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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 95/2018
[2019] NZSC Trans 21

MARK EDWARD LUNDY
Appellant

v

THE QUEEN
Respondent

Hearing:	27-28 August 2019
Coram:	William Young J O'Regan J Williams J Arnold J Miller J
Appearances:	J H M Eaton QC, J A Kincade, J Oliver-Hood and H C Coutts for the Appellant P J Morgan QC and M L Wong for the Respondent

CRIMINAL APPEAL

MR EATON QC:

May it please the Court, Eaton appearing on behalf of the appellant Mr Lundy. With me Mr Oliver-Hood, Ms Kincade and Mrs Coutts.

MR MORGAN QC:

May it please the Court. Morgan for the respondent and I am assisted by Ms Wong.

MR EATON QC:

May it please Your Honour, the determination as to whether this appellant suffered a substantial miscarriage of justice was undoubtedly a case specific inquiry and one that was assessed against what are established legal principles. The case itself, and I just wanted to spend a few minutes mentioning some background matters, has undoubtedly an extraordinary history. A unique history in New Zealand's jurisprudence. Inexplicably the name Mark Lundy has become synonymous with flawed expert opinion, flawed science and with miscarriage of justice. That was the position in 2013 when the Privy Council determined this case. It was the position again in 2018 when our Court of Appeal dealt with the case, recognising miscarriage and yet he remains in custody having served now over 17 years of a prison sentence and yet to face a trial where he is only confronted with legally admissible evidence. It is not just that factor that makes Mr Lundy's case novel. He is not simply a victim of flawed and novel science. He is in, what I respectfully submit is the novel position as well as a defendant in a murder case, of having been convicted at two trials where the Crown were permitted to significantly vary their allegations, their key factual allegations, both however successful and in the first of course where he had made a significant concession about this disputed purported tissue.

So two trials run on different factual bases and then under the umbrella of the application of the proviso, a third trial, one determined by the Court of Appeal effectively a trial on the papers, not witnesses, no cross-examination, no oral submissions, no addresses and in relation to a case that in my submission he was not asked to answer at trial. That is, was the central nervous system evidence and the DNA evidence alone sufficient to establish the key issue at trial, and therefore guilt. That being a determination notwithstanding the fiercely disputed expert evidence that the Crown in my submission exhaustively fought to ensure that the jury heard and we have a Court of Appeal decision where contrary to that approach from the Crown, there has been assessed that the evidence was not in fact particularly significant.

WILLIAM YOUNG J:

Well I do not think they said it was not significant. I think they said that other evidence left them sure of guilt.

MR EATON QC:

Yes this evidence was not determined to be in the same level of significance that the Crown attached to it and that is a key issue in this trial because the Crown approach clearly marked by the history is that the CNS plus the DNA did not get them over the line and hence they searched for and obtained and got the NFI evidence.

WILLIAM YOUNG J:

Well did they ever say that?

MR EATON QC:

That is implicit in the way that they conducted the litigation.

WILLIAM YOUNG J:

Because they relied on the mRNA evidence?

MR EATON QC:

Not simply because they relied on it but because after the Privy Council they went on a voyage of investigation to try and find evidence to fill what was perceived to be a void or a gap between the DNA and the CNS.

WILLIAM YOUNG J:

But wasn't that at a time when the IHC evidence was in dispute?

MR EATON QC:

Yes but after the IHC evidence found a way as being in dispute, there was no shift in position from the Crown.

WILLIAM YOUNG J:

No well they may have been overegging the omelette. It doesn't mean the omelette wasn't sufficiently egged in the first place. I mean I think this is a debating point. Unless you can take us to somewhere where the Crown says, well we concede that the absent mRNA evidence we haven't got a case, then I think it is pretty speculative.

MR EATON QC:

Well I refer to it because my submission is a matter of law about the fairness limb of the proviso is that one has regard to the significance of law in the context of the case. That history must be relevant and it must be relevant to fair trial, how the parties themselves have dealt with that evidence, notwithstanding a contrary view or a new view or a revised view that a Court of Appeal might take much further down the track. And so of course the Court of Appeal nevertheless decided this trial was fair in law and that's what is at the central issue in this trial.

In applying the proviso, the Court by way of summary, when he took the view that this case was just about the application of science and really didn't involve further detailed factual contests that might otherwise lean the Court to engage with extra caution before applying the proviso, but in my submission that is not a fair representation of this case and it is best demonstrated by

reference to what happened at trial one in compared with trial two because if ever there was a case where we had a history which said be very wary about making strong factual determinations in this case. It was this one because we know at trial one, the Crown persuaded a jury and then persuaded our Court of Appeal to say that that approach, the factual basis upon which the verdict at the trial one was reached was unchallengeable, that he had killed his wife and daughter at seven to 7.30 at night, that he had made an extraordinarily fast drive from Johnsonville to Palmerston in the early evening. That the cell tower evidence showed that he was away from Wellington at that period of time, that he had manipulated the family computer to manufacture a shutdown which was not in fact true, it was all part of trying to get an alibi and they had an eye witness who they presented as being a reliable witness who they were still clinging on to in the Privy Council who said I saw him, and I saw him running to a car that fits a description of his car. There was this big man in a wig, he had terror on his face and that was the factual basis. As I say, the Court of Appeal said that that was unchallengeable. It transpires, we know, many years later when the failings in the forensic evidence as regards assessing time of death by reference to stomach contents, that the Crown do a complete about face and say, actually no all those factual matters which we advanced so firmly, so aggressively, and so successfully, both at trial or on appeal, were all completely and utterly wrong. That evidence was quite unreliable. The eyewitness did not see Mr Lundy; the time of death was quite different, there was no fast driving at that time of day, he didn't manipulate the family computer. Our experts were all wrong. And it was only literally on the eve of the trial where there was an application to amend the indictment to say, we are no longer alleging a time of death that would even incorporate that time of seven to 7.30. We are now committing to a time of death the following day, on the 30th, at early morning. And then they advance a theory at trial two, successfully, that the likely catalyst for the homicide was a phone call received around eight or 8.30 that night from a business colleague, when of course at trial one they advanced a theory successfully that the homicide has already been completed.

