb. to 2 March 1971, First Supreme Court trial before Justice Sir Trevor Henry. Thomas found guilty of the double murder.

6 May 1971, Court of Appeal rejects appeal by A.A. Thomas.

17 February 1972, Review of case by Court of Appeal Judge Sir George McGregor. Advises against new trial.

5 February 1973, Government referred the case back to Court of Appeal.

26 February 1973, Thomas conviction quashed; new trial ordered by decision of Sir Richard Wild CJ, Thaddeus McCarthy J and Kip Richmond J.

26 March 1973, Second Supreme Court trial of Thomas before Justice Clifford Perry. 16 April 1973, Guilty verdict.

3 July 1973, Court of Appeal hearing; grounds of unfair conduct by prosecutor.

11 July 1973, Appeal dismissed by same three Court of Appeal Judges.

9 December 1974, Second referral to the Court of Appeal.[7]

3 February 1975, Appeal dismissed. Conviction upheld again.

1978 Application to Privy Council refused.[8]

[7] *R v Thomas (No 2)* [1974] 1 NZLR 658 (CA).
[8] *R v Thomas* [1978] 2 NZLR 1 (PC).

26 October 1978, Adams-Smith QC briefed to undertake an enquiry into evidential aspects of the case.

16 January 1979, Adams-Smith briefed to undertake a second enquiry.

17 December 1979, Second Adams-Smith report is presented to government.

21 May 1980, Thomas Royal Commission opens proceedings. Begins hearings 9 June, in Auckland, before retired Justice of NSW Supreme Court, Robert Lindsay Taylor J, and Peter Gordon ex-MP, and the Most Reverend Allen H. Johnston.

30 October 1980, Royal Commission concludes, after 64 days sitting, that Exhibit 350 had been planted. A Detective admits to lying. Thomas pardoned.[9]

Thomas is awarded NZD$1.087million compensation.

8 LOOKING AT THOMAS: CROWN CASE

8.1 Crown Evidence

The Crown relied on this evidence:

(i) Thomas had a motive, jealousy;
(ii) the fatal bullets came from Thomas's rifle;
(iii) the cartridge case, Exhibit 350, matched Thomas's rifle;
(iv) the axle to weigh down Harvey Crewe's body belonged to Thomas;
(v) samples of wire from Thomas's farm were in agreement with wire used to bind the bodies.[10]

8.2 Questions Arising

Who put the bodies in the river?

Who fed the baby after the Crewes were killed?

What stranger-killer would hang around the crime scene for these tasks and incur the risk of recognition and capture?

Why was a clean bullet shell-casing situated in already-sieved ground?

What kind of person would kill the Crewes? What association to the couple?

9 DISCUSSION AND ANALYSIS

9.1 General Onslaught

The evidence used by the Crown to shamelessly attack the accused exceeded all possibilities of corruption. The onslaught to gather improbable evidence against Thomas was inexhaustible—it had to be, since the more and more nullification was pushed, and adduced by the defence, that the rounds in the victims' heads were unlikely to be from shell-casing Exhibit 350, the more far-flung and dishonest the prosecution attack became. It had to be that way.

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9 Pursuant to *Crimes Act 1961* (NZ), s 407.

10 *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe*, PD Hasselberg, Government Printer, Wellington, 1980, 30, p. 17.

The Crown, with no forensics at the crime scene (and this is often overlooked), found imagined relationships linking Thomas to the Crewes and the murders. The attack on Thomas of highly specious and emotional evidence was massive; and the police falsehoods and fabrications, impossible to handle by intelligent men, were way beyond the naivety of this man under cross-examination by David Morris.

9.2 Manufacture of Bullet

No one expected evidence to come from Jack Ritchie, a dying policeman in the small New Zealand town of Dannevirke, who knew Hutton well (and who had told Gresson on tape that Hutton was a 'planter'), that there was a subtle difference in manufacture marks, and therefore dates of assembly, of a Number 8 bullet. The bullets in the heads did not match the planted shell case—they had never been assembled that way.

