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Susan Neill-Fraser - Tasmania - a case study

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Introduction to the Neill-Fraser case

Mr Robert Chappell disappeared from the *Four Winds* yacht, moored on the Derwent River in Hobart, in January 2009.[2] For 17 years he had been living with Susan Neill-Fraser who was subsequently convicted of his murder. The case against her was entirely circumstantial. There were no eye-witnesses or other direct evidence as to what had occurred.

The prosecution case

The prosecution case was that Neill-Fraser attacked her partner on the yacht either between 5-9pm or about midnight. Chappell was said to have been killed or rendered deeply unconscious. Between midnight and 3am Neill-Fraser was said to have sabotaged the yacht by opening a seacock and cutting a pipe in an attempt to flood and sink the boat. She was said to have hauled the body onto the deck, possibly with the use of a winch; then manoeuvred it into the tender (a small inflatable boat) after which she took it away and having attached a heavy fire extinguisher to it, dumped it somewhere in the river and returned home.

The issues raised in this research report

The prosecution case depended upon forensic evidence. This was provided by a forensic biologist and a forensic pathologist. The biologist claimed to have found trace-evidence of blood in the boat and the dinghy. The view taken here is that because of the inadequacy or limitations of the testing procedures that evidence should not have been admitted into evidence. The biologist was also asked about statistical inferences to be drawn from DNA evidence. As she had no expertise in this area, her opinion relating to that issue should also have been inadmissible. The pathologist said that an elderly man could be killed by a blow or blows to the head or body. Because there was no evidence to suggest that such a thing had occurred, and because the jury did not require expert guidance on such a point, he was not legally entitled to express that opinion and he should not have been asked to do so.

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[2] The facts here are from *Neill-Fraser v Tasmania* [2012] TASCCA 2. Additional materials on this case are available at the NetK Neill-Fraser Homepage.

We also maintain that certain submissions and statements by the prosecution and some directions by the trial judge were also inappropriate and should not have been made.

The new statutory right of appeal

It is important to note that under the new statutory right of appeal which came into force in Tasmania on 2 November 2015, there has to be 'fresh and compelling evidence' to satisfy the test for leave to appeal.[3]

It has been determined that once some fresh and compelling evidence has been admitted so as to satisfy the test for leave to appeal, further additional evidence which indicates a substantial miscarriage of justice has occurred is admissible, whether or not it is also fresh or compelling.[4] Whilst we take the view that each aspect of the evidence discussed in this article satisfies the test as explained by Peek J in *R v Drummond (No 2)*, it is only required for one aspect of that evidence to satisfy the statutory test, and the remainder of it would then be admissible on the grounds set out in *R v Keogh (No 2)*.[5]

The purpose of this article is to demonstrate that by careful analysis of the transcript of the trial, errors arising from inappropriate expert evidence, prosecutorial submissions and judicial directions or guidance can be identified which come within the scope of the above definition provided by Peek J.[6] We are aware of much additional work which had been done in this case, and which identifies further fresh and compelling evidence which goes beyond that described here. No doubt, a combination of both can and might well be used in any future appeal. However, we maintain that the appeal would be allowed on the basis of the shortcomings revealed in this research report.

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[3] The new right of appeal was introduced in the Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015, which became law on 2 November 2015, amending the Tasmanian Criminal Code Act 1924 Schedule 1 by introducing s 402A 'Second or subsequent appeal by convicted person on fresh and compelling evidence'. Additional materials on this provision are available at the NetK Tasmania Homepage.
The Tasmanian statutory provision is similar to that introduced in South Australia in 2013. The South Australian provisions are discussed at length in Bibi Sangha and Robert Moles, Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia, [*Miscarriages*] LexisNexis (2015) chap 6 'The right to a second or subsequent appeal'. See also Bibi Sangha 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' (2015) 17 Flinders Law Journal 471. Additional materials on this provision are available at the NetK South Australia Appeals Homepage.

[4] See *Miscarriages* at 6.5.7 'The range of evidence for a second or subsequent appeal'.

[5] *R v Drummond (No 2)* [2015] SASCFC 82; *R v Keogh (No 2)* [2014] SASCFC 136 and the discussion of this issue in *Miscarriages* 6.5.7 'The range of evidence for a second or subsequent appeal' where the court has accepted that once jurisdiction is established, an attempt to distinguish 'fresh evidence' from 'otherwise admissible new evidence' would be artificial and impractical; *Keogh (No 2)* at [139].

[6] *State of Tasmania v Susan Blyth Neill-Fraser* Transcript of Trial Proceedings for 21 September 2010 and following.

The use of screening tests

The forensic biologist in this case explained that her evidence was primarily based upon screening test results using Luminol and Hemastix tests. We will first set out the evidence concerning the procedures which she employed before detailing the specific findings which she arrived at. It should be noted that the witness had provided a written report. She initially gave her evidence-in-chief in response to questions by the Director of Public Prosecutions asking her to confirm elements of that report. Afterwards she gave answers by way of cross-examination to questions by senior counsel for the defence.

An important part of the forensic investigation was to determine if there was evidence of blood in the boat or the dinghy. The forensic scientist said that when looking for blood, 'we can use a test called a screening test *or* a confirmatory test. So in this case I used a screening test.'[7]

To those familiar with the history of wrongful convictions, this statement would immediately sound alarm bells. 'Screening tests', as the name implies, are used as a preliminary investigative tool to identify the presence of trace amounts of substances thought to be significant. In the IRA bombing cases in the UK in the 1970s investigators were looking for trace amounts of nitro-glycerine used in the manufacture of improvised explosive devices. In the Lindy Chamberlain case in Australia and the Neill-Fraser case the investigators were looking for trace amounts of blood. However, the point of distinction between a screening test and a confirmatory test is that the screening test is not specific for the substance which is being sought. It can respond to other reactive substances. The correct approach is to use a screening test *and* a confirmatory test.

R v Smart (2008) and the exclusion of Luminol test results

In the case of Mr Smart it was alleged that he had attacked his wife with a rubber mallet causing her death.[8] The evidence was dependent upon blood stains said to have been found at the scene. Some stains were confirmed to be blood with the use of confirmatory tests, and those results were held to be admissible. However, there were other alleged traces of blood which had only been identified by Luminol testing.

[7] Trial transcript at p 639 (emphasis added).
[8] *R v Keith Smart (Ruling no 1)* [2008] VSC 79 [*Smart*].

It was explained that Luminol is a chemical which may be placed into a solution with hydrogen peroxide. It is usually sprayed onto an area in a darkened room. When it comes into contact with blood, the iron in the haemoglobin reacts with the hydrogen peroxide and causes a chemi-luminescence which is a release of light resulting from the chemical reaction. The light emitted lasts only as long as the reaction, which may be around 30 seconds.

The problem is that Luminol:

> can cross-react with a number of other substances including nickel, copper, some rust surfaces and hyperchloride. It might also react with floor detergents. The only way to establish whether or not a substance which gives a positive reaction to luminol is in fact blood is to carry out further testing at a laboratory.[9]

The extent of the testing which was done in the Smart case was said to depend upon 'a pre-arranged list of priorities for testing. That meant that swabs were taken from some areas but not from others'.[10] This meant that some areas were subjected to further testing and the donors of that material had been established by DNA profile. However, because other areas were not subjected to further testing, the Crown argued that the jury could still draw the inference that the Luminol positive areas were indicative of blood.

Luminol testing requires 'speculation' which is not permitted

The court pointed to a case[11] where it was said that, 'an expert will not be permitted to speculate as to inferences when there is no evidence that could support such an inference.' This will become a major consideration in the Neill-Fraser case. As the court pointed out, '[t]he remaining luminol positive areas have not been tested to confirm the presence of blood'.

> It follows that the evidence concerning the luminol positive areas is almost entirely speculative. That it is blood is to be inferred without ever being able to exclude other substances, including cleaning substances, that might have caused the reaction. If the substance were to be inferred to be blood, the donor of the blood could never be identified. The time at which such substance was placed there could not be known either. All this occurred in circumstances where further testing could have been done to establish whether the reaction to luminol was caused by blood and by attempting to obtain a DNA profile to identify the donor.[12]

As Lasry J concluded in *Smart*:

[9] *Smart* at [22].
[10] *Smart* at [26].
[11] *Smart* at [27] citing *R v Berry & Wenitong*, [2007] VSCA 202 at [69].
[12] *Smart* at [28].

> Thus, although I would admit the evidence in relation to the blood stains which are confirmed to be blood by scientific analysis and which produce relevant DNA profiles, I would not admit the evidence in relation to the luminol positive areas where there is no confirmatory testing.

Rationality and the doctrine of precedent would both suggest that the same approach should have been taken in the Neill-Fraser case.

Admission of 'screening test' results as confirmatory - a well-established error

Using screening tests as if they were indicative of the presence of a particular substance was found to be a serious error in both the IRA bombing cases in the UK and in the case of Lindy Chamberlain and Edward Splatt in Australia.[13] In the IRA cases, the scientist swabbed the hands of the suspects, using a screening test, and it was said that the results showed a positive result for nitro-glycerine. Nearly 20 years after they were convicted it was revealed that soaps, boot polish and the plastic backing on playing cards would also give a positive result. The judges in the Court of Appeal made it clear that the misrepresentation of screening test results as if they were probative constituted a serious error.

The IRA bombing cases

In the case of the Maguire Seven, it was said that representing a test as being specific when it was not could be seen as 'a material irregularity in the course of a trial'.[14] It was revealed in the case of the Birmingham Six after the forensic scientist had been discredited, that 'ordinary soaps and detergents' could give a positive result to the test previously represented to establish the presence of nitro-glycerine.[15]

In the case of Judith Ward, the findings of the same scientist were found to be of 'no value' despite his confident assertions at the trial to the contrary.[16] The court found that the three scientists had given false and misleading evidence. It was said that the evidence derived from screening tests cannot be regarded as more than an 'initial step' towards the identification of nitro-glycerine: it was not evidence of the presence of nitro-glycerine. The scientist's conclusions were 'wrong and demonstrably wrong even by the standards of 1974'. It was said that the scientists placed a 'false and distorted scientific picture' before the jury.

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[13] These cases are discussed in *Forensic Investigations and Miscarriages of Justice –The Rhetoric Meets the Reality* (2010) Bibi Sangha, Kent Roach and Robert Moles, Irwin Law, Toronto. [*Forensic Investigations*] See chapter eight 'Forensic Science Issues'.
[14] *R v Anne Maguire and others* (1991) 94 Crim App R 133 [Maguire Seven]. Further details on this and the following cases can be found at the NetK IRA Bombings Homepage.
[15] *R v McIlkenny and others* (1991) 93 Crim App R 287 [The Birmingham Six].
[16] *R v Judith Ward* (1993) 96 Cr App R 1 [The M62 Bombings].

In some cases there may be understandable social pressure to hold people accountable for shocking crimes. The case of Sean Hoey in Northern Ireland involved 58 counts relating to alleged offences of murder, conspiracy to murder, causing explosions, conspiracy to cause explosions and possession of explosive substances with intent to endanger life or cause serious damage to property.[17] They arose from thirteen bomb and mortar attacks. They included a devastating bomb at Omagh in August 1998 which resulted in the deaths of 29 people including a woman pregnant with twins who did not survive. Hundreds of others were injured with many suffering terrible physical and psychological scars. The town centre was destroyed. Despite all of that the learned judge stated:

> Justice 'according to law' demands proper evidence. By that we mean not merely evidence which might be true and to a considerable extent probably is true, but, as the learned trial judge put it, 'evidence which is so convincing in truth and manifestly reliable that it reaches the standard of proof beyond reasonable doubt.'[18]

That had not occurred in that case, and it certainly had not occurred in the Neill-Fraser case.

In the case of Lindy Chamberlain, the preliminary test results indicated the presence of foetal blood in the front of her car.[19] After her conviction it was established that the material was in fact residue of sound deadener from under the wheel-arches of the car. 'There is compelling evidence that the spray was made up of a sound deadening compound and contained no blood at all.' 'The evidence falls far short of proving that there was any blood in the car for which there was not an innocent explanation.'

In the case of Edward Splatt it was alleged that there were seeds at the scene which established a link to Mr Splatt's environment.[20] The Royal Commission subsequently found that the iodine and Sudan IV tests were only preliminary screening tests. They could not confirm that the samples were seeds, only that the material contained starch and oils.

The problem relating to the inappropriate us of screening tests has been widely recognised for many years. Indeed, around the time of the Neill-Fraser trial, a judge of the Supreme Court of

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[17] *R v Sean Hoey* [2007] NICC 49.
[18] *Hoey* at [65] citing *R v Steenson and others* [1986] NIJB17 at p 36, Lord Lowry LCJ.
[19] *Attorney-General's Reference Lynne Chamberlain, Michael Chamberlain* [1988] NTSC 64. Further details and a summary of the Royal Commission report are available at the NetK Lindy Chamberlain Homepage.
[20] C R Shannon QC, *Royal Commission Report concerning the conviction of Edward Charles Splatt*, 1984, Ch 8 'Seed Endosperm' at pp 69-105 as discussed in *Miscarriages* at p 325. Further details on this case, including the full text of the book by Tom Mann, *Flawed Forensics, The Splatt Case and Stewart Cockburn*, are available at the NetK Edward Splatt Homepage.

Canada was giving an important public lecture in Edinburgh in which he stated in relation to the recently published *Forensic Investigations* book:

> In their study of miscarriages of justice in Britain, Canada and Australia, Professors Sangha, Roach and Moles identify recurring problems common to the experience of those jurisdictions. *These include the use of preliminary tests as conclusive evidence*, the failure to identify or disclose procedural errors in the use of scientific methods or tests, misinterpretation or misunderstanding of the significance of findings and experts going beyond their area of expertise or not explaining their findings or controversies and uncertainties in the science in a clear, impartial manner. They also note that experts have sometimes misunderstood their obligation of impartiality, have failed to apply the basic research methods of science and that judges and lawyers have failed to be sufficiently sceptical of both the science and the witnesses purporting to rely on it.[21]

However, in the Neil-Fraser case, instead of submitting that the screening test results should be inadmissible unless accompanied by a confirmatory test result, defence counsel instead asked if there were *other* screening tests which might have helped:

> Defence counsel: Are there any other screening tests that you could have, or should have applied to determine what the substance was on the deck that had returned the Luminol positive result?
> Witness: There are certainly further tests that could be done however as a standard practice, I guess you'd say, if we have a luminol positive stain then really the only tests that we apply are those tests that might help us to determine that it's blood because *luminol is the test that we use for blood*.[22]

For the witness to say that 'luminol is the test that we use for blood' is misleading, without further explanation, because she then goes on to acknowledge that it is not specific for blood.

Luminol lacks specificity

As we have seen, the forensic scientist in this case acknowledged that she chose to use the Luminol screening test *instead* of a confirmatory test. She described it at the outset of her evidence-in-chief as a 'screening test for blood' and added 'it is very, very sensitive but *it's not necessarily specific'*.[23]

[21] The Honourable Thomas A Cromwell, Judge of the Supreme Court of Canada, 2 March 2011 'The Challenges of Scientific Evidence' *The Macfadyen Lecture 2011*, The Scottish Council of Law Reporting, (emphasis added).
[22] Trial transcript p 673 (emphasis added).
[23] Trial transcript at p 639 (emphasis added).