And that is important in my submission when one looks at whether it is right to apply the proviso in this case because when you change your theory so significantly and so many years, 14 years after the event, then that causes significant prejudice, significant unfairness to a defendant and just to give but one example. We know that early on in this case, in 2000, there were in excess of 50 people who were nominated as suspects, the vast majority of whom were excluded from the investigation because they had an alibi for that seven to 7.30 timeframe. That included one particular suspect in whom the police had successfully obtained a suspect compulsion order in our High Court. So that is the factual background and what it means is, although the Court have said basically this was a case about science and therefore we are not going to exercise any particular caution that might otherwise apply to the application of the proviso. In my submission, the Court has misread the extent of factual dispute which was ostensibly, essentially, jury issues and we are left with so many unanswered questions that were the proper subject of debate before a jury but remain unanswered. Not the least of which in which there has never been a theory for is how on earth could Mark Lundy have carried out the crime as alleged and managed to rid himself of any forensic connection other than these two tiny spots on his shirt. Where did the weapon go? Where did the jewellery box go? Where did the overalls that he must have been wearing go, where did his shoes go? How did he clean up the car such that there was no transferrable matter on the jury box into the car. How did he clean up the motel if he washed himself and cleaned himself there. Where did everything go? And the Crown theory they advanced was he must have got rid of everything before he got back in his car because there was a very fine tooth-comb forensic examination of his car and nothing was found and of course the police then knew he was on foot. Where did this evidence go? Where did the murder weapon go? How on earth was he able to do this and as it happens, the only evidence that links him is when he hands over his shirt that he says is my shirt and I was wearing it last night.

How did it happen, seen by no one? Goes to work the next morning completely normally and of course as we raised in the Court of Appeal, whose hairs was Mrs Lundy holding in the palms of her hand? Whose was the male

DNA found under the fingernails of both Amber and Christine? Whose jersey or top with the matching blue fibres that were found under their fingernails in significant quantities that did not match the defendant's top? Whose was the palm print, whose was the footprint? All classic, critical important jury considerations but in applying the proviso, removed from jury consideration.

In *Howse* in the minority decision of the Privy Council at paragraph 44 the Court said this. "When trials are conducted according to rules, but safeguard the rights of persons charged, people respect the verdicts because they have been reached in conditions which the law regards as fair. Observance of the rules serves the wider public interest as well as the interests of the accused." And in my respectful submission, the criminal justice process in Mark Lundy's case has failed to safeguard his rights in the wrongful and illegitimate use of the mRNA evidence undermined the integrity of his trial and rendered it unfair.

O'REGAN J:
The *Howse* case is hardly one that favours your position is it?

MR EATON QC:
Well obviously I urge the Court to carefully consider the minority decision which is a powerful minority decision but what the *Howse v R* [2005] UKPC 30 decision is really, in my submission, telling us is that it is a case specific inquiry; it depends on the facts. And in *Howse* what was overwhelming for the majority was direct evidence that came from the accused's mouth. That is, I have confessed and I have information that only the offender could know, as opposed to some science from which we are inviting people to draw an inference and in my submission that is the factual distinction but the principles of *Howse* in my submission are relevant and helpful to this case.

Can I first of all deal with the inquiry about the breach of the fair trial right. The legal principles it seems are relatively settled in a case where the miscarriage has resulted from the wrongful admission of evidence. The question being what is the significance of that evidence in the context of the trial and that will determine whether the error was of a fundamental nature

and the question, did it carry significant additional weight having regard to the other evidence and if it did it will cause a trial to be unfair. Those are the principles which we have adopted in *Matenga v R* [2009] NZSC 18 and *Howse* reinforces those principles. So I guess the first question for this Court is when you determine the significance of the evidence in the context of the trial. How broadly do you conduct that investigation? Do you confine it to the trial record of the trial itself or as the appellant submits, is it a far broader inquiry when one is considering a fairness limb which means you have got to look at why the evidence was sought, what efforts went to obtain it, what was the pre-trial process, what was the response? What was the judicial assessment of it pre-trial? How did it feature at trial? That is to say, to what extent did it loom large at trial. How was it dealt with in openings and closings. Effectively how was it deployed at trial and then how was it dealt with post-trial when its admissibility is again challenged. Because I acknowledge from the outset what is different about this case is that it is very unusual for an appellant to have been through such a pre-trial process of challenging the admissibility of evidence to then have the ruling effectively reversed post-conviction so to that extent we are not talking about a flood gates approach to the proviso here. A flood gates concern; this is a very unusual set of factors. So in my submission, it is important to recognise when assessing the significance of this evidence that at the first trial the defence had conceded that it was Mrs Lundy's brain tissue. So that sets the history of it. That was a factor that the jury were told about at the re-trial. It was mentioned by my learned friend the prosecutor in his opening address. But after the Privy Council decision it is clear that the Crown resolved that there was a void in their case that they needed to fill.

WILLIAM YOUNG J:

A void? Their case could be strengthened.

MR EATON QC:

Well it was referred to by the trial Judge as a gap. It is a gap in their evidence. The evidence does not make the link between human CNS, it does not establish it is human CNS, that is the missing gap.

WILLIAM YOUNG J:

Where did the Judge say that?

MR EATON QC:

It is mentioned on more than one occasion. Paragraph 78 of the summing up is a reference. The prosecutor tried to shut off the issue by seeing if it could bridge that gap and actually prove that the DNA did come from the tissue, that is where the NFI comes in.