During the second trial, Dr Sprott had opened the package of assembled bullets sent to him by Ritchie and told defence counsel, Kevin Ryan of this. But Justice Perry, the trial Judge, took umbrage at such a suggestion, attacking Ryan for bringing discrepancy of shell-casing evidence to the jury, and undermining the defence team's credibility. Sir Richard Wild CJ advised Perry J to apologise in open court, but Perry J would not apologise.

However, the Royal Commission found the discrepancy to be so, and was adamant that police corruption had occurred.

As an aside—and this happened to the Thomas rifle—it is rare in forensics that a rifle, once removed for forensic purposes, is returned by the police and then uplifted again by them, but this is what happened on 20 October 1970. At 2.30pm that day, at the crime scene the police fired two bullets from the rifle, and planted one of the shiny, brass, shell-casings in a flowerbed, allegedly unsearched, to be found seven days later and become the infamous Exhibit 350.

Of this the Royal Commission said:

> We conclude that on the occasion referred to by Mr and Mrs Priest, Mr Hutton and Mr Johnston planted the shellcase, exhibit 350 in the Crewe garden, and that they did so to manufacture evidence that Mr Thomas's rifle had been used for the killings.[11]

Police disposed of this evidence after dismissal of the Second Appeal in 1973.[12] The Commission found clear 'impropriety on the part of the police'.[13]

9.3 Thomas Lying

The Crown evidence rested heavily on Thomas lying about where and when he might have met Harvey, when he might have last seen Jeanette, when and where he had worked.

Therefore, Thomas and wife, Vivien were liars in cahoots. They had lied about Thomas leaving the marital bed to commit murder, they had lied about the sick cow, and any and

[11] Ibid 250, p. 87.
[12] Ibid, 63, p. 25.
[13] Ibid, 366, p. 90.

all rebuttals made by Thomas and Vivien to the Crown interpretation were to be seen by the jury as evidence of guilt.

It played out magnificently that way.

9.4 Axle

An axle was used from Thomas's tip to weigh-down Harvey in the Waikato River. In spite of evidence of the axle's history given to the contrary, the prosecution by inexhaustible blurring of already mootable evidence, worked into evidence that the axle fitted the axle parts attributable to Thomas's farm.

Detective Inspector Bruce Hutton was the only one who could say that the axle was connected to Harvey Crewe's body, as he was the one who said the wire to the axle broke during the recovery operation of the body. There was much doubt about the axle's ownership and history, and nothing wrapping up the bodies was proven to ever have been in Thomas's possession.

9.5 Who fed the baby?

Furthermore, there was the question of who fed the Crewe's baby after the murders. The Crown said, and was prepared to go to any length to suggest that, having killed the Crewe parents, Thomas and his wife, Vivien undertook the risk of feeding the little baby.

This Crown view against Thomas should have been seen by any jury as such stupid recklessness as to be enough to see the police case was floundering or in doubt. It is also meant they were driving the 9kms there and back from their farmhouse, but were never seen by witnesses.

It is logical that whoever fed the baby was in cahoots with the killer. Strictly then, Vivien should have been charged with Arthur, as significantly the police pushed to get Vivien onto the property feeding the baby. This did not match Bruce Roddick's sighting and Roddick would not confirm that it was Vivien.

This is where the evidence of Bruce Roddick comes in. Roddick saw the woman who fed the baby, from 75mts or so away; and witness Queenie McConachie substantiated the presence of this person. Can we assume little Rochelle did not feed herself? And can we assume that Arthur and Vivien Thomas would be out of their minds to be running around on the Crewe driveway with an obvious murder scene, in which they had taken part, inside the house?

Whatever Roddick said or didn't say, whatever Roddick saw or didn't see, Roddick was guaranteed to meet a fusillade of police technique of intimidation and isolation, the purpose being that wherever the witness came from, he would invalidate himself. Roddick was the perfectly selected victim for police convenience—and, of course, it is not unusual for police to use this method when witnesses are seen to be unhelpful to maintaining the Crown position.

9.6 Premise of Motive

Arthur had a long infatuation with Jeanette.

Prosecution suggested 'financial pressure added to romantic frustration produced in Mr Thomas a deep resentment and smouldering jealousy of Mr and Mrs Crewe'.[14] Justice Perry did not pull up Crown prosecutor's innuendoes that the accused was sexually motivated regarding the killing of Jeanette Crewe.