She later referred to the Hemastix test (which uses test strips instead of a spray) which she had also referred to in similar terms. She described it as a screening test 'for blood' which is sensitive, but '*not necessarily specific'*.[24]

It would have been better to state clearly that the tests are non-specific as there are a significant number of substances which will give a positive reaction to the Luminol spray or the Hemastix strips. As the witness said:

> There are certainly other substances that will react with luminol to give false positive results. Now we've talked about metals, there are some plant substances that will also react, some cleaning products that will react, and also animal blood will react. Luminol will give a positive response to animal blood, paints, metal objects, some fruit and vegetables, some soils and bleach-based cleaning agents.[25]

The position with regard to Hemastix is similar. As one advisor has reported:

> it is not known and cannot be known what substance the test strip is responding to. They could include non-human blood, 25 common vegetables, 14 common fruits, copper and iron based salts and ions and body fluids other than blood (eg saliva) which may contain trace amounts of haemoglobin.[26]

An additional problem with Luminol is that it has the capacity to 'auto-luminesce'. It has an inherent glow and over-spraying will enhance the glow and appear similar to a positive reaction.[27] As we will see, this witness later reports that overspray is sometimes used to enhance the result in order to obtain a better photograph. As screening tests, Luminol and Hemastix will screen for all of the substances to which they are known to give positive responses - and for nothing at all - with Luminol's capacity to auto-luminesce. It follows that an apparent response cannot be seen to be indicative of the presence of any particular material, unless further follow-up tests are conducted.

'Experience' as a determinant of scientific test results?

The witness said that the standard practice with Luminol is to spray an area with the lights out, and then to photograph the areas that glow. She went on to say:

> The strength of the reaction, how long lived it is, the colour of the glow, the manner of the reaction, whether it's a constant glow or whether there is a sparkling or a bright flash which then dies down. *With experience you can*

[24] Trial transcript at p 646 (emphasis added).
[25] Trial transcript cross-examination at p 658.
[26] Forensic Report 20 Feb 2014 at p 9 (further details of the report are confidential until filed in court as part of the appeal).
[27] Report at p13.

> *distinguish 'false positive' reactions and 'true positive' reactions with luminol and how it reacts*. The colour, the longevity, is all an indication of that.[28]

The witness did not provide any references to scientific reports which would have supported the claims which were being made. The law relating to the admissibility of expert witness opinion evidence clearly excludes such unsubstantiated claims. The witness did not produce or refer to any validation studies to confirm the criteria being referred to.[29] 'Long lived' is a measure of time, therefore one would expect to see the times stated in respect of each stain to indicate those which are consistent with a positive response and those which are not. One would need to see the records of appropriate experiments to determine the accuracy and consistency of such results. 'Colour' is obviously important, therefore one would expect to see a colour chart indicating which colours indicate a positive reaction and those which do not. Obviously matters such as the 'brightness' of the flash, the 'constancy' of the glow and the quality of the 'sparkling' might be more difficult to establish objective criteria for. In the absence of such scientifically established criteria, one could only conclude that this is nothing more than the expression of a subjective belief on the part of the expert, as was the case in *R v Honeysett*.[30] There the court found that the opinion was based upon a subjective belief and therefore was not based on 'specialised knowledge'.[31] This meant that the decision to admit the evidence was a wrong decision on a question of law.[32] The court emphasised 'the obligation to furnish the trier of fact with the criteria to enable it to be tested'.[33] This was something which clearly was not done in the Neill-Fraser case.

It was pointed out in *Honeysett* that 'experience' may be more important in the context of matters which are not of a scientific or technical nature.[34]

The correct view in relation to Luminol test results is that:

> .. no attempt should ever be made to align the visual colour, duration and / or intensity of any luminol reaction to the presence of human blood without confirmatory scientific support. Where no such testing is undertaken, or the results of those tests are negative the presence of blood should not be reported or

[28] Trial transcript at p 640.
[29] See the discussion of this topic in Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law*, [*Miscarriages*] 2015, LexisNexis chap 9 'Expert Witnesses in Criminal Cases' particularly with reference to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Tuite v R* [2015] VSCA 148.
[30] *Honeysett v The Queen* [2014] HCA 29; *Miscarriages* at 9.4.4 '*Honeysett v R* and the "specialised knowledge" rule'.
[31] *Honeysett* at [43].
[32] *Honeysett* at [4].
[33] *Honeysett* at [31] citing *Makita* at [59].
[34] *Honeysett* at [23]; *Miscarriages* at 9.4.5 'Experience and "specialised knowledge"'.

> opined. To do so, essentially amounts to a 'guess' and is scientifically misleading.[35]

It is also inappropriate to make any distinctions between 'positive' and 'false positive' results in the absence of confirmatory testing. To categorise responses to blood as 'positive' responses, and the responses to other substances as 'false positives' is also misleading. The latter suggests that there has been some error in the process or that a response to blood is either superior or more accurate than responses to other substances. That would be untrue. There is nothing 'false' about what the witness called a 'false positive'.

If the witness was correct, and it was in fact possible to determine the presence of blood from the quality, timing and colour of the sparkling or the flash response, then manufacturers of this product would no doubt market Luminol as a *confirmatory* test. If that were to be done every packet would have to be delivered with sparking, flash, timing and colour charts.[36] Those charts, in turn, would have to be supported by properly validated scientific studies if they were avoid categorisation under the *Trade Practices Act* for being 'misleading and deceptive'. In addition, the scientist would need to video-record the testing procedure as that would be the only means by which the timing, colour and quality of flash responses could be subsequently verified either by other scientists or by a jury. There are obvious reasons as to why those things have not been done.

Confirmatory tests and the existence of blood

Surprisingly, the witness acknowledged that it was not unusual to *not* attempt to conduct a confirmatory test. The rubber handgrip on the tiller control was said to be 'weakly positive with HS [Hemastix] screening for blood', adding, 'no attempt to confirm presence of blood'.[37] The witness explained that sometimes swabs are taken of areas even where red/brown staining has not been seen, and it may come back with a weakly positive result:

> we'll often not then go on to try and confirm the presence of blood simply because we don't think there would be enough there, even if there was any there, to get a result.

One might well be tempted to question the value of such inconclusive testing procedures.

[35] Forensic Report 20 Feb 2014 at p 14 (further details of the report are confidential until filed in court as part of the appeal), see above fn 26.
[36] The Hemastix bottle does come with a colour chart printed on the bottle and which can be used to gauge the strength of the response.
[37] Trial transcript at p 669.

At times, the witness acknowledged that a confirmatory test *is* required to confirm the existence of trace elements of blood. As she stated in cross-examination:

> I certainly can't say that there was any blood present or not, because I haven't made any attempt to confirm it, but I do have a positive screening test.[38]

The witness acknowledged that the correct position is that without a confirmatory test, one cannot say whether blood is present or not. She added, 'no red/brown staining was seen' and 'I have a weak positive screening test'. She further said, 'I haven't attempted to confirm the presence of blood, so I don't know whether there was any blood present or not.'[39] She was then asked by defence counsel, 'when we see that expression "no attempt to confirm presence of blood" in other items then the same proposition applies', the witness said, 'that's correct'.[40] So, without a confirmatory test the witness says that she cannot know whether blood is present or not. But much of her other evidence has been to the effect that she can discern the presence of blood by the longevity of the glow response, the quality of the sparkle, and she otherwise states that when she refers to red/brown stains, she means to refer to blood.

Shortly after she stated:

> If the luminol positive result is a true result and not a false positive, as we were discussing earlier, then there has to be some blood there for it to be a true result, *however I've no way of knowing whether that's the case or whether it is a false positive.*[41]

As the witness seems to indicate, the important question then is to determine the significance of a screening test result in the absence of a confirmatory test. The correct assessment is that it has no evidential significance and for that reason would be inadmissible under both ss 79 and 137 of the *Evidence Act* 2001 (Tas). However, the witness appears to take the view that a 'belief', based upon unsubstantiated 'experience', can stand in the place of a confirmatory test.

A matter of belief?

The witness, earlier in her examination-in-chief had spoken about a panel on the boat which appeared to generate a positive response. She said of this:

[38] Trial transcript at p 668.
[39] Trial transcript at p 669.
[40] Trial transcript at p 669.
[41] Trial transcript at p 674 (emphasis added).

> *My belief* is the panel is giving false positive reaction - metal objects may give a false positive. The chemical glows slightly - *it's my belief – with experience* you can often tell - *it's my belief* that the luminol was reacting with the metal surfaces.[42]

During the course of the cross-examination, the witness explained:

> I found what I *believed* to be blood samples on the yacht. I don't think I tested any of the samples which came off the Four Winds.[43]

It seems surprising that the samples were not subjected to further testing to identify what substances may have been present, if any. Instead, their significance was left to be determined on the basis of what was 'believed' to be present. Whether a substance is or is not blood should be a matter of scientific examination, not 'belief'. It also follows from what the witness has said that in the absence of a confirmatory test, she has no way of knowing if a reaction is due to blood or other substances. For her to inform the jury that she 'believed' it to be blood without any proper scientific basis for that belief could be seen to be seriously prejudicial to the accused.

The law relating to the role of the expert witness makes it clear that such evidence should not be a question of belief, but of scientific fact. It is clear that scientific conclusions must be based upon facts and demonstrable reasoning:

> [The duty of an expert] is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.[44]

In the Neill-Fraser case the jury is being invited to trust the unarticulated 'experience' of the witness. As has been said in other cases, if that experience were able to achieve such results, why wouldn't you publish it and subject it to testing and peer review?[45]

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[42] Trial transcript at p 650 (emphasis added).
[43] Trial transcript at p 657 (emphasis added).
[44] *Makita* at [29] citing *Davie v Lord Provost Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39-40 per Lord President Cooper, discussed at *Miscarriages* 9.3.2.
[45] William Tilstone, Director of Forensic Science SA, and Professor of Forensic Science, Strathclyde University, 'Where Now for Forensic Science' Proceedings of the Australian Forensic Science Society, vol 4 no 1 April

Photographs and the 'overspray' problem

Photographs can, of course, be an important aid in assisting the jury to understand the facts being referred to in the evidence. However, in this case they clearly had limited value. During the course of her evidence, the witness noted that the stains in the dinghy can't be seen in the photos 'beneath the fingerprint powder'.[46]

This demonstrates a lack of coordination in the procedural aspects of the investigation. A proper procedure would have been to have taken photographs of the scene *before* the fingerprinting was undertaken.

The scientist says later in her evidence that her notes do not include measurements or diagrams as she relies on the photos.[47] Yet here we see that the evidential value of the photos is limited because the surface was not photographed prior to fingerprinting and now cannot be seen because of the fingerprint powder.

In speaking of a photograph of the dinghy the witness says that 'this run down here' (which appears as a fluorescent streak on the photograph) is just the chemical itself running down towards the back.[48] The witness then adds, '[t]he glow is *very pale* to some extent, even though *I'm calling it strong and weak*.'[49] One might think that the jury would have some difficulty in understanding what this meant. The witness then explained more about her methods when she said:

> Even when it's strong it's not particularly bright so, *we spray multiple times* to enable it to come out in a photograph so that's why there has been some *overspray* of the chemical which has then run down towards the back and pooled at the back.[50]

We can now see an instance where the desire to get a good photograph, requires repeated applications of Luminol - which can then 'auto-luminesce'.

1986, discussed in Robert N Moles, *Losing Their Grip – The Case of Henry Keogh*, 2006, chap 9 'No other reasonable possibilities' at pp158-160 in relation to the cases of *Preece v H.M. Advocate* [1981] Crim LR 783 and *Edward Splatt* (South Australia).

[46] Trial transcript at p 651.

[47] 'I haven't actually got measurements in here but the photographs that were taken with the scale will give you an indication of how big it was' at p 660. 'I didn't draw a plan, I relied upon photos – I'm bad at estimating distances' at p 670.

[48] Trial transcript at p 651.

[49] Trial transcript at p 651 (emphasis added).

[50] Trial transcript at p 652 (emphasis added).

The 'control' procedure

The witness then explained the control procedure which she used. A 'control' is an essential part of good test procedures. It usually involves putting a blank or a known-responder through the system to see if it generates the appropriate response. If it produces an inappropriate response it may indicate a faulty batch of the chemical being used or some other fault in the procedure. The witness had referred to a 'swab control' in her notes and she was asked to explain what that meant.[51] She said that when she takes a sample, she may also take a control sample of a 'luminol positive reaction'. The idea is to show that the reaction is coming from the luminol positive area rather than just 'we could've swabbed anywhere in that particular boat and got a reaction.' A swab is taken from a luminol positive area and another from 'an area that's not necessarily exactly adjacent to it but certainly in the same kind of area' '[t]hat wasn't positive with luminol'. She said that she had taken that 'as a control so that the two results can be compared'.

The witness then continued to add, '[h]owever the control samples weren't taken on the same night as the luminol samples were taken.'[52]

In fact, as the witness makes clear in her evidence the control samples were taken over two months later. This demonstrates a further basic failure of scientific method. To act as a 'control' it is imperative that the control and test samples are both taken at the same time and under the same conditions. If they are taken at different times or under different circumstances, there is no way of knowing if some intervening event has caused some change to the circumstances and thus affected the result of the test. In this case, because of the substantial time difference, the control samples were not in fact *controls* at all and it was misleading to represent them as such.

Positive correlation of staining with the existence of blood

Despite the foregoing evidence where the witness said that without confirmatory testing she had no way of knowing whether the Luminol and Hemastix were responding to blood, she also made it clear in her cross-examination that references in her report to 'red/brown stain' is another way of putting 'blood':

[51] Trial transcript at p 652-3.
[52] Trial transcript at p 653.

> So when you looked at your luminol positive result, you followed it through by looking for red/brown stain, which in another way – is another way of putting blood – correct?…….Yes, that's correct, yes.[53]

As we will see, there were numerous references by the witness to red / brown stains around the boat and the dinghy. To inform the jury that all such references were in fact references to 'blood' without there being any scientific confirmation of it, as the witness has stated, is clearly misleading.

The witness went on to express the view that, 'several areas of staining in the dinghy, based on experience and having seen lots of reactions, I would say *probably* are not false positive reactions.'[54] Of course there are no scientific criteria to specify what the probability assessment is based upon, which means that it is no more than speculation.

Shortly after, the witness acknowledges that positive reactions can result from metals, plant substances, cleaning products and animal blood. Indeed, she later states that 'cleaning chemicals based around bleach will *often* give a false positive reaction with luminol'.[55]

She then adds:

> Defence counsel: But this – you're not able to say that what you saw was not a false positive result?
> Witness: No, I'm not able to say definitively that, no, I can just tell you that based on my *experience* I don't *believe* it was.
> Defence counsel: But you can't rule it out, can you?
> Witness: No.

The jury is being informed that the witness's 'experience' provides the basis for her judgment and may think it appropriate to infer that it provides a satisfactory substitute in place of scientific confirmatory testing. The witness refers to what is 'probably' the case without explaining the basis for the assessment of the probabilities. She then suggests that confirmatory testing in some cases may not be possible:

> Now, part of the problem with luminol is that it's so sensitive it will react with dilutions of blood down to around one in a hundred thousand. So part of the problem is that you won't then necessarily see any obvious red/brown staining and you won't be able to do subsequent tests to actually confirm that what you've seen is or isn't blood in fact**.**[56]

[53] Trial transcript at p 657.
[54] Trial transcript at p 657 (emphasis added).
[55] Trial transcript at p 662 (emphasis in the following is added).
[56] Trial transcript at p 658.

The witness stated that Luminol is so sensitive that it can detect things which the human eye and confirmatory tests cannot detect – the presence of blood. Without being able to confirm 'that what you've seen is or isn't blood', the Luminol test, from an evidentiary point of view, is of no value, because no one can tell what in fact it is reacting to – if anything at all. It certainly cannot be suggested that it is necessarily reacting to minute traces of blood as opposed to minute traces of the many other possible substances. Maybe the appearance is just an 'auto-luminescence'?