WILLIAM YOUNG J:

Yes but the gap is, the science cannot tell us if it is her DNA. Secondly the science cannot tell us if it is human or animal tissue. The Crown says the issues do not sensibly arise from the facts of this case but the prosecution has tried to shut off the issue by showing that Mrs Lundy's DNA did come from that tissue, i.e. that by science they can prove the DNA came from the tissue.

MR EATON QC:

If in fact it is so overwhelmingly the inference that it did and there is no other available inference, inevitable inference, there is no gap to bridge.

WILLIAM YOUNG J:

The gap he talks about is the science gap.

MR EATON QC:

That's right.

WILLIAM YOUNG J:

And at paragraph 78 of the summing up starts, "The Crown says both these issues do not sensibly arise from the facts of this case." So that is what they are saying, is it doesn't matter if there is a gap. But we can close the gap anyway.

MR EATON QC:

And they went on to deploy it.

WILLIAM YOUNG J:

No, no I don't think it is a concession that they don't have a case.

MR EATON QC:

I am not saying it was a concession they don't have the case. I am talking about what was the significance of the evidence in the context of the trial because what happened was. The Crown's conduct is quite inconsistent with it being completely overwhelming. If it was completely overwhelming they would not have gone to the lengths they went to because the NFI was part of the –

WILLIAM YOUNG J:

Well what does it matter what the Crown thought? I mean the case is what the jury thought, what the Court of Appeal thinks and what we think. I mean obviously in any adversarial process, the counsel are likely to put the best possible evidence they can forward. They are not likely to say well I am pretty sure we have got enough if we just call 60% of our evidence, so we will flag away the last 40%.

MR EATON QC:

Yes well I guess in terms of the significance of the evidence in the context of the trial, this is the point that the minority in *Howse* spoke to and that is, if you have chosen strategically as a matter of tactics to advance this evidence, then you can't turn around and say, well we didn't need it. Don't worry about it, and pretend it didn't happen in terms of assessing fair trial.

WILLIAM YOUNG J:

But the majority in *Howse* obviously thought that they could.

MR EATON QC:

Well the majority didn't deal with the issue about it being a Crown tactic, but the majority focussed on the strength of the confession and said that's determinant and that is how I distinguish it on the facts.

WILLIAM YOUNG J:

There is quite a lot of rhetoric here and you saying what the Crown thought is all very fine but it doesn't actually assist me and I am only speaking for myself, in determining what the evidence actually shows because I know perfectly well that people will over read onwards. That they will call all available evidence, even though possibly they could get home on less evidence.

MR EATON QC:

Yes but what I am submitting to Your Honour is that the view that Your Honour is taking is too narrow and when one is looking at the fairness limb, under the proviso.

WILLIAM YOUNG J:

Deal with it when we get to fairness.

MR EATON QC:

Sorry?

WILLIAM YOUNG J:

Deal with it when we get to fairness.

MR EATON QC:

I am dealing with fairness now.

WILLIAM YOUNG J:

Are you?

MR EATON QC:

Yes this is the fairness limb. This is the significance in the evidence in the context of the trial and what I am saying Sir is it is relevant to look at, as part of the fairness assessment, why did the evidence come about and how did the parties respond to it. And, of course, here we know that post Privy Council the Crown –

WILLIAM YOUNG J:

Sorry probably my mistake but I thought you didn't get to fairness until paragraph 114 of your submissions.

MR EATON QC:

Yes what I said is I am going to deal with fairness first. And the reason for doing it is because it is in the record and I am just going to take the Court through the record to show how it came about because it wasn't just the – look if we could find something better to bridge the gap that would be useful. It was a very dedicated commitment of resources to try and fill what was perceived to be this gap because we know there was another process that was investigated in 2014. It is called fluorescent in situ hybridisation or otherwise known as FISH. It was ultimately abandoned by the Crown at pre-trial and ruled inadmissible but that was a process to see if the cells were human in origin and could determine sex. That was investigated in Seattle and not used. There was also the ESR here in Christchurch undertook what is called laser microdissection, LMD, where they try to obtain DNA results from specific cells from the shirt fabric. That involved cutting cells by laser but again that didn't work and in the midst of all this. They have also gone to the NFI in Holland, the National Forensic Unit and made enquiries with them about using mRNAs. So these are significant steps being taken to abridge a gap and then we also know that while all those steps are ongoing, at the end of the year they send the ESR elution, the eluded material off to UCLA Davis in San Francisco to Dr Wictum an animal DNA expert to see if she can help bridge the gap and of course we know what the result of that was. So there are significant efforts being made and then – and I just deal with these briefly because the Court will have read the pre-trial judgment of Justice Kós and the

pre-trial decision of the Court of Appeal but clearly once the Crown settled on the only success story from their perspective of those investigations, that is the NFI evidence, they were very anxious to get that before a jury. It is not a situation of saying, it's just not worth it. How many other cases in New Zealand are subject to an eight day pre-trial hearing to determine the admissibility of a particular aspect of the evidence. It is almost unparalleled.

WILLIAMS J:
But their official line was, wasn't it, as set out in 76 of Justice France's summing up?

MR EATON QC:
Well that's where they got to with it but in the build up to trial, there was no concessions being made. It is in the record of Justice Kós' decision. They are anxiously looking to make sure this evidence is before the jury and they would not have committed eight days of pre-trial time and the resources both at the first instance and on appeal, if this evidence didn't really make any difference to them.

WILLIAMS J:
What do we do with that? Do we disbelieve the proposition that the DNA evidence and the CNS tissue alone is enough to point irresistibly to the –

MR EATON QC:
That is the submission made and what I am suggesting is that of course they make that submission in case the jury don't accept the mRNA at trial.

WILLIAM YOUNG J:
But the mRNA at trial didn't prove it; it just made it more likely than not.

MR EATON QC:
Well that was the opinion yes.

WILLIAM YOUNG J:

So I can hardly really rely just on the mRNA evidence.

MR EATON QC:

There is no suggestion they were. There is no part of the defence case that says they are just relying on the mRNA.