The Royal Commission rejected this motive: 'We reject entirely the notion that any of the evidence put forward in this respect established a motive by Arthur Allan Thomas to kill the Crewes.[15]

9.7 Evidence Fabricated and Positioned

To a certain extent the avoidance of a *family* member being involved in the killing meant that the prosecution case had to be skewed away from evidence that might support another, 'closer-to-home' scenario and another offender.

Fabricated evidence suited this purpose—indeed it was vital.

9.8 Pre-determined Scenario

Detective Inspector Bruce Hutton's drive for a conviction had to support a pre-determined scenario for which there was no evidence. So once a pre-determined picture had been set, and an accused found, then evidence had to be created to support it. Again, any denials on the part of Thomas or Vivien were seen as specious and self-protective lies.

Regarding the police reconstruction of where Thomas had shot the Crewes from, it was important to match the weather conditions to the stormy night in question. It was ludicrous to suggest Thomas fired through the opened Louvre windows, as: (a) they would have been shut on the night in question because of the weather; and (b) the rush of wind and rain into the kitchen would have given the killer's game away. Yet Hutton set up photos of people shooting through the window to simulate a scenario.

Kevin Ryan pointed out that the prosecutors shared with police a strong desire for conviction at all costs, in spite of the principle of impartiality as officers of the Court (Ryan, 1997, p. 135).

Prime Minister Muldoon said, 'once they decided that Thomas was the murderer, the police used every trick in the book to have him convicted, and they were successful' (Muldoon, 1981, p. 144).

At the end of the day Thomas was to be seen not only as a murderer, but also as a lying and sick man.

[14] Ibid, 214, p. 59.
[15] Ibid, 408, p.98.

10 DISCOVERY

10.1 Procedure

Perhaps most pernicious of all is the police and prosecution's suppression of evidence from the defence eyes. This deliberate attitude of police, from jury vetting and selection on, not only put the defence on the back foot, but also made the British system of advocacy impossible.

When the Royal Commission asked Peter Williams, senior counsel for Thomas, if the police would make the file available for the defence, Williams replied:

'The position in New Zealand is the police would conceal the file beneath the skirt of privilege' (Williams, cited in Birt, 2012, pp. 96-97).

10.2 Crown Tactics

As well as constructing facts most suiting the Crown case, the subpoena system was used by police and prosecution to prevent defence from accessing witnesses, pre-trial. For example, Arthur's cousin, Peter Thomas could testify Arthur was at home the night of the murders, but the Crown had subpoenaed Peter and prevented Paul Temm, defence counsel in the first trial, from calling him. Roddick was also subpoenaed by Crown.

The *Halsbury's Laws of England*[16] were not followed, on the need for prosecution to make witnesses available to defence if and when they decide not to call them.

10.3 Disclosure and Falsehoods

Regarding issues of 'duplicity and concealment' that Thomas had to contend with, defence counsel, Kevin Ryan said to the Royal Commission:

> In our jurisdiction 'discovery' in criminal cases is denied and it is only because this Royal Commission directed that police records be made available for inspection that much of the truth has been exposed or mined for the first time (Ryan, cited in Birt, 2012, p. 96).

If the full police file had been disclosed would Arthur Allan Thomas be convicted twice of the double murders?

At the first and second trials, rules on disclosure and that disparity of resources between Crown and defence, made it difficult for Temm and Ryan to formulate robust advocacy. Similarly, the police, listening in a van outside the Court and following the case in real time, anticipated cross-examination of witnesses, completely undermining the impartiality of the process of 'in-camera' appearance of witnesses and authentic cross-examination. This tactic positioned the Crown well ahead of the game.

Detective Hutton even went as far, in the second trial, as to pressure witness, Leighton to sign an affidavit regarding the appearance of the letters on the head-stamps of the bullets. Leighton would not sign this, as he knew the information in the affidavit to be false.

[16] Viscount Simonds (ed) *Halsbury's Laws of England 3rd ed., Vol 10*. London: Butterworths, 1952 to 1964.

Detective Sergeant J.R. Hughes was singled out by Justice Taylor at the Royal Commission and made to admit that he had lied at the Thomas trials.