Cleaning up the crime-scene?

The topic of the sensitivity of Luminol was the subject of the following exchange which would not appear to have been advantageous to the accused:

> Defence counsel: generally speaking, attempts to remove blood stains by ordinary *domestic household cleaning methodology* will not remove all blood residue for the purpose of a Luminol test. In other words, if a blood stain has been cleaned up, you can still, generally speaking, use Luminol to find it?
> Witness: In many instances that's true yes … it's certainly possible for someone to attempt to clean blood up and for us to detect it with Luminol.
> Defence counsel: And depending on the quality of the cleaning, the chances of finding blood increase or decrease accordingly?
> Witness: Yes, the quality of the cleaning, the amount of cleaning product or the amount of water that's gone over the item in question, there are a whole of variables, but yes, it's certainly possible for someone to attempt to clean blood up and for us to detect it with Luminol.
> Defence counsel: It doesn't necessarily follow just because someone cleans up what they believe is a blood stain that it will not be able to be detected using Luminol?
> Witness: No that's correct.
> Defence counsel: Thank you. And that's one of the beauties of Luminol from the point of view of forensic scientists, they can come into a place that's been ostensibly cleaned up after an offence where blood's been spilt and still find the blood stains?
> Witness: That's certainly why we use it. Sometimes it's successful and sometimes it isn't but yes – that's often why we use it.[57]

There is no indication in the evidence that any inquiries were made to ascertain whether the surfaces on the boat or the dinghy had ever been cleaned with cleaning agents based around bleach or any other 'household cleaners' referred to in the question, which could also have been part of the explanation for those results.

[57] This discussion is from the trial transcript cross-examination at p 667 (emphasis added).

Explanation for failure to conduct confirmatory tests

The witness explained that sometimes swabs are taken of areas even where red/brown staining has not been seen, and it may come back with a weakly positive result. Where that occurs, 'we'll *often* not then go on to try and confirm the presence of blood simply because we don't think there would be enough there, even if there was any there, to get a result.'[58] This is very confusing. If the screening test result is consistent with the presence of blood / consistent with the presence of around 100 other substances / consistent with there being nothing at all, then it seems surprising that such positive screening tests would not lead to further attempts to identify whether there is any substance there and if so what it might be. To state that one would 'often' not attempt to confirm the positive screening result seems rather defeatist. Merely to say 'we don't think' there would be enough there, is clearly unsatisfactory. When the witness says, 'even if there was any [blood] there' is indicative of the fact that the witness does not know if there is any there. To report the positive screening test result to the jury, without a follow-up confirmatory test must, at best, be seen to be confusing and misleading.

Measurements and recording of details – missing or exaggerated

The witness agreed that the following observation was recorded in her notes:

> A small brownish stain on the top of the port side towards the stern was positive with the HS screening test for blood.[59]

The witness then agreed that 'I couldn't see it in the photographs'. As far as her notes were concerned, she observed, 'I don't have any specific information about it'. Having stated that there was a mark which gave a positive result with a 'screening test for blood', but to then fail to provide any further specific information about it would be seriously prejudicial.

The witness then referred to 'a slightly larger area', 'that was also luminol positive'.[60] Her report had said that it was 'Luminol positive area, weakly positive with HS screening'. She explained HS referred to 'that little dip stick test' and that she was looking for a colour change which varied from yellow to green. She then said, 'on the side of the bottle is actually a gauge of the colour changes you would get *with different concentrations of blood*'. This would no doubt reinforce in the minds of the jury that the test strips were in fact responding

[58] Trial transcript at p 669.
[59] Trial transcript at p 659.
[60] This and the following citations are from the trial transcript at p 660 (emphases added).

to blood, when the witness has already acknowledged that she does not know and cannot know if that is the case.

When asked 'how big was the stain' the witness replied, '*I don't know*'. She added, 'I haven't actually got measurements in here'. She then indicated that the photographs, which had been taken with a scale, will give an indication of their size. However, that only led to some other difficulties. As the witness stated:

> The area that I've actually outlined in black [with a black texta] is – *it's larger than the area that was positive* because I always take *a wide margin* when I'm circling it to ensure that I've got all of the edges'…[61]

She then added, 'within this area, and *I can't tell you exactly how much of it*, but within this area is the area that was positive with luminol'.

The witness then added, '*if it's blood* I can't tell you how old it is, except that being an object [a dinghy] that's normally in the water, *I would assume* it hasn't been there for very long.'[62] Counsel, of course, pointed out that a dinghy is more 'on' the water than 'in' the water, and the witness replied, 'I just have this mental picture of water being around and therefore it would have been washed away or diluted and whatever.' The witness agreed that she didn't know to what extent the dinghy had been exposed to sea-water, hosing down or 'being tipped over or whatever'.

Considerable discussion took place trying to pin down the location from which 'the swab 4.5 metres from the pointy end' was taken. Again, the witness said that photographs were taken with luminol positive areas circled, 'I didn't draw a plan, I relied upon photos', and 'I'm bad at estimating distances.'[63]

It appears from this that the nature of the reaction, the size of the area of any reaction, and now the duration involved are all based upon unverified and unverifiable assumptions.

The 'possible drops' confusion

In her report, the witness had also referred to 'possible drops'. As counsel said, 'And you've got here "Possible drops" What caused you to write that?...' The witness responded:

> Its very difficult with Luminol - we do use Luminol for pattern information, but where you get drops it's very difficult to tell whether you really have got a stain that was in the form of a drop or whether you've got a drop having just come off

[61] Trial transcript at p 661 (emphases added).
[62] This and the following citations are from the trial transcript at p 662 (emphases added).
[63] Trial transcript at p 670.

> the bottle that you're spraying with, so just to prevent any possible confusion at a later date, I made the note that there were possible drops there.
> Defence counsel: Right. And does that mean possible drops from your spray or they were possible drops of something on the deck?
> Witness: That's correct, either of those things.[64]

If the witness cannot determine if the observed reaction had been created by her or was pre-existing, merely recording the confusion does not *resolve* it. Clearly the jury could not be in any better position than the witness herself in understanding the sequence of events and the causes, or inability to explain the causes, of them.

The witness then went on to explain that there were further difficulties with regard to her identification of blood drops:

> But with Luminol also sorry – it's very difficult. If you see a stain that's round or elongated, because you've got no visual cues apart from the Luminol, you really can't tell whether that is a drop-like stain, or whether that's a stain that's got there from transfer for example, that just happens to look like a drop. So it's not like you're looking at a red/brown stain and being able to tell with any level of definity.

In bloodstain pattern analysis, the distinction between drops of blood and transfer stains could be crucial in interpreting the sequence of events and what has occurred. The witness is now informing the jury that the shape and appearance may be more reflective of the Luminol reaction than anything else. In other words, her distinction between drops of blood and transfer stains may be a distinction without a difference.

The observations said to be indicative of blood

In making any assessment as to whether there had been a 'substantial miscarriage of justice' as the Act requires, we would need to know how many references there were in the evidence of the witness to the existence of 'blood' in the boat or the dinghy. The following is not necessarily an exhaustive account of the findings of this witness, but they give a reasonable summary of the extent to which traces of blood may be said to have been found in the boat and the dinghy.

Exterior of the boat

The witness commenced by stating that she looked first at the exterior of the boat and commenced her observations at the wheelhouse. She found that 'red/brown apparent transfer

[64] Trial transcript cross-examination at p 673.

staining was apparent on the steps'.[65] The witness explained that transfer staining means that 'an object that's been *wet with blood* at the time has come into contact with another surface or another object and has transferred some of the staining to that'. She then added, 'numerous red/brown drops, some less than one millimetre in diameter, were present on a wooden panel to the right of the wheel'. She said they had directionality and appear to have landed at 90% to the surface they struck. 'Some apparent perimeter stains were also present'.[66] A 'perimeter stain' is one which has dried to some extent and then been wiped so that the majority of the stain has gone leaving just the visible outline where the stain was. There were several individual stains, which were slightly elongated.[67] There was more staining to the bottom of the panel. The stains 'weren't all tested, but they appear all to be the same and *I have assumed* that they are.' There are some 'very small drops' which indicate 'you've had blood that's been acted upon *by some force*. And the smaller the drop the greater the force that's been applied to it to produce it.'

The media report concerning this evidence was as follows:

> A forensic scientist has told the court that force was used to produce some of the *blood drops* found on Mr Chappell's yacht. Deborah McHoul says she found red-brown stains on the boat's steps that appeared to have been left by an object *wet with blood*. Ms McHoul has given evidence there were other stains *consistent with blood* dropping by force. She said there was also evidence of *blood stains* being wiped off the boat.[68]

The ABC also reported that the witness had said that 'blood spatter' had been discovered on the yacht.[69]

The witness then observed that 'on the bottom of the vent there's an obviously directional stain'[70] adding, 'I don't know what position the vent was in and when *the blood* was deposited on it.' She then referred to a transfer stain and a perimeter stain towards the bottom of the panel adding, '*I'm assuming this is blood*'. However, later in cross-examination, her evidence was in conflict on this point:

> Defence counsel: Now what you've got is it's luminol positive, so the first conclusion you reach, unless there's some evidence to the contrary, I suppose is

[65] This evidence commenced at transcript p 640-1. All emphases are added unless otherwise stated. All following references from the transcript are to the page previously cited.
[66] Trial transcript at p 642.
[67] Trial transcript at p 642-3.
[68] 30 September 2010, ABC News, 'Murder trial hears accused asked about will' (emphases added).
[69] 30 September 2010, ABC News, 'Blood discovered on missing physicists boat' (emphasis added).
[70] Trial transcript at p 644.

that you could take that to be blood?
Witness: Well no, I certainly don't assume that it is, it's certainly a possibility.[71]

She also added in respect of the perimeter stain, 'the *bloodstain* has partially dried'.

The witness then observed that there were, '[t]wo red/brown drops were present on the starboard panel in the saloon adjacent to the entry way'.[72] Also, 'a single red/brown drop was seen on a toilet roll and in the saloon on the port side of the entrance way'. Towards the bottom of the 12-volt panel 'there was a single red/brown stain'. The witness said it was unlikely that it was deposited at the same time as the other drops referred to because it had a different directionality.[73]

The witness then noted that her report had stated, the 'seat back vertical cushion for the starboard saloon had several brownish stains, two of which were tested and positive with the *HS screening test for blood*'.[74] The witness then referred to some 'big black circles' which she had drawn on there and which she said 'correspond to luminol positive areas'. Within some of those areas she found 'very small brownish stains that were positive with that screening test'.

The witness said she observed, the bulkhead had '[v]ery small brownish stains positive of HS screening test *for blood* were present on the paintwork'.[75] On the paintwork behind the seat cover there was 'some additional staining'. The report said there were Luminol positive areas '[o]n both outside walkways as possible drops and general stains'. That meant that some 'looked like drops' and others 'were just large amorphous positive areas with no determining pattern information within them'. There witness also confirmed 'a strong luminol positive area associated with a visible stain was present towards the stern end of the starboard seat area adjacent to the winch'.

Interior of the boat

The witness was then directed to the observations in her report which concerned the interior of the boat. She confirmed that she found 'luminol positive, [e]longated *possible drops* were present on the inside of the cockpit entry behind where the stairs would have stood'. There was also, 'apparent transfer staining on the steps and behind where the steps would have

[71] Trial transcript at p 663.
[72] Trial transcript at p 645.
[73] Trial transcript at p 646.
[74] Trial transcript at p 647.
[75] Trial transcript at p 648.

been, … there were some luminol positive areas'.[76] Also, '[t]he shelf to the right of the wheel, possibly a chart shelf, found a generally positive reaction [to luminol]'. 'In the saloon the table gave a *strong* reaction.*'*

'The panel below the barometer and the clock … gave a generalised positive reaction, that is to luminol'. However, the witness said that the panel appeared to have been replaced, and 'so my – my belief is that that was – that that particular piece of panel is giving a false positive to the luminol chemical.'[77] She also explained, '[t]he galley itself was generally positive, possibly due to the many metal surfaces.' She then added, '*it's my belief* that – that the luminal (sic) was just reacting with the metal surfaces'. Either the shiny metal surfaces enhanced the glow of the luminol, or it caused a 'false positive' reaction.

Having established that there were extensive traces of blood about various exterior and interior parts of the boat, the witness was then asked about her examination of the dinghy.

The dinghy

The witness's report said, 'a small brownish stain on the top of the port side towards the stern was positive to the HS screening'. These were the stains which could not be seen in the photographs because of the fingerprint powder.[78] The witness said she had observed 'drop and run type stains were on the very front on the inner aspect of the inflatable area at the front'. At the back to the left or port side, 'the area outlined in black there is an area that was positive with the luminal (sic) screening test *for blood*'.

The witness explained that '[t]he strength of the reaction in the front on the inside was very *long lived* and strong as was the area of staining towards the back on the port side.' The staining on the trim, 'that also was *strong* and *long lived*'. 'The area in the middle and towards the back was slightly less, gave a slightly less strong glowing reaction but was again *long lived*.' The other rather confusing comment we referred to earlier was:

> This run down here that you can see is just the chemical itself running down towards the back. Because the glow is very pale to some extent, even though I'm calling it strong and weak, overall even when it's strong it's not particularly bright so the exposure we spray multiple times to enable it to come out in a photograph so that's why there has been some overspray of the chemical which has then run down towards the back and pooled at the back.

[76] Trial transcript at p 649.
[77] Trial transcript at p 650.
[78] Trial transcript at p 651.

The witness can apparently discern a 'strong' but 'not particularly bright' response as being a product of 'overspray'. This is because 'we spray multiple times' to enable it to come out in a photograph.

The witness said that the 'luminol positive area right side of the floor' was 'the strong area up at the front on the right hand side'.[79] Then there was the 'Luminol positive rope and trim bow – under right side of bow' which was 'the rope and trim that you can see glowing in photograph here … the right hand side was positive'.

The witness said that 'some microscopic examination was attempted on the dinghy,… because I got such strong positive reactions in the – in the dinghy', however, 'I didn't find any obvious red/brown staining that would correspond with my luminol positive reactions'.[80]

It was confirmed that swabs taken from the jacket were shown to be Luminol positive.[81]

The witness also identified that the rubber handgrip on the tiller control was 'weakly positive with HS screening *for blood*', and this is where she added, 'no attempt to confirm presence of blood', which we referred to earlier.

The prosecutor's opening address to the jury

> [T]he tender itself was also subjected to a screening test for blood called luminol, and what happens with luminol is you put it – you put it on objects where there might have been blood and turn off the lights and it gets lum – *it goes luminous in the presence of blood,* and *so that reacted quite strongly, the tender and the inside of the tender for the presence of blood,* and swabs taken from the tender were found to match, with a high degree of probability, Mr Chappell's DNA. But on the other hand another screening agent for blood taken on that tender showed negative and one of the forensic scientist looked under the microscope to try and find some – what they look for is red/brown indications of blood and couldn't find any, *so some indications of blood,* his DNA, but others – others, no.[82]

The consequences of inferences based upon screening test results

In the Neill-Fraser case, the admission of screening test results clearly enabled the forensic scientist to engage in considerable speculation about the existence of blood stains about the boat and the dinghy. The true position, as the witness sometimes acknowledged, is that without confirmatory tests there is no way of knowing whether blood is present or not. The correct position would have been for the evidence in its entirety to have been ruled to be

[79] Trial transcript at p 652.
[80] Trial transcript at p 653.
[81] Trial transcript at p 655.
[82] Trial transcript at p 71.

inadmissible as was the case in *R v Smart*. However, having admitted it, and having allowed the witness to speak of assumptions about the presence of blood, and red / brown stains indicating blood, the jury (and the media) could hardly be blamed for accepting that there was considerable evidence of blood about the boat and the dinghy.