WILLIAM YOUNG J:

No but – sorry. All that it has indicated, as I understand it, was that it was more likely than not that it was human brain tissue.

MR EATON QC:

Well the opinion was actually, it is more probably human brain than other animals that were tested.

WILLIAM YOUNG J:

Okay, more probable than not.

MR EATON QC:

Yes, that's right.

WILLIAM YOUNG J:

So that is sort of low level probative value.

MR EATON QC:

Well not according to the Court of Appeal pre-trial.

WILLIAM YOUNG J:

Just from our point of view. I mean you might say the evidence shows that the killer was right-handed; the defendant is right-handed. It is more probable than not that the killer was right-handed, that sort of implicates the defendant. Well it is vaguely relevant.

MR EATON QC:

Well this strikes at the heart of the key issue at trial. Is this human tissue. That was the key issue. It is deployed to strike at the heart of the – it is not peripheral issue, left or right-handed wouldn't tell you anything. If this is human, that is game over.

WILLIAM YOUNG J:

Yes but it doesn't show it is proven, it is more probable than not that it is human. That's not game over.

MR EATON QC:

Two matters in response to that. Number one. What the Court of Appeal did and this line of debate that we are having would suggest your own view might be the same is that post appeal, the Courts take a different view about the significance in the evidence than they did pre-trial because we know from the record, Justice Kós described as very important evidence. President Ellen France described it as being pivotal evidence. The majority said it is highly relevant, it is a critical part of the Crown case, potentially highly prejudicial to Mr Lundy but not unfairly so. So that was the pre-trial assessments about the significance of the evidence.

WILLIAM YOUNG J:

Did they know at that stage that the IHC evidence was no longer in dispute?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

I know it wasn't really pushed.

MR EATON QC:

Because it all happened before Justice Kós.

WILLIAM YOUNG J:

Yes but it really wasn't pushed before Justice Kós. But was it abandoned?

MR EATON QC:

Yes, it wasn't appealed and the orders that Justice Kós made were effectively without issue. What we are talking about now is not how it was being treated pre-trial.

WILLIAM YOUNG J:

Yes but say they were wrong pre-trial. Going back, it seemed to me to have been wrong actually.

MR EATON QC:

But the question is, of course, how did it impact on the fairness of trial. Your Honour makes a good point, that the evidence was expressed in a very conservative and cautious manner by Dr Sijen. And that was a significant factor to both Justice Kós and to the majority in the Court in allowing it to be admitted, because it is expressed conservatively and cautiously, because she is an impressive and careful witness. But the question in terms of fair trial is, how was it deployed by the Crown at trial. Because if that conservative cautious evidence was then lost in rhetoric from counsel who says, why are they so conservative these experts. You and I will know what they are really saying. They dance around on the head of a pin but this is clear and overwhelming evidence which is exactly in my submission what the Crown did at trial. They deployed it, inviting the jury to discard the cautious nature of the evidence. So there is no submission, anywhere of the closing address of my learned friend that says, look we accept this evidence may not be particularly helpful or particularly probative or particularly relevant and we don't encourage you to rely on it. What my friend said is, our case is that we can get there without it but we are deploying it. And the question then becomes, well what does the jury do with that in terms of assessing this man's fair trial because if it hadn't been there, what would their approach have been to all the issues and it begs this question which is completely unanswered. The defence argued, in terms of the closing address, it is impossible for Mr Lundy to be guilty because he did not have enough fuel to carry out this

extra trip. Impossible. And the Crown answer was, nothing is impossible if you have got your wife's brain matter on your shirt and he has got that, we all know, because the CNS DNA and the mRNA tell us that. How do we know if the jury rejected the defence proposition of impossibility –

WILLIAM YOUNG J:
Well we don't but that is not really critical to the proviso.

MR EATON QC:
Well it is.

WILLIAM YOUNG J:
I mean that would be critical to whether there was a miscarriage of justice, the first step in this process.

MR EATON QC:
Well isn't it relevant to whether or not, what the significance of this evidence was. It has obviously got more significance if it is possible that it answered the question of the jury.

WILLIAM YOUNG J:
Well of course it can't be – the possibility that it was taken into account by the jury is a real one and that is why it is common ground, I think, that you have established a miscarriage of justice for the purpose of section 385(1)(c). The question then is, notwithstanding the fact that it may have been material to the verdict of the jury, was there a substantial miscarriage of justice and that's not answered by saying – going back to 385(1)(c) and saying well it was a miscarriage of justice because it may have influenced the jury. I mean it is just going around in circles.

MR EATON QC:
No it is answered by saying, when we engage as an appellate court on appellate review, without the benefit of hearing any witnesses but looking at the way in which this evidence was deployed at trial, what was its

significance? Because the Court of Appeal have said it didn't really have any great significance and it wasn't needed and the defence are saying –

WILLIAM YOUNG J:
The Crown case seems to be presented on the basis that it was strictly speaking surplus to requirements but they were throwing it in anyway, that is the way the Judge seems to sum up.

MR EATON QC:
With respect, I am pitching it a bit higher than that. I can take you to the passage in my friend's closing address.

WILLIAM YOUNG J:
I am just looking at the way the Judge summed up, 76 page 670. "Leaving aside the evidence of Dr Sijen and all that debate, the Crown says you can be satisfied based on these facts that it is her brain" and submitted the facts irresistibly point that way and any other explanation is just unreal. She then refers to the gap in the science and the Crown says that these issues don't arise on the facts but notwithstanding that, the Crown tried to shut off the issue by proving that Mrs Lundy's DNA did come from that issue and that is where the NFI evidence comes in. So what volume are the closing addresses.

MR EATON QC:
It is in the case on appeal, it starts on page 508. Just before we turn to it though, in terms of how the Judge dealt with it. I suggest with respect Sir it is most convenient to go to His Honour's handout because there was only one handout given to the jury in deliberations and it was a six or seven page document which is only about the mRNA evidence. It starts at page 689. So it is at the back of the summing up.