It had also been kept from the defence that he, Hughes, had served in the navy with the foreman of the second Thomas jury.

11 TIME FOR TRUTH

11.1 No Evidence, No Motive

Contrary to the evidence given there was no evidence placing Thomas on the Crewe property on the evening of 17 July 1970, nor was there any evidence that he was continuing to harbour any interest in Jeanette. There was no motive.

The Royal Commission found:

> At the second trial in particular, Thomas was strenuously cross-examined concerning Hughes' evidence which contradicted his own, and his credibility was attacked both then and again during the Crown Prosecutor's final address. The evidence assumed substantial importance, first as establishing whether Thomas had been in the company of Mr and Mrs Crewe in their own home, and secondly from the point of view of the credibility of Thomas in the witness box. [17]

It was the overall credibility of Thomas that was at stake here.

11.2 Overall Finding

Regarding Exhibit 350, the Royal Commission found:

> It was put there by the hand of one whose duty it was to investigate fairly and honestly but who, in dereliction of that duty, in breach of his obligation to uphold the law, and departing from all standard of fairness fabricated this evidence to procure a conviction of murder.[18]

Furthermore, the Royal Commission concluded:

> that on 11 November 1970 the Police did not have just cause to suspect that Arthur Allan Thomas on or about 17 June 1970 at Pukekawa murdered Jeanette Lenore Crewe or David Harvey Crewe. His arrest and prosecution for their murders was not justified'.[19]

12 PARDON AND OUTRAGE

12.1 Free Pardon

The *Crimes Act* vests power in the Governor-General as representative of the Sovereign, to grant a free pardon. This means 'that person shall be deemed never to have committed that offence'.[20]

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17 Ibid, 370, p. 91.
18 Ibid, 486, p. 115.
19 Ibid, 411, p. 99.
20 *Crimes Act 1961* (NZ) s 407 Effect of free pardon.

Thomas was pardoned on 17 December 1979. He had never committed the offence for which he had been gaoled for nine years. Thomas was a free man, but compensation was due—the Commission noted 15 effects of damage, pain, loss, deprivation, suffering, ignominy and anguish.[21]

12.2 Outrage

The 1980 Royal Commission found conclusively:

> That a man is locked up for a day without cause has always been seen by our law as a most serious assault on his rights. That a man is wrongly imprisoned for 9 years, is a wrong that can never be put right. The fact that he is imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law, is an unspeakable outrage.[22]

Would the New Zealand police ever take this cataclysmic rebuke lying down? 'The reaction from police was swift, vitriolic and concerted' (Birt, 2012, p. 46).[23]

12.3 Finally

The system lacked the balances necessary for impartial administration of justice.

One would have to have blinkers on, not to see that both trial judges, whether they meant it or not, had eyes only on the prosecution and the success of that evidence for the jury. Of course, when an accused is seen as a complete and utter liar throughout, the judge's summing up would be skewed toward prosecution evidence, and all the time the accused is put in a position of having to prove his innocence. The onus of proof was reversed. It was an amazing orchestration that precluded legal analysis and placed not only the accused, but also the judges in the case into untenable positions.

13 BAIN: FACTS AND COURT HISTORY

13.1 David Cullen Bain: Facts

In Every Street, Dunedin, the early morning of 20 June 1994, 22-year old David Bain went on his paper round. It was winter. At some time in the early morning, David's mother, Margaret, two sisters, Arawa and Laniet, brother, Stephen, and father, Robin were killed by .22 bullets to the head. Stephen was part strangled as well as shot. David's mother and sisters were lying on or near their beds.

Robin Bain was lying on the lounge room floor, and lying one-metre away from his left shoulder was David's discharged .22 rifle. There was a message on the computer, 'Sorry, you are the only one who deserves to stay'. At 7.09am, David phoned 111.

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[21] *Report of the Royal Commission*, 488, p. 115-116

[22] Ibid, 491, p. 116.

[23] Also see D. Fisher, 'Crewe inquiry worries after eulogy', *New Zealand Herald*, Monday 8 April 2013, <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=1087606>.

13.2 *David Cullen Bain:* Court Chronology

1994, David Bain was charged, within two days, with the murder of his family.