The admission of the foregoing evidence subsequently enabled the prosecution to develop a scenario, as we will see, based upon a fatal assault with a wrench or a screwdriver. Without it, there would have been no factual basis to support it. The situation in this case would then be analogous to the situation which prevailed in *R v Stafford*.[83]

The case of *R v Stafford*

In the Stafford case, his fifth appeal was eventually allowed because it was determined that the circumstances at the scene were not consistent with the prosecution scenario. It was said that if the young girl had been attacked in the manner described, there would have been considerably more forensic evidence of the attack, including blood, at the scene:

> The evidence which has subsequently emerged shows that the jury should not have been invited to regard central aspects of that scenario as fairly open on the evidence. The prosecutor's obligation is to put the case against the accused fairly.[84]

The appeal judge in *Stafford* said the potency of the circumstantial scenario advocated by the Crown as an instrument of persuasion should not be underestimated, and it was found that 'it was apt materially to mislead the jury'.[85] He said the unsustainable aspects of the circumstantial crown case were central to the way in which it was presented to the jury. He added:

> where, as in this case, it turns out that crucial aspects of a circumstantial case advocated by the Crown to the jury are unsound, it is a strong thing to conclude that the points made by the Crown with the evident intention of persuading the jury to convict did not actually influence their decision to do so.[86]

In *R v Drummond (No 2)* it was said:

> In the unusual circumstances here, the prosecution deliberately led the now discredited evidence of [the forensic scientist] for the avowed purpose of persuading the jurors …. The tender of that evidence was justified on the basis that it did rationally affect the ultimate result in the case … If, as occurred here, such evidence is given without sufficient care by the prosecution expert witness

[83] *R v Stafford* [2009] QCA 407 [Stafford].
[84] *Stafford* at [138].
[85] *Stafford* at [141].
[86] *Stafford* at [144].

> or the prosecutor to check its accuracy, it is difficult to see how evidence later proffered by the defence controverting the accuracy of the prosecution evidence can be denied to *have a real or material bearing on the determination of a fact in issue which, in turn, may rationally affect the ultimate result of the case*.[87]

He also emphasised that the focus of an appeal 'is upon the fairness of the trial process rather than the substantive justice of the outcome'.[88] This has been affirmed by the recent decision in *R v David Eastman*.[89]

The ACT appeal court overturned the conviction of Mr Eastman after 19 years on the basis of flawed forensic science. It did so, despite the acceptance by the court of a 'strong circumstantial case' against Mr Eastman.[90] That could not be said of the case against Neill-Fraser, where the circumstantial case was weak.

What Neill-Fraser's case did have in common with that of Eastman was that the forensic science evidence 'lacked a proper factual foundation' and that it was 'a case inextricably woven around the forensic evidence' and without it 'the fabric of the case would have changed completely'.[91]

In *Stafford*, the judge held that the trial was unfair in a way which was apt to deprive Mr Stafford of the consideration by the jury of the real case which could fairly be made against him rather than a theoretical case, important aspects of which were not sustainable on a fair view of the evidence.[92] Again, the same analysis is clearly applicable to the Neill-Fraser case.

The scenario in the Neill-Fraser case has the same degree of implausibility to it as did the claim that Lindy Chamberlain killed her baby. Ms Chamberlain was said to have left a barbecue to put one of her children to sleep in a tent. It was said that she then took her young baby to the front passenger seat of her car which was nearby, cut the baby's throat, put the body into a camera bag, cleaned up the car and herself, and returned to the barbecue just 10 minutes later, looking calm and composed. She had always appeared to be a loving mother and had no history of mental illness.

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[87] *R v Drummond (No 2)* at [162] citing R v Keogh (No 2) at [109] (emphasis in original).
[88] *Stafford* at [146].
[89] *Eastman v Director of Public Prosecutions (No 2)* [2014] ACTSCFC 2 [*Eastman*].
[90] The court agreed with Martin AJ that the circumstantial case could be described as 'strong' but not 'overwhelming' *Eastman* at [233].
[91] *Eastman* at [253].
[92] *Stafford* at [152].

It took some thirty years and many formal inquiries and hearings to establish that the many expert witnesses put forward by the prosecution had given incorrect evidence.[93] The Royal Commission sat for 92 sitting days and heard 145 witnesses. Her conviction was overturned in 1988.

Just a few years earlier, similar serious and systemic error had been found in the case of Edward Splatt in South Australia. Mr Splatt was convicted entirely on the basis of forensic and scientific evidence which was said to have been found at the scene. His trial took 11 days. The Royal Commission which led to Mr Splatt being pardoned took over 190 sitting days. It found that every single piece of evidence which had been put forward at Mr Splatt's trial contained errors.[94] Mr Splatt was granted a pardon in 1984.

The Commissioner noted a 'cardinal rule' which 'must be obeyed at all times whatever technique is being performed':

> Every operation must be documented on the case notes and documented in such a manner that it will still be comprehensible perhaps years later. All major observations must be checked by an independent observer who must indicate that the proper checks have been made by initialling the notes.[95]

There does not appear to have been any checking of the timing or the quality of the sparkle or flash in relation to the Luminol test results, which according to the witness made a crucial difference between a positive and a false positive result. Many of the observations in the Neill-Fraser case could not be checked because of the absence of measurements and diagrams and the paucity of the photographic record.

The Splatt Commissioner said that in a trial where the evidence is of such scientific nature, a very serious obligation lies not only on the scientists who give evidence, but on the representatives of the legal system who are responsible for the conduct of the trial. He said that the vital obligation of the scientists is that they spell out in non-ambiguous and precisely clear terms the weight and significance of the tests and analysis. He emphasised that the critical responsibility which rests upon legal persons is to ask such detailed and probing

[93] 16 November 2014, New York Times, 'Vindication at Last for a Woman Scorned by Australia's News Outlets – "Dingo's Got My Baby": Lindy Chamberlain's Trial by Media'. The Chamberlain (and the Splatt case) are discussed in *Miscarriages* chaps 8 and 9.
[94] Royal Commission Report concerning the conviction of Edward Charles Splatt 1984: Carl Reginald Shannon LLB (Hons) QC (former Supreme Court Judge, NSW) [*Splatt Report*].
[95] *Splatt Report* at pp 51-2, citing with approval the view of Dr Robertson concerning 'the very minimum requirements' which would operate in England and in Scotland. The following points are from these pages of the Splatt Report.

questions of the scientists as are likely to elicit the proper evidence. None of this appears to have been done in the Neill-Fraser case.

The Commissioner stated that there are serious obligations on both witnesses and counsel in a criminal trial. The scientific witness had to clearly state *all limitations*, and counsel to probe and investigate to the furthest limits of relevance.

The recommendations of the Splatt Royal Commission were very important, and brought about significant improvements in the forensic procedures in South Australia.

In addition, Dr Tilstone and Dr Robertson from the South Australian Forensic Science Centre gave evidence at the Morin Judicial Inquiry in Canada chaired by Justice Kaufman. Dr Tilstone had been the head of Forensic Services in South Australia. His evidence to the Kaufman Commission was about the new forensic standards which operated in Australia at that time.[96] He pointed out in a section 'Writing Expert Witness Statements' that the policies in force not only articulated for the scientists how reports are to be written, it also noted that the scientists should 'be prepared to justify any deviation from this to your checking officer or section manager'.

Dr Tilstone testified about the policy in place at the South Australia Forensic Service:

> There was a fairly lengthy policy on reporting, and that policy said that reports had to contain five following parts. They had to have a chain of custody which defined the items which were examined, and where they came from. They had to define the tests which were conducted. They had to specify the results of that testing. They had to specify the conclusions which could be drawn from the testing, and *they had to specify the limitations which could be placed on those conclusions*.
>
> In regard to the conclusions and the limitations, the policy instructed staff to report in exclusionary terms, so the policy was always that findings should be interpreted from the point of view of *what they excluded*, the things that were *not possible* as a result of these findings. And the policy also required that they should state the limitations on non-exclusions.

Dr Tilstone testified that the National Association of Testing Authorities [NATA] program in Australia contained provisions which speak to the issue of how reports should be written. He said that the importance of these provisions was that they at least alerted the reader to the fact that there were other explanations possible for these findings.

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[96] This discussion is from the Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin [*Morin Report*] Toronto, Ontario, Ministry of the Attorney General (1998) vol 1 Chapter II: Forensic Evidence and The Centre of Forensic Sciences at p 333 (emphasis added).

The Commissioner said that:

> A forensic scientist may leave the witness stand concerned that his or her evidence is being misinterpreted or that a misperception has been left about the conclusions which can be drawn or the limitations upon those conclusions. *An obligation should be placed on the expert to ensure that these concerns are communicated as soon as possible to Crown or defence counsel. Where communicated to Crown counsel, an immediate disclosure obligation is triggered*.[97]

The issue about the disclosure obligation is extremely important, and reinforced by the recent findings in the Eastman cases.

The Splatt and Morin Royal Commission Reports make it clear that once erroneous evidence in these types of cases are brought to the attention of the Forensic Science Services, they have an obligation to bring it to the attention of the relevant authorities to ensure that the appropriate action is taken. 'The scientist, if truly objective, has an ethical obligation to inform the person affected by the misinterpretation.' 'The onus should rest with the expert to correct testimony... It would be preferable that the expert, where practicable, rectify the matter through Crown counsel.'[98]

In this case, a report outlining the concerns which have been raised in this research report was sent to the Forensic Science Services in Hobart. The intention was to develop a collaborative approach to the identification and correction of error as suggested by the Splatt and Morin Commission reports. The only response was a letter sent by the Assistant Commissioner of police to say that the police had confidence in the Tasmanian Forensic Services and that further correspondence on the matter would not be entertained.[99] Clearly the recommendation of the Splatt Royal Commission report that forensic services in Australia should be independent of the police has not been implemented in Tasmania.

Forensic witness comments about DNA

In the Neill-Fraser case the forensic biologist who had given evidence about the testing for blood stains was asked by defence counsel to comment about the figure 'one in a hundred million' which was used in the context of a DNA test. The witness said, 'You really need to

[97] *Morin Report*, Recommendation: 'Policy respecting correction of misinterpreted forensic evidence'.
[98] Ibid.
[99] A letter was sent by Neill-Fraser's lawyer to the Director of the Forensic Science Service Tasmania on 9 September 2014 requesting an urgent review of the forensic evidence which had been given in this case. It enclosed a report by Dr Bob Moles setting out many of the details covered in this article and an independent forensic expert report. A reply was subsequently received from the Tasmanian Police dated 18 September 2014 stating that no further correspondence would be entered into.

talk to Dr Grosser about the statistics.'[100] She said she was not familiar about the statistical side of things and agreed that she only had 'a rudimentary understanding' of these issues. The prosecution objected, enquiring as to whether this was admissible 'opinion evidence'. The trial judge asked of the witness, 'is your understanding based on your study, training or experience in connection with the field of science in which you practise?' The witness responded, 'My understanding is based on what I've heard being discussed by the other scientists in the laboratory' adding, 'I'm certainly *not an expert* in the statistical interpretation of DNA profiling'.[101]

The judge said that the question was not whether the witness 'calls herself an expert' but 'whether she qualifies as one for the purposes of the *Evidence Act*'. He decided to hear argument in the absence of the jury. On the *voir dire*, both counsel decided to 'leave the evidence as it stands' and to not ask any further questions of the witness.[102]

The prosecution submitted that 'a rudimentary knowledge' which was 'gained by hearing people with such expertise speak about it in the laboratory' put the witness in the same position as the cleaner. This, it was said, was to introduce the 'prosecutor's fallacy' through a witness who had done no more than hearing other people with expertise talk about it. Defence counsel said that he did not need to make further submissions, and that the question was allowable 'on the basis that it's being put with the expertise this witness has. She is, after all, a forensic scientist of quite some years' experience'.[103]

The judge pointed out that the witness was a forensic scientist with 19 years' experience with both a Bachelor's and a Master's degree:

> the significance of DNA probability statistics is not her field but that *she has heard people that she works with* and has worked with who one would – who work in the area *discussing such statistics*. s79 of the Evidence Act makes evidence of somebody's opinion admissible if that person has specialised knowledge based on the person's training, study or experience. The witness' understanding of the statistics would appear, from what she said, to have been based more on experience than on training or study, but she's a forensic scientist who has specialised knowledge in relation to DNA and if she has an opinion as to the significance of a particular statistic then in my view she's entitled to express that opinion, it falls within the scope of what's made admissible by s79. So I'll permit the question.[104]

[100] Trial transcript at p 663.
[101] Transcript at p 664 (emphasis added).
[102] Transcript at p 665.
[103] Trial transcript at p 665-666.
[104] Trial transcript at p 666 (emphasis added).

To say that the witness 'has specialised knowledge in relation to DNA' is inconsistent with what the witness said[105] and with what the judge acknowledged when he said that DNA statistics is 'not her field'. Indeed she commences her answer in relation to the question by saying, '[m]y understanding, *as not a DNA scientist* … '.

The *Evidence Act* s 79 (1) does require the witness to have specialised knowledge based on the person's training, study or experience. It then requires that the opinion expressed is 'wholly or substantially based *on that knowledge*'. When the judge stated that the witness's opinion was based more upon experience, than upon training or study, this could only have referred to the witness's experience of hearing other people talking about the matter. It is clear from the cases, that this was not what was envisaged by the statutory provision in question.[106]

Forensic Pathology evidence

The prosecution introduced the State Forensic Pathologist for Tasmania and then asked:

> Prosecutor: we don't have a body in this case, and I want to ask you some questions of a general nature but with particular reference to a sixty five year old man described as somewhat frail and a heavy smoker, if that's of relevance … Now is it your opinion that such a man could be killed or rendered unconscious by a single blow?
> Witness: Yes.[107]

He gave the same answer to somewhat otiose question about whether the same sort of person could be killed by 'multiple blows'.

The pathologist was asked, 'would it matter to the prospect of him being killed or rendered unconscious that such blows might come to his head from behind?' He answered somewhat unresponsively, 'I believe that he could be hit on the head, on the back of the head, yes.'

He was then asked, '[c]ould be killed by a single blow too, to several parts of the body, is that right? He said, '[t]hat's right'. However, it is difficult to envisage how a single blow could be inflicted on 'several parts of the body'.

[105] See above where the witness said, 'I'm certainly not an expert' in DNA profiling.
[106] See the discussion of these issues in *Miscarriages* at 9.3.2 – 9.4.8, especially at 9.4.5 where it is said that '"experience" can provide a basis for specialised knowledge in matters which are *not* scientific or technical' discussing *Honeysett v R* (2014) 311 ALR 320 at [23] (emphasis added in *Miscarriages*).
[107] Trial transcript at p 1007.

The pathologist agreed (as if anyone would doubt it) that 'such a man' could be killed by a blow or blows 'with a blunt object'.[108] As to the quantity of blood which would ensue the pathologist said, unsurprisingly, that it would depend upon the type of object and the location of any blow or blows. The witness also discussed the nature of 'lethal injuries' which may cause haemorrhage around the brain which is 'frequently seen as causes of death in *murders'*. The prosecution asked whether a stab wound might 'send a fine spray – a fine spray of droplets to objects'. Obviously, this would connect with the evidence of the forensic scientist concerning the drops ('possible' drops) which may have been positive responses to Luminol.