WILLIAM YOUNG J:
It is not exclusively about the mRNA evidence.

MR EATON QC:

No this is the introduction to it. You will see the title is about the mRNA. It recalls the defence as saying that the CNS and the DNA doesn't establish that it is human brain tissue and it goes over and you will see at page 690, under the heading (B) Issues arising. This document addresses one item of evidence that they rely upon to support the proposition that tissue is Mrs Lundy's brain, namely Dr Sijens' evidence. It says you don't need to establish beyond reasonable doubt. "However whether or not this is Mrs Lundy's brain tissue is obviously a very significant fact so you need to consider this issue particularly carefully, don't speculate or guess. Recognising how important a fact it is, you need to give it careful scrutiny." So this is the Judge saying this is important evidence for you to determine, recognising what the consequences will be of an acceptance of the evidence.

WILLIAMS J:

Well there is no doubt that it is important evidence and that is reflected in the amount of time and energy spent on getting it in and challenging it. What you are really saying is that it was evidence that could not be done without.

MR EATON QC:

No. I am saying it struck at the root of the issues at trial; it was evidence of such a nature that if it was wrongly admitted, the trial wasn't fair. That is the significance of it.

WILLIAM YOUNG J:

But if it went to prove something that the Court of Appeal were satisfied had been independently proved, why is the trial unfair?

MR EATON QC:

Well because that finding by the Court of Appeal is wrong.

WILLIAM YOUNG J:

Okay well that is a good point to argue. That if the evidence, absent the mRNA evidence doesn't show that it is Mrs Lundy's brain tissue on the shirt, then the proviso is not able to be applied. I think that is probably common ground.

MR EATON QC:
Well that is more on the –

WILLIAM YOUNG J:
Well you have shifted from saying, it was unfair to apply the proviso, to saying the proviso was wrongly applied because it wasn't showing that it was her brain tissue. I mean you are dealing with fairness at the moment.

MR EATON QC:
Sorry that is my fault. All I am talking about at the moment is how the evidence was dealt with by the parties, by the Courts, and I am about to turn to how it was deployed by the Crown. My submission being these are all relevant factors for this Court to take into account in assessing what its significance was in the context of the trial.

WILLIAM YOUNG J:
Well it is undoubtedly significant and it may have influenced the jury's verdict, it may well have. You don't have any dispute from me over that. Where you start to run into, at least doubt, is whether that means that the proviso wasn't applicable if the Court of Appeal was satisfied that putting this evidence entirely to one side, it was her brain on his shirt.

MR EATON QC:
Well with respect, isn't that conflating the two limbs? Because limb one is just a focus on the strength of the evidence, absent inadmissible material and we look at that in a vacuum and say – our case is you say, are you sure of guilt and are you satisfied that a guilty verdict is inevitable being the only reasonably possible verdict.

WILLIAM YOUNG J:

Well you have got a big argument over that I am afraid.

MR EATON QC:

Well that is issue one. Issue two is I am not influenced by whether I think he is guilty or not because a guilty man is entitled to a fair trial. I am looking, was this evidence significant in the context of the trial and if it was, it has distorted the trial.

WILLIAM YOUNG J:

But in a case where the miscarriage of justice is alleged to be the admission of inadmissible evidence, which is of a character which may have affected the verdict, there will always be this sort of issue.

MR EATON QC:

Yes and when the exercise of the Court engages in, as they did in *Howse* without resolution and a lot of these decisions don't reach a unanimous decision, the question is well let's look at the evidence and try and determine how significant it was. Now in *Howse* it gets resolved because the wrongfully admitted evidence could not possibly taint the confession which was overwhelming and it was peripheral evidence; it went to motive. The evidence here was deployed to go to the central issue. Is it Mrs Lundy's brain tissue.

WILLIAM YOUNG J:

Well we may be getting into a repetitive set of exchanges.

MR EATON QC:

Is the Court at my friend's closing, the address which starts at page 508 and we are talking about deployment because this is in response to the argument, well it was expressed as a conservative opinion and if we go to the first reference which is page 512. And you will see in the middle of that page where it is addressing the defence argument because the defence had made note in the address that morning about impossibility and the Crown say, "Nothing is impossible if you end up with your wife's brain on your shirt."

And then at the bottom of that page, “Let’s just put it out there, members of the jury, this is Christine Lundy’s brain on the shirt, this is the effect of the evidence. Everybody sort of danced around the edges of it in this trial, didn’t they?” Because the neuropathologists all say, no all we can say is central nervous system tissue. The DNA lady says all I can tell is et cetera and all the lady from the NFI can say is well I conducted tests. So there he is, using all three and saying, they are all dancing around it but I don’t have to, you don’t have to. They may be conservative but you don’t need to be.

WILLIAM YOUNG J:
No, no I don’t think he is saying that. He is saying you have got three pieces of evidence that you can put together. Essentially the strands of the rope analogy is applicable.

MR EATON QC:
Well no because what he is doing is he is being critical of their conservative evidence. It carries on at 513, second paragraph. “I am not constrained by the facts of the neuropathologist or a DNA expert, I am just making a submission to you on the whole of the evidence.”

WILLIAM YOUNG J:
“Based on the whole of the evidence” that is exactly the point I put to you.

MR EATON QC:
If you go over at page 514, at the top there. “You can wonder as much as you like about rates of fuel consumption and you can wonder as much about the inept science of predicting death. What I suggest to you is – and you can’t get away from it, he has got his wife’s brain on his shirt.” Now that’s a reference to CNS plus DNA plus mRNA.

WILLIAM YOUNG J:
I agree.

MR EATON QC:

And the question is, would he have been permitted to make that submission so forcibly if he didn't have mRNA there? Because that gave him an evidential basis for it.