1995, David Bain was found guilty.

1995, Court of Appeal refused an appeal re erring of trial judge.

1998, Bain sought pardon from Governor-General, Sir Michael Hardie Boys. Minister of Justice investigated new information from defence team.

2000, Justice Minister, Phil Goff, found number of errors in Crown case: Referral to Court of Appeal.

2003, NZ Court of Appeal upheld the conviction.

2007, Privy Council in London overturned the conviction.

2007, Bain bailed before minimal non-parole period of 16 years.

2009, the Crown ordered a new trial. David Bain acquitted on all counts.

Most still thought Bain was guilty, certainly the police. Could there really be two Arthur Allan Thomass in a row?

14 LOOKING AT BAIN

14.1 Crown Case

On 24 June 1994, in a suburban house at 65 Every Street, Dunedin:

(i) David Bain arose at about 5.00am, took his .22-calibre Winchester rifle from the wardrobe and the key for trigger lock from a jar on his desk, and shot to death his mother, two sisters and brother.

(ii) In the struggle with brother Stephen, a lens from his glasses fell on floor.

(iii) He then washed his blood stained clothes, leaving blood stains in the laundry, and changed into clean clothes.

(iv) He then did his morning paper run at 5.45; seen by witnesses on the run.

(v) He returned from the run about 6.42, switched on the computer at 6.44am and typed, ‘Sorry, you are the only one who deserves to stay’, to give the appearance his father had committed the murders and then suicided.

(vi) When father Robin came into the lounge to pray at 7.00am, from the caravan where he lived, David shot him at close range.

(vii) He re-arranged the scene to look like a suicide.

(vii) Pretending agitation, David called 111 at 7.09am.

14.2 Defence Case

(i) While David was on his paper run, Robin Bain killed the other family members.

(ii) Robin switched on the computer and typed the message for David to read.

(iii) Robin then shot himself.

Much criticism of the Thomas case can find replication in the Bain case.

15 DISCUSSION AND ANALYSIS

15.1 Lack of Available Forensics

Police procedures were faulty. 'The crime scene was not original by the time the officer in charge of the crime scene got to the scene'.[24] Detective in charge of case had moved object placements for 'better' photography.

D.S.S. Jim Doyle conceded that nothing was done to analyse the closeness of range of the shot to Robin's head, nor was any analysis of skin undertaken.

In the course of the trial, testimony of the police armourer claimed the rifle used for the killings was 20cm longer than it actually was.

'Gunpowder residue tests were affected because the hands and clothes were not protected as they should have been'.[25] Doyle admitted under cross-examination that what ought to have been done forensically with Robin's body was not done.

David was in the frame. Robin effectively did not exist, and apparently never a suspect. Doyle had ordered all the scrapings from Robin Bain's hands to be destroyed by 26 January 1996. Bloodied footprints: inconclusive as to whether they were from Robin or David, and photographs of footprints were lost.

15.2 Problems

(i) David said he commenced his run at 5.45am. It seemed settled that the computer was turned on at around 6.44am, but the time of David arriving home and computer being turned on remained uncertain. Detectives never established the time base or checked David's watch for accuracy.[26]

(ii) There is a difficulty. Is it possible that the accused was prepared to run the risk that before he arrived home his father would find the scene and ring the police?

(iii) Did the accused, having shot his father, have the acumen and deliberation of mind in the murder maelstrom, to place the weapon alongside Robin, in order to exculpate himself, by giving a convincing construction that the father, overcome by derangement and guilt, had shot himself?

(iv) The Court of Appeal found difficulty determining the tenability of a murder scenario split in time.

(v) If the police had an open mind, how much attention was paid to the role that Robin Bain had played? His hands were never wrapped up for protection, and Doyle admitted that.

(vi) Who wrote the computer message? This was inconclusive. It could be the wording of Robin, saying sorry, as what I have done is terrible for you to have to face, but I can't take

[24] Joe Karam (2012) *Trial by Ambush: The prosecutions of David Bain*. Auckland: HarperCollins, p. 216.
[25] Ibid.
[26] Joe Karam (2012) *Trial by Ambush: The prosecutions of David Bain*. Auckland: HarperCollins, p. 217.

my estrangement from your mother and all of you any more. Or equally, it could be the wording of David to implicate his father. The latter interpretation was accepted.