The final question from the prosecution was, 'would age and frailty brought on by age, I suppose, have anything to do with a susceptibility to dying or being rendered unconscious?'[109] The pathologist complained that '[w]e're getting pretty – pretty into the hypotheticals here', and that the exchange was getting 'very speculative'. At that point the prosecution finished the examination-in-chief.

Surprisingly, defence counsel, instead of objecting to any of this commenced the cross-examination with the words, '[n]ow just continue this speculation'.[110] This led defence counsel to ask if a person taking aspirin would bleed more profusely 'if he or she was bashed over the head in the way that the Director has suggested'. The pathologist was asked by defence counsel to explain how such bleeding might be affected by knife wounds, and if 'the critical thing with a knife wound' is whether 'the severing of one of the veins or the arteries' was important, because 'that's where you get the spray affects [sic] and things'. Defence counsel then got the witness to confirm that anyone could die from single or multiple blows to the head.[111] Again, it is hard to see how this would have advanced the position of the accused.

Speculation not admissible

The point to be made here, and will be made again in the context of submissions by the prosecutor, is that 'speculation' in the context of criminal trials is not permitted. As was said in *Straker v R*:

> The real complaint of the appellant [Straker] is that Dr. James was permitted to speculate on a possibility of which there was no evidence of probability … The

[108] Trial transcript at p 1008.
[109] Trial transcript at p 1009.
[110] Trial transcript at p 1010.
[111] Trial transcript at p 1011.

> question, therefore, is whether Dr. James's speculation on possibilities which had no basis of probability was admissible. I can see no basis upon which it was admissible … he is not entitled to speculate on a possibility directly relevant to the issue or to a fact in issue when the speculation is adverse to the accused person and when there is no evidence which would support a conclusion that the fact was established.[112]

The better approach, instead of encouraging more speculation, would have been to insist upon it be removed or avoided entirely.[113] Far from there being any objection to any of this by defence counsel, the entire process was legitimated by defence counsel reinforcing many of the points made by the prosecution. We take the view that the entirety of this evidence should have been held to be inadmissible for the following reasons.

Not 'specialised knowledge'

Expert opinion can only be given where it is necessary to assist the jury to interpret the evidence before the court. As King CJ pointed out in *R v Bonython*, in order to determine if expert evidence is admissible, the trial judge must first determine:

> Whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.[114]

It is important to distinguish between those circumstances where jurors can work things out for themselves, and where they really need some expert assistance to understand properly the issues involved. Ordinary members of a jury might be expected to appreciate that when people get drunk their judgment is impaired and they might drive badly and crash a car. However, they might need some expert assistance to understand how ingested poisons might affect the nervous system and cause death. As was pointed out in *R v Turner* [1975], jurors do not need psychiatrists to tell them how ordinary people (not suffering from any mental illness) are likely to react to the stresses and strains of life.[115]

There has been much public discussion about the need for additional laws to deal with people who 'king hit' other people and so cause death by a single punch to the head. It is clearly public knowledge that a person could be killed or rendered unconscious by a single blow

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[112] *Straker v The Queen* (1977) 15 ALR 103 at 114; Jacobs J cited in Kevin Borick QC, 'Expert witnesses and the duty of disclosure — Keogh v James: Per incuriam', *Direct Link* September 2011 7 at p 9.
[113] See previous discussion of *R v Berry & Wenitong*, and the subsequent discussion in the context of the case of Gordon Wood. Both cases (and many others) make it clear that speculation is not permitted in the context of a criminal trial.
[114] *Bonython v R* (1984) 38 SASR 45 at [46]-[47]. See the discussion of this at *Miscarriages* 9.3.1.
[115] See the discussion of this in *Forensic Investigations*, chap 2, citing *R v Turner* [1975] QB 834 at p 841.

whether to the head or to other parts of the body. They do not need an expert to explain that to them.

No factual basis for it in the evidence

A further reason why this line of questioning is inadmissible is because there is no factual basis for it in the evidence. As is clear from the *Makita v Sprowles* before expert opinion evidence is admitted in court, it must be established that:

- The expert has stated, and the party calling the expert has proven, the facts on which the expert opinion is based.
- If any facts relevant to the opinion are assumed, they have been identified and proven in some other way.[116]

The nature of the problem can be summed up by reflecting upon the words of the prosecution in the opening questions to the pathologist – 'we don't have a body in this case'. It might also have been said, 'we don't know if there is a body in this case'. All that is known is that Mr Chappell disappeared from his boat and has not been seen again since. As we will see shortly, the prosecution initiated this line of questioning to support speculative submissions to the jury about how Mr Chappell might have been killed. However, there being no factual basis to support the hypothesis that he was beaten, bashed or stabbed, these questions and answers should have been held to be inadmissible. Although defence counsel was willing to 'continue this speculation', it would have been better if he had put a stop to it. It is not the business of counsel to encourage the jury to engage in speculation.

Conclusion to the forensic evidence

The view has been put forward that the preceding forensic evidence in this case should have been held to be inadmissible. The evidence of the forensic scientist concerning the results of the preliminary screening tests was inadmissible on the basis of legal authority and common sense. The testing agents can give a positive result to a significant number of different substances, and the witness on many occasions says in her evidence that she does not know whether the response is to blood or other substances. The claim that blood-based responses are distinguishable is in conflict with that evidence and in any event is not substantiated by any validation studies. The frequent references to stains and positive results being references to the existence of blood would have been seriously prejudicial to the interests of the accused.

[116] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at [85] discussed at *Miscarriages* at 9.3.4. See also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [64] and [66] discussed at *Miscarriages* 9.4.3.

The evidence of the forensic scientist as to the meaning of the interpretation of statistical information relating to DNA was inadmissible, because on her own admission the witness was not an expert in this field. The suggestion that she would be regarded as an expert because she had overheard real experts talking about the topic is clearly contrary to legal authority.

The evidence of the forensic pathologist with regard to the ways in which an elderly person could be beaten or stabbed to death was inadmissible, because it was not based upon specialised knowledge as the Act requires and it was not a matter upon which the jury required expert assistance. It was also inadmissible because there was no factual basis in the evidence upon which the opinion could be based.

Individually, and in combination, the cumulative effect of this evidence would have been to suggest to the jury that the boat and the dinghy were awash with bloodstains; that such evidence was linked in some way to the disappearance of Mr Chappell and that there may have been some correlation between those findings and the discussion about the ways in which an elderly man could be beaten or stabbed to death.

As we will see, it was that speculation which provided the basis for the further speculative submissions by the prosecutor as to the cause and manner of death, to which we now turn.

A critical review of the prosecution case

In the Neill-Fraser case it is claimed that the prosecution has not acted in accordance with the general guidelines or the more specific duties which are required of it.

The general duty of a prosecutor

In South Australia the DPP Guidelines state: 'The obligations of the Director of Public Prosecutions are no different from those imposed on every prosecutor or prosecuting authority in the common law system.'[117]

> This Policy and the annexed guidelines are those governing the decision to prosecute criminal offences in South Australia. They form part of the uniform prosecution policy *adopted by the Directors of Public Prosecutions of all States* and the Commonwealth of Australia in 1990.

[117] Director of Public Prosecutions South Australia: Statement of Prosecution Policy and Guidelines October 2014, Adam Kimber SC DPP.

The prosecution guidelines state that prosecutors must be fair, independent and objective. It is a requirement that the prosecutor must not:

> express by inflammatory or vindictive language, the prosecutor's personal opinion that the accused is guilty;
> press the prosecution's case for a conviction beyond a full and firm presentation of that case;
> by language or other conduct seek to inflame or bias the court against the accused.[118]

In *Wood v R*[119] the Chief Justice stated that the *Barristers' Rules* (NSW) state that:

> 64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.[120]

That is because, as *Boucher v R*[121] explained, the character or eminence of a barrister is to be wholly disregarded in determining the justice or otherwise of the client's cause, it being an inflexible rule of forensic pleading that an advocate shall not, as such, express their personal opinion of - or their belief in - the client's case.

Boucher was cited by the High Court in *Libke v R* when it was pointed out that:

> '[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice.' In the Supreme Court of Canada, Rand J described the role of the prosecutor as being:
>
> 'not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with *an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*.'[122]

Above all, the duty of the prosecutor is to ensure a fair trial in accordance with the rule of law.

> Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing [the] function of presenting the case against an accused, [the prosecution] will act with *fairness* and detachment and always with the objectives of establishing the whole truth in

[118] See for examples the South Australian Bar Association Barristers Conduct Rules 14 November 2013.
[119] *Wood* at [576].
[120] New South Wales Barristers' Rules 6 January 2014
[121] *Boucher v R* (2006) 228 ALR 190 [*Boucher*]
[122] *Libke v R* (2007) HCA 30 at [71]; Hayne J citing the Canadian Supreme Court in *Boucher* at 23-4 (emphasis added). See the discussion of this point in *Miscarriages* at 8.3.

> accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a *fair* one.[123]

Above all, the 'rule of law' principles require the various officials of the legal system to act with rationality, reasonableness, coherence, consistency and compliance with the prevailing legal norms.[124] Qualities which were significantly lacking in the Neill-Fraser case.

Speculative prosecutorial submissions

The starting point for this analysis is to remind ourselves that the prosecutor opened his questions to the pathologist by stating, 'we don't have a body in this case'. We might also add that it is not known if there is a body in this case. Mr Chappell disappeared from his yacht and it is not yet known what became of him. However, the prosecution case was based upon the claim that Neill-Fraser had beaten him to death with a metal wrench or had stabbed him with a screwdriver.

The prosecutor developed the analysis by informing the jury that 'wrenches had been found to be missing'.[125] It would have been better to say that wrenches had not been found and were *assumed* to be missing. It was then said that '[a] great big fifty three foot boat, they'd need a bit more than a tiny little wrench.' The suggestion appears to have been that the size of the missing wrench could be inferred from the size of the boat. That would have to be regarded as an invalid inference. It would be more rational to suggest that the size of a wrench would be related to the size of the equipment or machinery it was to be used on.

The prosecutor then told the jury, 'she's walking backwards and forwards, he's getting increasingly angry'. There was no evidence whatever to support those assertions. The jury was told about potential difficulties in the relationship, and that Neill-Fraser might be better off financially if he were dead.

The development of the scenario put to the jury by the prosecutor was:

> Anger, bang. Maybe once, maybe twice. But here comes the – here is perhaps the significance of there being no body found. Why, if this is a complete stranger to Mr Chappell and a complete stranger to the boat, would there be no body left on board? That doesn't make sense, does it? But if in fact it was someone who was closely connected to the boat, closely connected to Mr Chappell, and who would

[123] Whitehorn v R (1983) 152 CLR 657 at 663–4; 49 ALR 448 [1983] HCA 42 per Deane J (emphasis added).
[124] The rule of law principles are discussed at length in the context of the theory developed by Professor Neil MacCormick (legal theorist), Lord Bingham (the most senior British judge of his day) and Robert French (Chief Justice of the High Court of Australia) in *Miscarriages* chap 2 'Institution of Law, Rule of Law and Human Rights'.
[125] Trial transcript at p 1392.

> be able to be behind him without raising his attention because they're known to be in that space, where there's only one way in. She's walking backwards and forwards and delivers blow – a blow or blows, or maybe stabs him with a screwdriver, I don't know, he doesn't look round, and so the body doesn't have any marks of what you'd expect if someone had come down there, a stranger, intent on doing him harm, the body I suggest would have marks consistent only with being delivered by someone who he knew to be there, who he knew and expected to be behind him.

The submission is that Mr Chappell has been beaten to death with a heavy wrench – a submission which, we will see shortly, the trial judge thought to be quite plausible. Even though there is no 'evidence' of such a wrench. The prior existence of such a wrench and the speculation that it was the murder weapon is merely an inference from the fact that no such wrench was found in or near the boat.

The jury is then told that where a person is killed by a stranger the assailant does not attempt to dispose of the body. That is clearly untrue. If any person, friend or foe, had killed Mr Chappell, they would have the same interest in disposing of the body because of the potential for there to be some evidence (possibly DNA evidence) to connect them to the body or to delay or confuse any investigation. There is no criminological hypothesis which suggests that only family members or friends will dispose of the body of a murder victim and that strangers to a victim will leave the bodies of their victims to be found by the police.

There is no evidence to support the submission, '[s]he's walking backwards and forwards and delivers blow – a blow or blows, or maybe stabs him with a screwdriver, *I don't know*.'[126]

There is no evidence to support the submission:

> He doesn't look round, and so *the body doesn't have any marks* of what you'd expect if someone had come down there, a stranger, intent on doing him harm, *the body* I suggest *would have marks* consistent only with being delivered by someone who he knew to be there, who he knew and expected to be behind him.

Given that the prosecution has already accepted, 'we don't have a body in this case', then there can be no possible basis for making assertions about the type of injuries the body does or does not have. Even if there had been injuries to a body, there is no scientific basis upon which the jury could determine whether they had been inflicted by friends or strangers. There

[126] Transcript at p 1393.

was no evidence and no scientific principles to support such extraordinary propositions in this case.[127]

Here, the appeal court recognised that the trial judge had stated, 'there was no direct evidence that the appellant killed the deceased'.[128] It also observed that there was 'no direct evidence of the circumstances of the homicide.'[129] Despite this:

> The judge thought it *quite likely* that the appellant hit the deceased on the head with a heavy wrench from behind, but concluded that the evidence did not enable the making of a detailed finding as to the manner of attack.[130]

As we saw above in the context of the Hoey case, 'quite likely' is not the standard to be applied in a criminal trial. A conviction for murder requires proof 'beyond a reasonable doubt'.

The judge could not make a detailed finding about the manner of the attack, because there was no evidence that any attack had occurred:

> But here, there's *no evidence* as to – well you might think there's *no evidence* as to what went on, if you are satisfied that Ms Neill-Fraser killed Mr Chappell.[131]
>
> The difficulty though is that because (sic) there's *no evidence* as to what happened to Mr Chappell.[132]

Yet, despite there being 'no evidence', in sentencing Neill-Fraser, the judge was content to accept that Mr Chappell had been struck by a wrench:

> The Director of Public Prosecutions suggested that Ms Neill-Fraser killed Mr Chappell by hitting him to the head with a heavy wrench from behind. It is quite likely that that is what happened, but I do not consider that the evidence is sufficient for me to make detailed findings as to the manner of attack.[133]

The 'quite likely' scenario was not just based upon an *insufficiency* of evidence, but upon a total absence of it as the judge has acknowledged, and was clearly contrary to the most basic rule of law principles.

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[127] An attempt to establish that a pattern of knife wounds to three separate bodies could identify the fact that they were administered by a single perpetrator was held to be without any scientific basis in *Gilham v R* [2012] NSWCCA 131.
[128] *Neill-Fraser v Tasmania* [2012] TASCCA 2 [Court of Appeal] at [125].
[129] Court of Appeal at [138].
[130] Court of Appeal at [193] (emphasis added).
[131] Judge summing up to the jury (password 'supreme') [*Summing up*] at p 13 (emphasis added).
[132] *Summing up* at p 14 (emphasis added).
[133] Sentencing Remarks 27 October 2010.

In the appeal in *Wood v R*, the appeal court judge was severely critical of prosecution counsel for putting a proposition to the jury (about a shot-put throw) for which there was no evidence before the court. He said:

> The submission that followed was extraordinary and should never have been made.[134]
>
> This submission was entirely unsupported by any evidence.[135]
>
> The suggestion of a shot put action was an invention of the prosecutor during the course of submissions for which there was absolutely no support in the evidence.[136]

In making assertions about what marks the body does nor does not have, the prosecution is assuming the role of a witness. In stating that there is a possible correlation between the existence of such marks and the potential identity of a perpetrator the prosecution is acting as an expert witness – and providing opinion evidence to the jury about the interpretation of patterns of injury. All of this is being done in front of the jury in circumstances where all are agreed there is absolutely no proper basis for it. There is no body. There are no injuries to be explained. There is no possible basis upon which to exclude strangers or include family members or friends.