WILLIAM YOUNG J:

He claimed and the Judge didn't express any dissention from that proposition, that he didn't need to rely on the mRNA evidence.

MR EATON QC:

Yes that was a submission but the Crown did rely on it and of course they relied on it. They weren't going to fight so hard to get it in and then not rely on it.

ARNOLD J:

Didn't he say later in his closing that, he raised the possibility of not needing to rely on the NFI evidence?

MR EATON QC:

Yes, in closing my friend said, "We say that that's enough."

ARNOLD J:

That's right.

MR EATON QC:

But – and then goes on to rely on it.

ARNOLD J:

So that is why the Judge put it the way he did. That the Crown says you can reach the conclusion based on the two facts of the CNS and the DNA but there is also this which adds to it.

MR EATON QC:

That's right. And so, two points. Number one, how do you then unravel on appellate review the risks –

WILLIAM YOUNG J:
We can't unravel it, that's why you have got the proviso.

MR EATON QC:
Yes and then you ask yourselves, why was the evidence adduced.

WILLIAM YOUNG J:
Why?

MR EATON QC:
Why was the evidence adduced?

WILLIAM YOUNG J:
Well it was evidence because it supported the Crown case. I mean it is a question that doesn't need to be asked because the answer is obvious.

MR EATON QC:
It was deployed to fill what was perceived to be a gap.

WILLIAM YOUNG J:
In the scientific evidence.

WILLIAMS J:
Your point is really that this evidence is so intertwined with the core of the Crown case, that surgical extraction of it in order to establish whether what was left was going to be enough, was impossible.

MR EATON QC:
Well yes.

WILLIAM YOUNG J:

Al that gets you to show that there is a miscarriage, that gets you past section 385(1)(c).

MR EATON QC:

Yes but these submissions are addressing the significance of the evidence at trial in the context because if it is significant, if it goes to the root of the issue, then it is an unfair trial.

WILLIAMS J:

Yes so that was going to be my second sentence. If that first proposition is correct, then it goes to the root and must by definition, according to the authorities, be unfair.

MR EATON QC:

That's right. Regardless of whether it made a difference at trial or not.

WILLIAM YOUNG J:

What are the authorities you are relying on for that? We have got the minority judgment in *Howse.*

MR EATON QC:

Sorry Sir, what was the proposition?

WILLIAM YOUNG J:

You are saying that where evidence that is inadmissible bears on the fundamental issue in the case, there is no scope for the application of the proviso. What is the authority for that?

MR EATON QC:

So *Wilde v R* (1988) 164 CLR 365 at paragraph 123 of our submissions. 120 I think it is, the *Wilde* reference. Yes it is the High Court of Australia.

WILLIAM YOUNG J:

Is that the Chief Justice in *Wilde* – in *Guy*?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

I don't think anyone else thought it was a proviso case.

MR EATON QC:

Well what this Court in *Guy v R* [2014] NZSC 1 –

WILLIAM YOUNG J:

It was a he says/she says case.

MR EATON QC:

It is the principle about what unfairness means and the significance of the evidence.

WILLIAM YOUNG J:

This was a case where a statement made by the complainant had been given to the jury by mistake; it went into the jury room.

MR EATON QC:

Yes that's right. It may have been the defendant's record, or something like that.

WILLIAM YOUNG J:

I think it was a prior consistent statement.

O'REGAN J:

Yes it was a prior consistent – it was a number of things I think.

WILLIAM YOUNG J:

Have we got *Guy?*

WILLIAMS J:

Yes tab 5 of the appellant's bundle.

WILLIAM YOUNG J:

It's a funny passage because as I said I don't think anyone suggested that the Crown or the other Judges suggested the proviso could be applied. And it was a complete deviation, what had happened was a complete, in any event, a complete deviation to the rules.

MR EATON QC:

Well the reference in our submissions is to the High Court of Australia in *Wilde* which this Court in *Guy* referred to and in *Wilde* the application proviso was considering whether the irregularity that occurred was such a departure from the central requirements goes to the root of the proceedings and if it has, then it is not a fair trial. But I don't think there is any –

WILLIAM YOUNG J:

Is there anything about the *Wilde?*

MR EATON QC:

No I don't think there is any dispute though in terms of the principle about the significance of the evidence and what issue it goes to as being critical factors in assessing the fairness limb.

WILLIAM YOUNG J:

Are you saying that where a case is absolutely overwhelming, although the fact that inadmissible evidence in support of that has been adduced and was itself significant, means the proviso can't be applied because it would be unfair.

MR EATON QC:

Well that's right, yes. If it is denied the fair trial right.

WILLIAM YOUNG J:

No but you say it does deny the fair trial right.

MR EATON QC:

If the evidence strikes at the heart of the issue and was inadmissible, then yes, that is fundamental.

WILLIAM YOUNG J:

So is *Wilde* the authority for that?

WILLIAMS J:

Well that's not quite what *Wilde* says is it because *Wilde* hinges on the fact that in the severance or in the refusal to severe, one of the counts that was sought to be severed, returns an acquittal. You don't have that useful dynamic here.

MR EATON QC:

And obviously it is more useful to look for cases where you are talking about inadmissible evidence. You can try then and assess what the significance it was in the context.

WILLIAMS J:

My point is you can see why *Wilde* concludes what it does, given the obvious factual scenario. My question is, this isn't an analogue of that is it? If it can be established that it wouldn't have made any difference, and of course you are going to argue about that, but if it can be established, you don't have an analogue with *Wilde* because it hasn't gone to the root of the case; there was already an overwhelmingly sufficient case.

MR EATON QC:

Well I don't accept that.

WILLIAMS J:

No, of course.

MR EATON QC:
If the evidence strikes at the heart of the issue at trial –

WILLIAMS J:
So the essence of that is, the proposition that if the evidence is very relevant, game over.

MR EATON QC:
Well yes absolutely.