(vii) One of Crown's key points in the trial was that four bloodied fingerprints on the gun matched David Bain. At the second Court of Appeal, evidence was given of a reasonable possibility the blood was non-human (David used the gun some months earlier for shooting rabbits and possums), a scientific finding not sustained at the third Court of Appeal, thus placing David's prints back on the gun and contemporaneous with the murders. These evidential uncertainties were key to the Privy Council decisions to quash the convictions.[27]

16 JUDICIAL REVIEWS

As with the Thomas trials, the matter of Bain's innocence did not lie down. The 2003 Appeal Court upheld the conviction of Bain. In 2007 it was overturned by the Privy Council, 'in something of a rebuff to the New Zealand justice system'.[28] In declaring 'the appeal should be allowed, the convictions quashed and a retrial ordered' the Board declared there was a 'substantial miscarriage of justice'.[29] The Board stated that this order 'does not … restrict the duty of the Crown to decide whether a retrial now would be in the public interest'.[30]

In 2009, the Crown ordered a new trial, and Bain was acquitted on all counts.

In 2011 the question of compensation arose. By that time the New Zealand Government had become fully involved and extraordinarily sensitive to the question of compensation.

16.1 Review 1

The then Minister of Justice, Simon Power sought advice from Canadian Supreme Court Justice Ian Binnie as to the innocence of David Bain on the balance of probabilities, for the Government to determine compensation payment.

Notwithstanding the conclusion of the Court in 2009, when Bain was acquitted on all counts, and as it stands not-guilty of the murders, and notwithstanding the recommendation of Justice Ian Binnie that David Bain be paid compensation for wrongful conviction in 1995 and his 13-years in gaol, another Minister of Justice, Judith Collins, saw fit to disagree. Judith Collins ordered another peer review.

16.2 Review 2

Cabinet said that Binne had exceeded his brief. New Zealand High Court Judge, Robert Fisher was appointed to undertake the second review. The attitude and stance taken by

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[27] *David Bain v The Queen Opinion*, Privy Council 10 May 2007 [91]-[96], [112], [117] Lord Bingham.

[28] Gans, J. (2016) 'News: Former High Court judge rules on high Profile NZ murder case', Law School Opinions on High, University of Melbourne, <https://blogs.unimelb.edu.au/opinionsonhigh/2016/08/04/news-former-high-court-judge-rules-on-high-profile-nz-murder-case/> Accessed 27 August 2016.

[29] *David Bain v The Queen Opinion*, Privy Council 10 May 2007 [119] Lord Bingham.

[30] Privy Council 10 May 2007 [119] Lord Bingham.

Fisher J was antithetical to the legal stance taken by Justice Binne to evaluate the questions asked of him.

16.3 Review 3

Could it end there? No. In March 2015, yet more government intervention when a fresh Justice Minister, Amy Adams took up the reins, and saw fit to commission a new review, this time by the Honourable Ian Callinan, retired Australian High Court Judge, thus discarding the previous reports, which had already cost the New Zealand government around NZD$500,000.

'The furious Binnie commented, "It seems the Government is looking for somebody to give them the opinion they want, which is that David Bain should be denied compensation".'[31]

'It is into this treacherous territory that Callinan was commissioned and willing to tread, ultimately reaching the opposite conclusion to his Canadian counterpart, whose report he was instructed to ignore'.[32]

These governmental requests coming after a criminal matter has been tried in court and judicial determinations released into public record, suggest a lack of confidence in the New Zealand justice system.

16.4 Callinan Report

In early August 2016, the Callinan Report was released: *David Cullen Bain: Claim for Compensation for wrongful conviction and imprisonment*. Justice Callinan concluded that Bain's actual innocence was not proven to the required standard.

In finding that 'the Applicant has not proved on the balance of probabilities that he did not kill his siblings and his parents on the morning of the 20th of June 1994' (Callinan, 2015, 407, p. 144), Callinan J was addressing the Terms of Reference he was given:

> I am asked to satisfy myself whether Mr David Bain has proved that he is innocent, on the balance of probabilities, of the murders, the subject of this report. It is only if I am satisfied to that standard of proof that I am asked further to decide whether Mr David Bain (the 'Applicant') has proved that he is innocent of them beyond reasonable doubt (Callinan, 2015, 1, p. 1).