This whole scenario should have earned the same rebuke as did the shot-put throw submission to the jury in the Wood case. It was an invention of the prosecution and should never have been made.

Break in or drugs from Queensland

In the opening address to the jury, the prosecution acknowledged Neill-Fraser's concerns about a possible drug connection, and the possible use of the yacht for drug-smuggling. She was concerned that Mr Chappell had been on the boat at night without the tender tied alongside. With the lights out, to the casual observer, it might appear that there was nobody on board. If the yacht had been used to smuggle drugs, unknown to its owners, those involved might have taken the opportunity to board the yacht to recover them and then unexpectedly found Mr Chappell confronting them, with obvious consequences. The prosecutor stated:

> she'd been told that people smuggled drugs on yachts similar to Four Winds and they sell the yacht and they retrieve the drugs later. So she wanted the police to search with dogs. She impressed on them this – this theory about, well, that

[134] *Wood v R* [2012] NSWCCA 21 [Wood] at [319].
[135] *Wood* at [320].
[136] *Wood* at [320].

> people were using the yacht somehow to smuggle drugs and had got onto open it and look for them or get them back, or something like that.[137]
>
> She repeated the concern that drugs may have been on board and it was connected with break ins and she urged the police to follow that line of investigation.[138]

However, in the closing address to the jury the prosecutor stated:[139]

> The whole story about smuggling … it's a constant theme of her early… talks to police … when you think of it it's nonsense. It's just nonsense logically … it's just a ridiculous thing when you look at it logically, but it doesn't even explain why the body would be taken away from the scene of where he was killed to somewhere secret. Why would these smugglers bother? It doesn't make sense. But it was put up very seriously and it was put up very seriously by Ms Neill-Fraser knowing, I suggest, that the whole thing was a fabrication on her part.

For the prosecutor to tell the jury that smugglers would not dispose of a body after they had killed someone was not supported by any evidence to that effect. To tell the jury that such a view is logical and any suggestion to the contrary is nonsense is to invite the jury to engage in impermissible reasoning. Knowledge about empirical correlations concerning smugglers, killers and body disposals is not a question of logic at all. It is a question of knowledge about empirical patterns of behaviour. To suggest to the jury that any disagreement with the proposition being put forward is 'ridiculous' and 'nonsense' is to invite the jury to accept something as true on the basis of reasoning which is false and clearly prejudicial to the interests of the accused.

The prosecution assertion that the suggestion of smugglers being involved was fabricated, ridiculous, nonsense is inconsistent with the facts which the prosecution ought to have known about and failed to disclose. It is also inconsistent with the prosecution duty to treat the accused fairly, and not to disparage the accused (or the case which she is putting) unreasonably.

In November 2011 the Australian Federal Police reported that drugs were found in a yacht which had arrived in Bundaberg Queensland after travelling from Vanuatu in the Pacific. The drugs had an estimated value of $78 million, and $3 million in cash was also found.[140]

[137] Trial transcript at p 55.
[138] Trial transcript at p 58.
[139] Trial transcript at p 1394-5.
[140] 14 November 2011, Australian Federal Police Media Release: 'Four Spanish nationals arrested for record 300kg cocaine bust'. See also, 2 December 2013, Good Weekend, 'When the Wolf got caught: how an accidental phone call helped bring down Oliver Ortiz'.

On 3 April 2014 it was reported that a lucrative and high volume drug smuggling operation had been utilising small yachts to access ports along the eastern seaboard of Australia *for many years*:

> 60 Minutes goes inside the multi-billion dollar cocaine war that stretches all the way from South America to Australia. In the past three years, our Federal Police have intercepted nearly two tonnes of cocaine on the lucrative Pacific route.
>
> Small yachts are loaded up with hundreds of millions of dollars' worth of the illegal drug on the coast of Ecuador, before making the long journey here. The innocent-looking yachties breeze into our eastern waters, mostly undetected, before offloading their cargo to local dealers.
>
> Tara Brown tracks the smugglers from South America to Vanuatu and Tonga, where a boat holding 200 kilos of cocaine *and a rapidly decomposing corpse* was discovered shipwrecked on a remote island reef.[141]

The program went on to say:

> In response to criticism in our story by Ecuador anti-narcotics police that the Australian Federal Police has failed to co-operate on matters of drug trafficking, the AFP has issued this statement.

The statement included the following:

> The AFP has had a presence in South America *since 1989* … the AFP and its partner agencies in the Pacific region have achieved considerable success in recent years combating the trafficking of drugs into Australia via yachts … Since September 2010 [the Neill-Fraser trial commenced 21 September 2010], the AFP has seized some 1.9 tonnes of cocaine that had transited through the Pacific en route to Australia. This had a potential Australian street value of approximately $570 million … in 2002 the AFP established the Pacific Transnational Crime Network and today there are 18 Transnational Crime Units in 13 Pacific Island countries. It is an integral part of a combined effort to share criminal intelligence and target organised criminal groups operating across the region.[142]

The information about the history of these activities was not disclosed to the jury at the Neill-Fraser trial and could represent a serious non-disclosure by the Crown. The prosecution should have known that there was a very genuine concern by the police concerning the smuggling of large quantities of high-value drugs in 'small yachts' loaded up with 'hundreds of millions of dollars of illegal drugs'. The Australian Federal Police had been active in this area since 1989, and had established a formal crime network since 2002.

Indeed, on the very day the jury retired to consider their verdict, the ABC reported a major drug find on a yacht on a Brisbane, Queensland, marina. The evidence in this trial was

[141] Channel 9, 60 Minutes, 'The High Seas: Inside the Multi-Billion Dollar Cocaine War' (emphasis added).
[142] A copy of the undated statement is available here (emphasis added).

completed on 13 October 2010. The following day Blow J summed up to the jury. On that day, this major drug find was announced…which involved precise locations where the Four Winds had been just before Mr Chappell's disappearance; Scarborough Marina, Brisbane – the very same marina from which location Mr Chappell and Ms Neill-Fraser had bought the Four Winds a few months earlier – and Eden in NSW, where the yacht had overnighted on the voyage down from Brisbane to Hobart, under the direction of the paid crew.. It clearly contradicted the suggestions by the prosecutor that Neill-Fraser's concerns in this regard were unfounded or designed to mislead. The Home Affairs Minister is reported to have said:

> This is a fantastic effort by the Australian Federal Police, Customs and border protection and Queensland and New South Wales police working together.[143]

It would be surprising if the prosecutor was unaware of such revelations, but even if that were so, it would not be of any assistance in defending the prosecution's position. It is well accepted that there is no distinction to be drawn for disclosure purposes between the prosecution and the police. If material is known to the police, the accused is entitled to it, whether or not the prosecutor knows of it.[144] It is unnecessary for these purposes to investigate whether the prosecutor had actual knowledge of the information.[145]

If the jury had known about this information before delivering the verdict, as clearly it ought to have done, it might well have affected their assessment of whether Neill-Fraser had reasonable grounds for her belief or whether she was engaged in 'fabrications' as the prosecutor had suggested.

Lies and red-herrings

In the closing address to the jury the prosecutor went to considerable length to portray Neill-Fraser as a liar and even a bare-faced liar. The jury was told:

> She's erected a wall of lies to knock back the police investigation, to divert it in other ways, and to you, to divert you in other ways. And sometimes even with a wall of lies though the truth will come seeping out through the edges.[146]

The idea of 'the truth seeping out through the edges' was a constant refrain throughout the prosecutor's submissions. 'Ms Neill-Fraser is always, I suggest, always on guard for that sort

[143] 15 October 2010, Andree Withey and Murray Cornish, ABC '$160m cocaine bust on Brisbane yacht' first reported 14 October.
[144] See *Miscarriages* 8.5.1. 'Crown as an indivisible entity' citing *Button v R* (2002) 25 WAR 382 at [58].
[145] Miscarriages 8.5.1. citing *Mallard v R* (2005) 224 CLR 125 at [16].
[146] Trial transcript at p 1386.

of truth of his dissatisfaction leaking around the edges of her lies.'[147] '[W]hat Ms Neill-Fraser said and I think it's, well I suggest to you, that it's the truth coming out around the edges of the block of lies'.

Even simple and unremarkable observations laid the ground for more such accusatory statements. Why is this entry of the 10th January in your diary in two pens?[148] The prosecution told the jury, '[i]t's clearly in two pens. It's clearly in two pens. It wasn't disputed that it was. Laying a false trail.'[149]

It led to the prosecution submission:

> When you look at the number of lies and look at her credit, look how she seemed in the witness box to you, ladies and gentlemen, I suggest that you would be very hard pressed to believe anything she said unless it was reliably corroborated by someone else.[150]

The suggestion that the jury should not believe Neill-Fraser unless she was able to find corroboration for what she said would be to invite them to engage in impermissible reasoning. There are many circumstances in which it would be improbable and unreasonable for anyone to be expected to provide corroboration such as when they are asked about personal aspects of their intimate relationships. To suggest to the jury that a person should be disbelieved in such circumstances, is effectively to reverse the onus of proof. Indeed, the mere existence of a lie is not a sufficient basis from which to draw implications as to guilt. There are particular directions which the judge should give as to whether alleged lies are indicative of a guilty mind, usually referred to as an *Edwards* direction.[151] Although this was partially acknowledged during the trial, it was agreed that the judge's direction on this issue would only relate to two specific incidents.[152] Yet the prosecution submissions went well beyond those two issues and portrayed Neill-Fraser as fundamentally untruthful and dishonest in relation to all that she said.

The prosecutor developed the closing submissions to the jury by stating that:

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[147] Trial transcript at p 1390.
[148] Trial transcript at p 1387.
[149] Trial transcript at p 1395.
[150] Trial transcript at p 1412.
[151] Based upon the case of *Edwards v The Queen* (1993) 178 CLR 193 at 210.
[152] Trial transcript p 1384 where it was said that the *Edwards* direction will relate only to two of the circumstances which were said to have involved lies or assertions said to be lies. These involved an incident about having gone to Bunnings on Australia Day and another about having stayed at home on the night of Australia Day.

> I will suggest to you now that this is and was typical of the way Ms Neill-Fraser treated the police investigation into the disappearance and death of Mr Chappell, and typical of the way the case has been conducted by raising 'red herrings' by setting off 'hares' …[153]

He then said that 'raising "red herrings" and laying false trails and so on, might all give the impression, that … there must be a reasonable doubt.' The general warning by the prosecutor to the jury was 'is she the only one who gives this evidence, and if so, look at her credit, just look at whether you trust anything she says' if it is not seen to be in her interests. 'She's erected a wall of lies to knock back the police investigation, to divert it in other ways, and to you, to divert you in other ways.' This clearly goes well beyond the two lies for which the prosecution said a special direction needs to be given. And 'sometimes even with a wall of lies though the truth will come seeping out through the edges or around the side and will reveal itself sometimes in what she says when she isn't completely on guard'.

An issue about the boat (dinghy) being untied was a matter of 'red herrings'.[154] Soon after the prosecution said, 'I want now to just mention some of the red herrings and so on that have been thrown about'. Then:

> the way the case has been conducted I suggest, red herring, red herring, red herring, … you've got so many red herrings. It's like that interesting program that the man from the Victorian police showed us how you can look at the bottom of the Derwent, there was a school of fish, well it could have been a school of red herrings as far as this case is concerned because that's how many have been strewn about.[155]

Neill-Fraser's description of another incident was referred to by the prosecution as 'a cruel fabrication, a completed (sic) red herring, totally untrue, made up to cover up the fact that she's the one lying to police from the very start'.[156]

Her reference to a break-in, or drug smugglers 'is all a red herring deliberately vague to put police off her track. And they're there, ooh, another break-in'.[157] However, the prosecutorial non-disclosure about the police activities in this area, which we outlined earlier, gives it a different perspective.

Neill-Fraser's possible confusion about the timing or sequence of events was another 'big red herring'. The prosecution added that if she was genuinely confused:

[153] Trial transcript at p 1386.
[154] Trial transcript at p 1397.
[155] Trial transcript at p 1399.
[156] Trial transcript at p 1400.
[157] Trial transcript at p 1402.

> you would think, wouldn't you, that the treating psychiatrist might be called to give evidence about this amazing phenomenon that appears to affect Ms Neill-Fraser. [The doctor], where was he? Not to be seen in this case. Why? Well you decide for yourself. Maybe he would say that it is *a common feature of people who commit murders* that they lie, or claim to have no memory of it, or their memory gets patchy around the crucial times, the times of great excitement, great passion, anger, the red mist that descends, it's sometimes said – who knows? I don't know? We didn't hear from him. I'm not speculating I'm just saying, we didn't hear from him … This is science fiction almost. The reason, I suggest, is that there was another red herring.[158]

For the prosecution to make such adverse comments about the failure of the defence to call a witness and then to speculate about what that witness may have said is contrary to legal authority. To suggest that such a witness would have referred to 'a common feature of people who commit murders' would have been seriously prejudicial to the position of the accused. It would suggest that such a witness would link any possible confusion which Neill-Fraser may have experienced to the fact that she is or possibly is a murderer. And to say, 'I'm not speculating' is clearly inconsistent with the speculation which has preceded that statement.

The proper position is that 'the accused is not required to give evidence or call a witness' and that 'the jury should not guess or speculate about the evidence the accused may have given, or the evidence the witness may have given'.[159] If that is correct, then it is clearly inappropriate for the prosecution to encourage such conduct. 'According to the joint judgment of the High Court in *Azzopardi*, it is "almost always" desirable to give these directions to address the risk of the jury reasoning impermissibly from the accused's silence.' It is clear that '[n]o comment should be made as to the failure of the defence to call a witness who might have been able to assist the defence.'[160] 'If any comment is to be given it is that the jury should not speculate about what a witness not called might have said.'[161]

The prosecution then stated in relation to Ms Neill-Fraser's knowledge of Mr Chappell's will, 'there's another red herring or falsehood spoken by the Accused to the police'.[162]

The rest of the prosecution closing statement continued in the same vein. Matters which did not fit the prosecution hypothesis were mostly 'red-herringed' and in doing so went well

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[158] Trial transcript at p 1403 (emphasis added).
[159] This and the following comment are from the Judicial College of Victoria, Victorian Criminal Charge Book: 4.10.2.1 - Bench Notes: 'Defence Failure to Call Witnesses'. References are to *Azzopardi v R* (2001) 205 CLR 50; *Dyers v R* (2002) 210 CLR 285; *R v DAH* [2004] QCA 419.
[160] This and the following comment is from the Judicial Commission of New South Wales, Criminal Trial Courts Benchbook, 'Witnesses not called', [4-370] Defence Witnesses.
[161] Ibid citing *Dyers* at [15].
[162] Trial transcript p 1405.

beyond the particular issues which the prosecutor said required some specific warning to the jury by the judge.