WILLIAM YOUNG J:
Has there ever been a case I wonder where an admission has been held to be inadmissible on appeal but the conviction nonetheless upheld.

MR EATON QC:
For a confessional statement? You mean an admission by way of confession?

WILLIAM YOUNG J:
Yes.

MR EATON QC:
I'm not aware of…

WILLIAM YOUNG J:
The *Tamihere* case where a huge issue was made at trial of the suggestion that the accused had been wearing a watch of one of the deceased, between trial and appeal the body of the deceased is found; watch is still on wrist. Was that seen as supplying the application proviso, I don't think so.

MR EATON QC:

Well my argument on behalf of Mr Lundy is that in assessing the significance of the evidence in this case, you take into account the fact that it is expert opinion because that is likely to be treated as perhaps more authoritative than a non -expert. That it is addressed to the key issue at trial, as opposed to a peripheral issue. So in *Howse* it was deployed as demotive which was not the heart of the case but getting closer to it, but this is right at the heart of the case and then you would look at, well what attention was it given at trial. So was it, for example, a flippant comment. Well take the *Gassy v R (2008) 236 CLR 293* case for example, which I know Your Honour Justice Young is familiar with. Now that was inadmissible expert opinion. It came in in the form of half a page job sheet. It was said, by the Crown, to strike at the heart of the issue at trial and as a consequence the conviction was set aside. It came from an expert and went to the heart of the trial.

WILLIAM YOUNG J:
Yes, but the proviso wasn't applicable.

MR EATON QC:
Well no, but in terms of principle about the significance of the evidence.

WILLIAM YOUNG J:
Yes, that's not a proviso case.

MR EATON QC:
No. But when assessing significance, what we know here is this evidence was, I think, 396 pages of evidence at trial, four days, six witnesses, the subject of the sole handout at trial. And when we look at the descriptions that various judicial officers attributed to it on its way –

WILLIAM YOUNG J:
Well you've said this.

MR EATON QC:

– then how could it not reasonably only be described as being significant in the context of the trial? And if that's the case then it ought to –

WILLIAM YOUNG J:

I don't think anyone would say it wasn't significant in the context of the trial.

MR EATON QC:

The question is how significant. Significant enough that the trial's become unfair.

WILLIAM YOUNG J:

Okay, well, why? Why did it make the trial unfair, rather than simply say it was surely significant? Why did it make it unfair? You say because it distracted attention from running other defences?

MR EATON QC:

Well this evidence was debated in October and then November with a trial starting in early February. It was an extraordinary distraction for the defence, both in terms of attention and resource.

WILLIAM YOUNG J:

But can you put something concrete on that. Is there evidence? There isn't any evidence saying well, we didn't have time to prepare for trial because we were worried about the mRNA evidence.

MR EATON QC:

No, but with respect Sir, as a trial lawyer one would know that if you're immersed in arguing this – the defence was still looking to come to this Court pre-trial. Declined. Were trying to run it, and unsuccessfully tried to run it again at the start of the trial. It was the focus in the months leading up to trial. That's how significant it was.

WILLIAM YOUNG J:

Well I agree it was potentially distracting, I don't have a difficulty with that, but I'd like to know what that means in practice. Did it mean witnesses weren't interviewed or…

MR EATON QC:

Well on the lead application, remember we debated about the impact it had on defence strategy in terms of a challenge to the IHC evidence.

WILLIAM YOUNG J:

So was that still possibly on the cards?

MR EATON QC:

Well I can't offer evidence to show it was, but what I can say is that the prospect of a significant debate about IHC following the Privy Council was obviously very real and the major development –

WILLIAM YOUNG J:

I thought you said that it had been abandoned before Justice Kós.

MR EATON QC:

It was abandoned before Justice Kós, that's right.

WILLIAM YOUNG J:

You're thinking it might have been revived again?

MR EATON QC:

Well I think the point being that the mRNA came out in mid-2014. The pre-trial argument was in October and so it's very much a live issue and it wasn't just the mRNA that the defence were dealing with at that last –

WILLIAM YOUNG J:

But just accepting that it was a distraction, and I accept it would have been a distraction, what difference does that make? I mean it was still open to run

the IHC argument at trial if you could have found an expert who would have supported it.

MR EATON QC:

Well, no, because unless you got rid of the mRNA you're really doomed, because the mRNA was deployed for two reasons. One, –

WILLIAM YOUNG J:

But it's only more likely than not, 51% perhaps.

MR EATON QC:

The mRNA was saying that this is human.

WILLIAM YOUNG J:

No it wasn't. It was saying it's more likely than not that it's human.

MR EATON QC:

Sorry, that was my mistake. The mRNA was saying, firstly, our view is that this is brain and then assessing the issue about species. If the IHC was to say it's CNS, which is brain or central nervous system tissue. The mRNA evidence also carried out that role. So you really need to knock mRNA out before you would revisit your attack on the IHC.

WILLIAM YOUNG J:

Why? Why? Why couldn't you run both attacks?

MR EATON QC:

Well, because the mRNA was obviously going to be seen as corroborating the IHC as two independent bases are proving the same point.

WILLIAM YOUNG J:

But why not knock both out?

MR EATON QC:

Well the defence –

WILLIAM YOUNG J:

The problem with knocking both out was your expert witnesses agreed with the IHC evidence and that's a fundamental problem.

MR EATON QC:

Yes, that's right.

WILLIAM YOUNG J:

So isn't all of this sort of a persiflage?

MR EATON QC:

Well, Your Honour's asking, how did it affect your trial.

WILLIAM YOUNG J:

I'm asking for, I want something tangible, something I can put my finger on and say well, crikey, if this evidence was admitted then the whole thing would have been different. Now, I'm prepared to say the whole thing would have been shorter and slightly less complex, but I'm looking for something more than that.