Justice Callinan's elegant and well-balanced report provides a thorough analysis of evidence presented in the case. He systematically raises different case theories from Crown and defence perspectives, and points to contentious issues of evidence.

Of the death of Robin Bain, Justice Callinan states, 'If Robin Bain were a determined suicide, he could have committed it. If the Applicant were a determined murderer he could have done the killing' (Callinan, 2015, 375, p. 134).

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[31] Gans, J. (2016) 'News: Former High Court judge rules on high Profile NZ murder case', Law School Opinions on High, University of Melbourne, 4 August 2016, <https://blogs.unimelb.edu.au/opinionsonhigh/2016/08/04/news-former-high-court-judge-rules-on-high-profile-nz-murder-case/> Accessed 27 August 2016.

[32] Ibid.

Perhaps this comment sums up the whole of the Bain case and its aftermath. It remains a dilemma of evidence, a dilemma of justice, a public dilemma that has not been entirely satisfied by the ex-gratia payment offered to Bain.

16.6 Payment

The Bain team were set for another legal challenge. The government conceded,

> They [the Bain team] made it absolutely clear that they intended to legally challenge that report, leading to considerable further cost and delay in this matter. While the Crown is confident in the strength of its position in any such review, it's clearly desirable to bring finality to this case and avoid the cost and uncertainty of further proceedings.[33]

In August 2016, the government offered Bain NZD$925,000 'ex-gratia' (without obligation). Bain accepted this pragmatic resolution.

Considering the economic rationalist argument it is possible that this seeming capitulation of the government to pay an 'ex-gratia' payment, not 'compensation', suggests that the government,

(a) did not want to set any precedent for compensation payments of a similar kind; and,

(b) wanted to finish the matter without further expense, public disquiet and police antagonism.

17 CONCLUSION: CAN THE INDEFENSIBLE BE DEFENDED?

17.1 The Three Cases

(i) The university in the Australian employment law case was charged with 'impropriety'.[34]

This comment goes to the heart of the fiduciary duty that a university owes to its employees.

(ii) The Thomas Royal Commission charged the police action as 'a shameful and cynical attack on the trust that all New Zealanders have, and are entitled to have, in their Police Force and system of administration of justice'.[35]

This comment goes to the heart of the public reliance on constitutional certainty.

(iii) The Bain case was finalised after three external reviews and settled ultimately by the 'ex-gratia' payment.

This outcome resonates with the economic expediency of justice, and takes its place among the many difficulties faced by agents of society competing for position.

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[33] Amy Adams (2016) 'Conclusion reached in Bain compensation case' 2 August 2016, Beehive New Zealand <https://admin.beehive.govt.nz/release/conclusion-reached-bain-compensation-case> Accessed 27 August 2016.

[34] *NTEU v RMIT* [143].

[35] *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe*, PD Hasselberg, Government Printer, Wellington, 1980, 492, pp. 116-117.

What brings together the two criminal cases in this paper is the difficulty the police had created, in each case, by their need to take attention away from another party that may have significantly met the fact scenario of the case. This dilemma forced the police to heavily skew evidence away from the other party, and to create evidence, of a flimsy or dishonest kind, towards the accused in their sights. The finding of the Thomas Royal Commission and the Bain retrial exposed this dilemma through an insightful and robust examination of evidence.

Could it be said that in all three cases there is an overthrow of the fundamental rules of evidence? And that when evidence is concealed and unseen it is the breakdown of law and the plainest abrogation of justice?

17.2 Upholding the Balances

What happens when there is an imbalance in the presentation of evidence due to a plague of corrupted evidence?

In today's world, is the duty to uphold all the balances of fiduciary and economic imperatives asking too much of institutional practices in education and law?

If trial procedure is designed to meet the demands of justice, and if, as Odgers said, 'trial procedure is determined by the law of evidence' (2012, p.1), then justice goes hand-in-hand with the correct operation of the rules of evidence.

Let no impropriety intervene.

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