This case is an example of the type of problem referred to by Judge Tilmouth in his report on wrongful convictions where he said there were 27 cases involving the issue of lies by the accused as evidence of guilt. The Tilmouth report said the law in this area has become too complex for juries to understand, and a simple solution would be to discourage prosecutors from 'misplaced reliance on alleged lies for the reasons spelt out in *R v Heyde*'.[163]

In *Heyde*, Gleeson CJ referred to the earlier case of *Sutton* where 'Street CJ said that reliance by the Crown on lies as collateral conduct providing evidence of guilt is "fraught with the risk of miscarriage".'[164] It was pointed out that:

> In the present case, however, the issue was dealt with in a perfunctory manner, and it is impossible to escape the conclusion that if the necessary attention had been given to the relevant principles some of the so-called 'lies' would never have been left to the jury at all, and others, if left, would have been the subject of instructions considerably more detailed than those that were given.[165]

Gleeson CJ then referred to *R v Lonergan* where it was said:

> As most false statements or denials may also be explicable upon some hypothesis other than the accused's implication in the crime, the judge would do well to point to other explanations and the danger of giving too much weight to a lie. …[166]

Clearly that did not occur in the Neill-Fraser case.

Clarke JA in *Heyde* had explained that:

> If the trial judge rules that it is open to the jury to conclude that the accused has told deliberate lies which are capable of being regarded as corroboration or affirmative evidence in support of the prosecution case then it is *imperative* that [the judge] instruct the jury carefully as to the permissible significance of the lies in the circumstances of the case.[167]

Certainly if 'red-herrings' are seen as being equivalent to lies then it is important to note:

> it is critical that the jury be instructed that only if they are satisfied beyond reasonable doubt that the accused has told deliberate lies and that the inference

[163] S Tilmouth, 'The Wrong Direction: A case study and anatomy of successful Australian criminal appeals' ('The Wrong Direction'), previously presented at the Criminal Lawyers Association of the Northern Territory Bali Conference, 24 June 2013. The period of the research for the report ran from 1 June 2005 to 31 December 2012. Tilmouth is a judge of the District Court of South Australia. He is the co-author with J Glissan of *Australian Criminal Trial Directions*, LexisNexis Butterworths, Sydney, first published 1990 as *The Right Direction*, discussed in *Miscarriages* at 1.1.1. The reference is to *R v Heyde* (1990) 20 NSWLR 234 [*Heyde*].
[164] *R v Sutton* (1986) 5 NSWLR 697 at 701
[165] *Heyde* at p 236; Gleeson CJ citing Burt CJ in *R v Buck* (1982) 8 A Crim R 208.
[166] *Heyde* at p 237 citing *R v Lonergan* [1963] Tas SR 158 at p 160; Burbury CJ.
[167] *Heyde* at p 246.

> should be drawn that [the] motive for doing so was a fear of the truth, in the sense discussed, should they conclude that the relevant statements of the accused provide affirmative support for the prosecution case. In addition the jury should be informed that they could only draw that inference if they are satisfied that there is no other reasonable hypothesis for the telling of the lie. In this context the trial judge should be *astute to ensure that the jury properly understands that a lie may be explicable upon other hypotheses*.[168]

The approach taken in the Neill-Fraser case can be compared to that of *R v Wood* where the appeal court stated:

> It would seem that he lied about some matters. Certainly his behaviour was at times unusual. Nevertheless, the trial judge ruled that the Crown could not use any alleged lie as a consciousness of guilt lie, a ruling about which there is no controversy.[169]

The judge in Wood noted that, '[t]he prosecutor emphasised that … the applicant told a number of lies about [the] situation. I accept that he did lie..'.[170] However, he added an important note of caution:

> I accept that there are anomalies and inconsistencies in the accounts which the applicant gave of his movements … [which] arouses suspicion. However, a suspicion, even a strong suspicion, is not sufficient to make good the prosecution case.[171]

He then made a point which reflects the concern about the Neill-Fraser case:

> It may be that there are some inaccuracies in the chronology reflected in the various statements which [Wood] made. However, the prosecutor's analysis of these events is *nothing more than speculation*… Whatever inaccuracies there were … and whatever lies he told … they did not lead logically to the conclusion that the applicant had made a deliberate decision to isolate Ms Byrne. There was no basis for the drawing of such an inference. That scenario amounted to *nothing more than conjecture*.[172]

Those critical comments by the judge provided an important basis for the overturning of the conviction in the Wood case.

Concluding summary on the prosecution case

Apart from having led evidence from the forensic witnesses which should have been excluded there were an extensive range of submissions by the prosecutor which should not

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[168] *R v Heyde* (1990) 20 NSWLR 234 at 246 (emphasis added) citing *R v Preval* [1984] 3 NSWLR 647 at 651; *R v Collings* [1976] 2 NZLR 104 at 117; *Lonergan v The Queen* [1963] Tas SR 158 at 160 and *R v Toia* [1982] 1 NZLR 555 at 559
[169] *R v Wood* [2012] NSWCCA 21 [*Wood*] at [14].
[170] *Wood* at [371].
[171] *Wood* at [359].
[172] *Wood* at [371] (emphasis added).

have been made. Those concerning the specific nature of an attack upon Mr Chappell, and those relating to the details of the disposal of his body were unsupported by any evidence. The suggested inferences that Mr Chappell must have been attacked by someone known to him and not by a stranger were not supported by any expert opinion to that effect and should not have been put to the jury. The very extensive submissions by the prosecution to the effect that Neill-Fraser had been untruthful and had engaged in conduct with a view to misleading investigators or prosecutors was not consistent with the obligations of the prosecution to present the case against the accused fairly. The suggestion that a connection with possible drug smuggling activities was nonsense, was not consistent with what was known by the police concerning those issues. As we have seen, the leading authorities on these issues would have required detailed warnings to be given to the jury to at least make them aware of alternative possible explanations consistent with the innocence of the accused.

It just remains for us to review the way in which the judge encouraged the jury to dismiss possible explanations consistent with the innocence of Neill-Fraser.

The Judge - summing up to the jury

A circumstantial case is one where there are no direct or eye-witnesses to the events in question. The surrounding circumstances then provide the only basis for the drawing of appropriate inferences. In such cases there are special rules which apply.

In this case the judge correctly observed that in a circumstantial case the conclusion of guilt has to be the only rational conclusion open on the evidence that the jury accepts. If there is 'any rational hypothesis' or 'any sensible theory' consistent with innocence, then Neill-Fraser had to be found not guilty.[173] One criticism of this case is that this explanation was only provided to the jury in the judge's summing up at the end of the trial. It meant that the jury members had sat through the hearing of all the evidence, no doubt considering how it may have indicated her guilt of the crime for which she was accused, and unaware that pathways to innocence may have been equally important.

In Neill-Fraser's case the judge made it clear that it was a circumstantial case in relation to a charge of murder.[174] It must therefore be established that murder is the only rational explanation of the facts accepted by the jury and that there is no other rational explanation. The judge explained how the obvious alternative explanations relating to disappearance,

[173] Trial transcript at p 1504.
[174] Trial transcript at p 1507.

accident, suicide and third party intervention could be excluded. If he was mistaken in respect of any one of those, then it would mean that a rational explanation, consistent with the innocence of Ms Neill-Fraser, was still open on the facts and the conviction should therefore be overturned.

In *Fitzgerald v The Queen* Fitzgerald had been charged with the murder of one person and causing serious harm to another.[175] The prosecution had not alleged that Fitzgerald struck the blows which caused the injuries, only that he had been present at the scene when the events occurred. His conviction was based upon his participation in the joint-enterprise or his being part of a common plan to attack the victims. Fitzgerald's presence was inferred from the discovery of his DNA which had been found on a didgeridoo at the crime-scene and that was thought to be sufficient to indicate his presence at the crime-scene and his implication or complicity in the commission of the crime. It was subsequently established that there was a possible explanation of those circumstances consistent with Fitzgerald's innocence. The previous evening Fitzgerald was at a boxing match where he had on two occasions shaken hands with another person who was known to have been at the scene and also to have touched the didgeridoo whilst there. The forensic scientist accepted that the sample of Fitzgerald's DNA could have been transferred to the didgeridoo as a secondary transfer – by a third-party, rather than by direct contact with Fitzgerald.

That was sufficient for the court to accept that an innocent explanation consistent with the innocence of the accused could not be ruled out. The High Court held:

> it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a reasonable doubt as to the appellant's guilt. Alternative hypotheses consistent with the appellant's innocence … were not unreasonable and the prosecution had not successfully excluded them.[176]

The question arises as to whether the prosecution had excluded all explanations consistent with the innocence of the accused in the Neill-Fraser case.

Disappearance

The judge dealt with the possibility of disappearance by stating, 'there is evidence that tends to establish that Mr Chappell is dead and gone'.[177] However, the matters which the judge

[175] *Fitzgerald v The Queen* [2014] HCA 28.
[176] *Fitzgerald* at [36].
[177] Trial transcript at p 1507. In the following emphases are added.

referred to in support of that conclusion do not do in fact provide support for it. The judge stated there is, 'the evidence from the family of not having heard from him'. That, of course, is what they would also say if in fact Mr Chappell had just disappeared. The judge then observed that there are:

> inquiries as to other police forces and Medibank and so forth – Medicare and so forth, that have revealed no sign of him still being alive, and there some paragraphs in the agreed facts … as to inquiries that were made and revealed no evidence of him still being alive.

The references to 'no sign of him still being alive' is consistent with both disappearance and death and provide no basis for discriminating between the two. The underlying observations are that there are no confirmed sightings of him and no activity by him or attributed to him. This is what one finds in all cases where people have 'disappeared'. In effect, the judge is citing evidence of 'disappearance' as if it were 'proof of death'. This is clearly an invalid and inappropriate inference, and would collapse the distinction between a person who has disappeared and one who has died.[178]

It is important to note that the National Missing Persons Coordination Centre states that each year 38,000 people are reported missing in Australia.[179] While 95.5 percent of people are found within a short period of time, there remains approximately 2,000 long term missing persons; those who have been missing for more than three months. It would be irrational to infer that they were all dead. Indeed, there is no principle by which one can discriminate between the missing and the dead apart from the discovery of the body or evidence of it. None of this was mentioned in the course of the Neill-Fraser trial to assist the jurors to obtain a sense of perspective in relation to these issues.

Accident

The judge stated in his summing up to the jury, '[s]o there's also evidence that tends to suggest that what happened was not an accident.'[180] However, the factors which he cited failed to support that conclusion. The judge stated, 'the evidence that the Four Winds was sabotaged tend to suggest there was no accident.'

[178] See 9 November 2015, 60 Minutes, '60 Minutes track down fugitive Michael Hand living in United States', where it is reported that 'Michael Hand has been presumed dead for 35 years. That is, until #60Mins caught him in his tracks.' It is claimed that Hand had been living under an assumed name in Idaho Falls in Idaho.
[179] The National Missing Persons Coordination Centre is described as 'Australia's official website for missing persons'.
[180] Trial transcript at p 1507.

Clearly, proof of damage to the boat is not proof of damage to the person of Mr Chappell. Indeed, the two events (the disappearance of Mr Chappell and damage to the boat) could be entirely unconnected. There is no logical necessity which ties them together. There is nothing to exclude the possibility that Mr Chappell could have gone off somewhere and later on some people came across the yacht and being unattended, caused damage to it.

The judge also referred to the fact that, '[t]he blood in the yacht tends to suggest that there was – that there was no accident.' This reference by the judge to 'the blood' emphasises to the jury the significance of the various (and inconclusive) test results which were inappropriately admitted, which we discussed at length earlier in this research report. When those results are excluded, there is no sufficient evidence of any blood or bloodstain pattern analysis which is indicative of a murderous assault or indeed of any assault. Minor traces which were found were entirely consistent with the account provided to the jury of Mr Chappell's extensive nosebleeds on the boat which required him to be hospitalised and subsequently flown back to Hobart.[181]

Suicide

The judge also stated, '[t]here's *evidence* that tends to suggest that Mr Chappell didn't commit suicide.'[182] The judge referred to the evidence of Mr Chappell's son Tim who said that Bob Chappell wasn't depressed or suicidal. However, such views, even if correct, cannot be said to be contra-indicative of suicide. Tim was not particularly close to his father, and even if he were, there are countless examples of people who commit suicide in circumstances which come as a great surprise to their families or friends.[183] The same can be said of the comments by the judge noting that Tim said that his father was 'interested in his work, regarded it as important'. Again, sadly, many people in similar situations do commit suicide. Indeed, much was made throughout this trial, as we saw earlier, of the *frailty* of Mr Chappell as a factor enabling Neill-Fraser to bludgeon him to death. In his study on suicide, Riaz Hassan noted that suicide amongst older people is associated with declining health and an increasing sense of dependence.[184]

[181] Trial transcript p 51 Crown Opening, 'some witnesses will call [recall] "Bob", developed a really severe nosebleed and he had to be hospitalised up in Queensland while the boat sailed on'.
[182] Trial transcript at p 1507 (emphasis added).
[183] In making various points here, the authors wish to emphasise that it is important from the point of view of legal analysis to show that suicide as a possibility could not be ruled out. They are not to be understood as suggesting that there is any particular reason for suggesting that Mr Chappell did in fact commit suicide.
[184] Riaz Hassan, *Suicide Explained – The Australian Experience,* (1995) Melbourne University Press, p 157.

As the authors of a recent study on suicide stated, 'the reasons for a suicide are never really knowable, ..'.[185] They point out that there have been some 30,000 academic papers on suicide published between 1980 and 2011. They cover complex issues in fields such as psychiatry, psychology, genetics, neuroscience and sociology. If one is to conclude from two simple observations about the appearance of suicidal ideation and 'interest in work' to a conclusion about the probable occurrence of a suicide in a specific case 'beyond reasonable doubt', then one would have to demonstrate that the conclusion is not only compelling but also consistent with the medical, psychological and sociological studies in this area. Regrettably, the judge had no expert advice on this topic to assist him, and the best that one could say is that his own intuitive assumptions in this area are not a satisfactory legal basis upon which to encourage a jury to convict someone of murder. It is clear that if suicide could not be ruled out of contention as a reasonably possible cause of death, then Neill-Fraser could not be convicted of murder in a circumstantial case.

The judge then added, 'and if he did commit suicide it's hardly likely that he would have scuttled the yacht'. The basis for this probability assessment by the judge is unarticulated, but clearly presupposes the application of principles concerning suicidal behaviours. As there was no evidence before the court on this topic, it represents another issue where the judge is not simply commenting upon the evidence for the assistance of the jury, but is introducing a form of 'junk' expert evidence in the guise of 'comment', which is clearly unacceptable.

The judge has also presupposed in what he says that the two events (suicide / scuttling the boat) are necessarily connected and demonstrate some inconsistency. The suggestion is that the scuttling of the boat rules out the possibility of a suicide. But this seems illogical. There is no *necessary* relationship between the two events. It is clearly possible that one person could commit suicide and another person could come across the empty boat and vandalise it.

There is also no necessary inconsistency between the two events. If a person was in a frame of mind to inflict life threatening damage to oneself, then why would they not be likely to inflict damage upon their immediate physical environment? A suicidal person might well burn their house down or drive their car off the cliff. However, to suggest (as the judge does) that a person who is willing to kill oneself, would not be willing to cause physical damage to some inanimate object such as a boat appears to be a *non-sequitur*.

[185] Ben Fincham et al, *Understanding Suicide: a Sociological Autopsy*, 2011, Palgrave MacMillan, London pp 1-2.

The judge then added that suicide would be unlikely because he wouldn't have, 'tied the fire extinguisher to himself and disappeared without a trace.' This is unacceptable. The judge is not entitled in summing up to the jury to make assertions of fact which are unsupported by any evidence. There is no evidence to suggest that Mr Chappell and the fire extinguisher were united in some final, fatal embrace. Neither Mr Chappell nor the fire extinguisher have been located. For the judge to put this proposition to the jury as if it were an established fact is not only prejudicial but invites them to engage in impermissible reasoning and to wrongly exclude the possibility of suicide.

The location of 'the body'

The judge then referred to *the evidence* which suggests that Mr Chappell's body was, 'taken away and dropped in the unsearched deeper waters of the River Derwent.' Again, there is no evidence to support this. The judge continued to state that, 'the evidence tends to suggest that the – the body must have been disposed of in some unsearched part, or else travelled to some unsearched part of the Derwent.'[186]

This presupposes, of course, that there is proof of 'a body'. There is none. As we have seen above, the reasoning which has led the judge to infer that there must be a body is fundamentally flawed. Here, the judge unfortunately confuses 'the evidence' about the searches with invalid inferences which can be drawn from the results of such searches. Relatively small areas were searched and all of the search results were negative. It would be rational to conclude that Mr Chappell's body was not found and no one knows where it is, or indeed if there is a body to be found. It would be irrational to conclude that 'the body' must therefore be located in some region outside the designated search area.[187] This would be to beg the question which is being asked. What happened to Mr Chappell? As the judge explained in his earlier remarks to the jury 'basing your verdict on *the evidence* means that you mustn't use guesswork or speculation in arriving at your verdict.'[188] This is precisely what the judge himself has done.

[186] Trial transcript at p 1508.
[187] Given the problems of visibility and the difficulties attending such searches, the possibility that the body was within the search area but not located cannot be reasonably excluded.
[188] Trial transcript at p 1493.

The brevity of reasoning supporting the judge's conclusions

It is important to note that the issues of the possible disappearance of Mr Chappell, and of accident and suicide were all dismissed by the judge in less than one page of transcript. Five sentences were devoted to the issue of disappearance; three sentences to the issue of an accident, and three sentences to dismiss the possibility of suicide.

The judge is also clear about where the evidence leads: 'you can fairly readily conclude that Mr Chappell has died'; 'all the evidence .. tends to suggest .. there was no accident .. Mr Chappell didn't commit suicide'. In the midst of this there is hardly a note of caution to the jury, 'So it seems to me, it's a matter for you, but it seems to me that you can fairly readily conclude that Mr Chappell has died.'[189]

Clearly the judge has not given a balanced view to the jury. One which would emphasise the duty to consider carefully all possible rational explanations consistent with the innocence of the accused. They have virtually been directed to find that foul play is the only option left to consider.

As for the involvement of people other than the accused, the judge states, '[t]here's evidence that *tends to suggest* that Claire Chappell had nothing to do with the disappearance.'[190] Much of the rest of the judgment is given over to an explanation of why the jury might like to consider that Ms Neill-Fraser may have murdered Mr Chappell.

The judge provides a detailed account of the saboteur with intimate knowledge of the boat. He explains that someone had used the dinghy from the *Four Winds*.[191] He notes that someone used the winch handles and '[t]he evidence is that they were kept in the rear port locker.'[192] The judge does not mention here that 'the evidence' in this respect was given by Ms Neill-Fraser and without it the police would never have known that the winch handles were in the wrong place. An extraordinary thing if in fact this was a sign of murder and Neill-Fraser was as devious as the prosecution had alleged. The judge also noted, 'there's evidence of the blood on the steps, and Ms Neill-Fraser has said that that wasn't from the nosebleed.'[193] Again, this observation was obviously important in building the case *against*

[189] Trial transcript at p 1507.
[190] Trial transcript at p 1508.
[191] Trial transcript at p 1508.
[192] Trial transcript at p 1509.
[193] Trial transcript at p 1507.

Ms Neill-Fraser, and there is not the slightest suggestion that she was being a 'liar', a 'bare-faced liar' or trailing 'red herrings'.

The judge also noted that someone also made sure that the bilge pumps didn't work. Here, the judge takes the opportunity to mention, 'Ms Neill-Fraser was familiarised with the plumbing'.[194] However, he does not mention the fact that it was Neill-Fraser's view that the boat was unsinkable because of its separate water-tight compartments:

> Neill-Fraser: it's unsinkable in the normal way, so –
> Defence counsel: What do you mean it's unsinkable?……
> Neill-Fraser: Well it's got six watertight bulkheads and it was just one of the reasons we liked it so much and it – it can't sink because even if you do get a small hole in the hull the bulkheads can be shut off and the pumps – the bilge pumps would work.[195]

In this context it would have been appropriate for the judge to remind the jury of these views being expressed by the accused and to consider whether she was being devious or just showing a genuine sense of amazement that anyone would try to sink the unsinkable boat.

It appears that however familiar the saboteur was with the boat, they did not seem to appreciate this factor, which may well explain why the boat ended up 'low in the water' but was clearly not sunk when the police arrived the following morning.

Neill-Fraser's motives or motivations

In his summing up the judge mentions that there was a Crown witness who stated that Neill-Fraser had, many years previously, attempted to solicit him as an accomplice in the murder of her husband and brother. The outlining of those concerns takes place over five pages of transcript.[196] Four times as much attention is giving to those damning allegations as is given to the discussion of rational alternatives to murder.

The judge discusses motive in the form of greed and the allegation that the relationship was over. For an insight into the relationship between Neill-Fraser and Chappell, the judge mentions the evidence of three people:[197]

[194] Trial transcript at p 1509.
[195] Trial transcript at p 1179.
[196] Trial transcript at p 1511-1515.
[197] Their roles are explained by the prosecution in opening at trial transcript p 51.

Stevenson - a temporary and short-term navigator of the boat;

Rowe – an electrician who worked briefly on the boat;

McKinnon – the diesel mechanic.

The prosecutor said in his opening address to the jury that Neill-Fraser had told the police that she was in a committed relationship, but these three men knew differently. 'So to the police it was a committed relationship but to these three men in Queensland quite a different story, it was over'.[198] It does seem strange that if Neill-Fraser had been planning to 'do away' with her husband, and she was as cunning and manipulative as the prosecution suggested, that she would tell these temporary workers she came into contact with, very briefly, something so obviously inconsistent with the story she was going to tell the police.

It may be thought to be unsatisfactory that the evidence of the relationship between the accused and her partner of nearly 20 years, in the context of an allegation of murder, is left to three hired-hands who had only known them briefly. McKinnon, the diesel mechanic, said in his evidence that they seemed friendly enough, but not too intimate, 'not intimate, just – just friends, I suppose'.[199] One wonders what level of intimacy might be expected when an older couple are having discussions with the person designated to fix the diesel engines. The judge noted that the family members did not note any evident hostility.[200]

However, the judge then devotes four pages of transcript to detailing the financial motives Ms Neill-Fraser may have had and concluded, '[w]ell I've canvassed some aspects of the circumstantial evidence' and added, 'the defence say that you simply can't rule out the possibility that someone else did it'.[201] But of course this does not come with the ringing endorsement of the judge or indeed of any elaboration of it.

It may be said that the defects in the summing up by the judge were reminiscent of those which were found in the UK case of *R v Bentley*.[202] As was said in that case, '[t]he language used was not that of a judge but of an advocate.'

> Towards the end of his summing up, the trial judge did indeed remind the jury of ... essential points that [the accused] relied on.. This very brief and somewhat dismissive account, coming at the very end of the summing up and following a much longer account described as the whole case, did not in our judgment do justice to the points which, good or bad, had been made on behalf of [the

[198] Trial transcript p 64 Crown Opening.
[199] Trial transcript at p 522.
[200] Trial transcript at p 151.
[201] Trial transcript at p 1518.
[202] *R v Bentley (Deceased)* [1998] EWCA Crim 2516.

> accused] and which the jury should have been invited to consider. Whether the jury would have been impressed by these points if they had been dispassionately identified and laid before them we can never know. As it was, the jury were never fairly invited by the trial judge to consider the points which had been made on the [accused's behalf].
>
> The effect was to deprive [the accused] of the protection which jury trial should have afforded. 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 citizen*.[203]

Much the same may be said about the judge's address to the jury in the Neill-Fraser case.

The 'fresh and compelling' test

The claim has been made that various items of forensic evidence in this case should have been held to be inadmissible at the trial. It is also claimed that various submissions by the prosecution, and various directions by the trial judge were also either inadmissible or inappropriate. A new right of appeal was established in Tasmania in 2015.[204]

The Act enables a further appeal where there is 'fresh and compelling' evidence which should be considered on an appeal. At the leave to appeal stage it has to be established that it is 'reasonably arguable' that such evidence will be adduced on the appeal.[205] At the hearing of the substantive appeal it has to be established that there has been a 'substantial miscarriage of justice'.[206]

In the case of *R v Drummond (No 2),* Peek J explained that where there has been false or misleading forensic evidence led at trial, or where the prosecution has put submissions at trial which are false or misleading, that will be sufficient to satisfy the 'fresh' and (most likely) the 'compelling' requirement under the Act at the leave to appeal stage.[207] This is on the basis that expert witnesses and prosecutors have a duty not to mislead the court. As Peek J said, the accused and defence counsel are entitled to rely upon the fact that prosecutors and expert witnesses will act in compliance with their duty. A subsequent discovery that they have failed

[203] Ibid (emphasis added).
[204] The Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015 which came into force in Tasmania on 2 November 2015. The provisions are now contained in the *Tasmanian Criminal Code Act* 1924 Schedule 1 402A.
[205] The 'reasonably arguable' standard applies on all applications for leave to appeal.
[206] The detailed discussion of these issues is in *Miscarriages* chap 6.
[207] See the discussion of *R v Drummond (No 2)* [2015] SASCFC 82 in *Miscarriages* at 6.5.5.1.

in this regard will then constitute the 'fresh evidence' requirement of the test for leave to appeal. No doubt the same principle would apply to the issue of judicial misdirections.

An important component of the fresh evidence test is that the evidence could not 'even with the exercise of reasonable diligence have been identified at the time of the trial'.[208] It might be suggested that the errors which we have identified in this article, having been identified, in the main, from an analysis of the trial transcript, do not constitute *fresh* evidence. It could be argued that any person with the appropriate legal knowledge could have identified those errors at the time of the trial. Apart from the point made by Peek J in *Drummond* about the accused and defence counsel being able to rely upon prosecutors and expert witnesses not misleading the court, there is one further important argument, in the nature of an estoppel, which would apply to any prosecutors attempting to run such arguments.

Suppose we have a defence application for a further appeal based upon the existence of prosecutorial error at trial. If the prosecution were to object to such an application on the basis that the discovery of such error at trial was not 'fresh' it would rebound badly upon the prosecution.

The lack of 'freshness' argument entails the prosecution asserting that the error could with reasonable diligence have been discovered at the time of the trial by defence counsel. At that point, defence counsel would be bound to ask the prosecution if they exercised reasonable diligence at the time of the trial. If they assert that they did, that would be tantamount to admitting that they knew of the error at the time of the trial, but failed to inform the court (or the defence) of it. That would surely amount to an admission upon which a charge of unprofessional misconduct could be based, which interestingly, in turn, would satisfy the 'fresh evidence' ground for leave to appeal.

If the prosecution were to assert that they did not know of the error at the time of the trial, because they failed to exercise reasonable diligence, then that admission would also be sufficient to also satisfy the 'fresh evidence' ground of appeal.

It is hard to imagine the circumstances in which an acknowledged error by the prosecution, or an expert witness, would be rejected at the leave stage for lack of 'freshness'. It may of course be argued that the error which has been identified was not sufficient to amount to an issue which was 'compelling', in that it was not sufficiently 'substantial' or 'highly

[208] *Tasmanian Criminal Code Act* 1924 Schedule 1 402A (10).

probative' in the context of the issues in dispute at the trial. No doubt there may be errors by the prosecution which could be disregarded under the '*de minimus*' rule, and might otherwise be inconsequential. We are of the view that such arguments in relation to the issues which we have identified in this research report would not be successful.

It is also important to note that the requirement for evidence which is fresh and compelling is only an initial test at the leave stage to enable the rejection of appeal applications which are without merit. So long as there is some evidence which is fresh and compelling any additional evidence which is indicative of a miscarriage of justice will be admissible, irrespective of whether it also happens to be fresh or compelling. In *R v Keogh (No 2)*, Gray J explained that where there is some evidence to satisfy the fresh and compelling test under the Act, additional evidence which is not fresh and compelling can then be considered also.[209] It is the contention of this article that all of the errors discussed here would be admissible on an appeal as satisfying the fresh and compelling test. However, even if it were only the misleading forensic evidence which satisfied that test, then the remainder of the evidence discussed here would be admissible under the extended interpretation put forward in *Keogh*.

In the cases of *Drummond* and *Fitzgerald*, the appeals were allowed on the basis of a single forensic error. It is the contention of this article that the errors outlined here are far more extensive and together would certainly satisfy the 'substantial miscarriage of justice' test under the Act.

A prosecutorial concession on this appeal

Because of the nature of the prosecutorial and forensic errors which have been identified in this case, it would provide a suitable opportunity for the prosecution to concede that appealable error has occurred and to make a joint application to the court that the appeal be allowed.[210] Such concessions are not without precedent in Australia. In the case of Farah Jama in Victoria, the prosecutor assigned to the appeal recognised that there had been a judicial misdirection.[211] It appears that the judge had given the jury a 'lies direction' based upon a misunderstanding of the facts.[212]

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[209] See the discussion of *R v Keogh (No 2)* [2014] SASFC 136 as applied in *Drummond* in *Miscarriages* at 6.5.5.1.
[210] For UK examples of this see *Miscarriages* 8.6 'Prosecution concessions' at p 247.
[211] See the account of this in Julie Szego, *The Tainted Trial of Farah Jama*, Wild Dingo Press, 2014, review by Bob Moles. See also The Hon FHR Vincent, AO QC, Report Into the Circumstances that led to the Conviction of Mr Farah Abdulkadir Jama (2010) Victorian Government Printer.
[212] See the discussion of this topic above 'Lies and red-herrings' in relation to the *Edwards* direction.

Mr Jama had said in his statement that he had never been to a nightclub, let alone a nightclub where an apparent sexual assault had occurred. In evidence at the trial, Mr Jama's friend said that he had twice been to a nightclub with Mr Jama. Where there is evidence from which it might be inferred that an accused had told lies, the judge is required to give the jury a lies direction which asks the jury to consider that a lie may not be motivated by consciousness of guilt, but by a desire to avoid embarrassment or for other similar reasons. However, in this case, the prosecutor assessing the appeal realised that the judge's direction was based upon a misunderstanding of the evidence.

Mr Jama had given his statement two years before his trial. At that time. his statement that he had not been to a nightclub was true. Two years later at the trial, his friend's statement that he had twice been to a nightclub was also true, as they had gone there in the intervening years. There was therefore no proper basis upon which the jury could infer that Mr Jama had told lies. The prosecutor accepted that an appealable error had occurred and took the initiative in bringing this to the attention of both the defence and the court registry. Indeed, he asked the registry to expedite the hearing of the appeal and the appeal court sat the next working day to hear the appeal. In an extraordinary judgment, the court agreed that appealable error had occurred and that the conviction should be set aside.[213] Indeed, the judgment of the court comprises just a single sentence:

> The Court, having read the materials filed by the parties and having considered the submissions and concessions of the Crown, is satisfied that it is appropriate to order that the conviction relating to the applicant be set aside and a verdict of acquittal be entered.[214]

It would in the opinion of the authors be entirely appropriate if the prosecutors and the Court of Appeal in Tasmania were to take a similar approach to the wrongful conviction of Sue Neill-Fraser.

[213] There was of course the additional extraordinary issue of the contamination which occurred in relation to the DNA sample in this case for which this case is widely known.
[214] See *R v Farah Jama* [2009] VSCA No 764 of 2008.