MR EATON QC:

Well what I say is that in terms of the way it was dealt with at trial, is my friend would not have been able to say, with support from expert evidence that this man has got his wife's brain tissue on his shirt. He would have been able to say that's the inference we invite you to draw but he was given expert evidence and we were looking at the way it was deployed before.

WILLIAM YOUNG J:

The truth is, if it was Mrs Lundy's CNS, it was almost certainly her brain.

MR EATON QC:

No. Well, no sorry, yes, yes of course. Yes that's right, so as you soon as you make it human, that's game over.

WILLIAM YOUNG J:

As soon as you get the CNS linked to the DNA, as soon as you are satisfied the DNA and the CNS come from what is effectively a single incident, then it's game over.

MR EATON QC:

Or it comes from a human.

WILLIAM YOUNG J:

Yes.

WILLIAMS J:

Well not quite because you ran contamination pretty hard.

WILLIAM YOUNG J:

No that is why I said it comes from a single incident.

MR EATON QC:

Once you have got the link that it's human, it's game over.

WILLIAM YOUNG J:

Well once you have got the fact that if it is Mrs Lundy's, it's human.

MR EATON QC:

Yes, that's right. And so we are going round in circles.

WILLIAM YOUNG J:

Well I don't know whether we are going around in circles or not but can you point to anything other than general distraction –

MR EATON QC:

Well with respect Sir, that's significantly downplaying what impact this must have had on the defence.

WILLIAM YOUNG J:

Well I don't think it is actually. I understand what it is like to be doing a major criminal case and have issues that come up and have to be dealt with.

MR EATON QC:

And be running a significant admissibility issue right up to the eve of trial and at trial?

WILLIAM YOUNG J:

I understand it is distracting. I mean there is a lot of what you say I don't disagree with. What I want to know is, what effect did distraction on the trial?

MR EATON QC:

Well the effect it had on the trial was that Mr Lundy spent significant time and resource arguing about a matter he should never have to argue about that was able to taint all his defences; and answer his defences and was deployed to answer his defences. That's the effect it had at trial.

WILLIAMS J:

So your point is, it wasn't just a distraction. It was a massive distraction.

MR EATON QC:

Of course it was.

WILLIAMS J:

So massive that the job wasn't done properly.

MR EATON QC:

Well just give it some context.

WILLIAM YOUNG J:

Okay. What respect was the job not done properly? This is the tangibility that I am looking for.

MR EATON QC:
The defence job?

WILLIAM YOUNG J:
Yes.

MR EATON QC:
Well the defence argued impossibility because of time of death, because of Mr Tupai, who was the neighbour who saw the sliding door open at a time when there was an inference that it must be from somebody who is not a friendly visitor to the address and because of fuel. So the defence – you read Mr Hislop QC's closing address, barely dealt with the science; it was too over whelming.

WILLIAM YOUNG J:
More likely than not, all the inferences to be drawn from the conjunction of CNS tissue and DNA on two parts of the shirt.

MR EATON QC:
Well he got up to speak.

WILLIAM YOUNG J:
I know what he said.

MR EATON QC:
Yes – all he'd heard was, he's got his wife's brain matter. That's what this evidence proves, the three scientific features proves this and he didn't seek to challenge the science, rather he said well it is impossible, he can't have or it must be an innocent explanation.

WILLIAM YOUNG J:
Well I think he did seek to challenge the science didn't he. From looking at this Judge's summing up anyway.

MR EATON QC:

The defence was on impossibility.

WILLIAM YOUNG J:

Yes but I think he did challenge the mRNA.

MR EATON QC:

Yes in that handout that we just saw from Justice France, it said that the defence position – this doesn't prove it is human, that was the defence position. But one reads the arguments that were put. This evidence dominated the defence case. It had dominated the preparation and it dominated the trial. It dominated – remember Mr Morgan said in closing. "We have heard so much about it, I don't want it to dominate my address, I don't want it to dominate the trial, even though we have heard so much about it." That was acknowledgement, it has got way out of control this evidence. It is a feature that looms large. It is the only subject of handout by the Judge. The Judge is saying, this is a really important factor for you to decide. That's the significance of it. And my friend is pointing back to the minority decision in *Howse* and this is at paragraph 123 of our submissions, the inadmissible evidence there of course going to motive. And the Court said half way down, at reference at paragraph 123, "Jurors would have accepted inadmissible evidence in this trial where the Judge considered the question of motive assumed high relevance in relation to the central issue. Unlike *Wilde* therefore, this is a case where on the Judge's assessment, the admissible evidence in relation to the central live issue must have been accepted by the jury. Moreover, the Crown cannot now plausibly contend the jury are unlikely to have relied on that evidence, when the Crown's position at trial was in deciding who killed the girls, they should have regard to it. Clearly if you use the test in *Wilde* the evidence carried additional significant weight in the trial."

WILLIAM YOUNG J:

I wonder if the Court in *Howse* wasn't really dealing with this in terms of *Matenga.*

MR EATON QC:

Do you mean straying away from *Matenga?*

WILLIAM YOUNG J:

I think it is a pre-*Howse* and certainly a pre-*Matenga* case.

MR EATON QC:

Well *Howse* was a focus on the fairness limb.

WILLIAM YOUNG J:

Which I agree, remains.

O'REGAN J:

I don't think *Matenga* changed the fairness limb.

MR EATON QC:

No that's right. So I don't think *Matenga* would influence the approach to the fairness limb at all.

WILLIAM YOUNG J:

Except if you are looking at the issue of the proviso through the prism of the eyes of the jury, it might have a slightly different role to play.

MR EATON QC:

Well I guess my submission in response to that is because it is an enquiry about fairness of trial, then it is a broad inquiry that the Court makes that will be influenced by the facts of the particular case without setting too narrower confines about what might or might not be significant in the particular case to hand. And how you assess the significance will depend. And as I say, the feature here being it is expert evidence, what issue does it go to, how large does it loom at trial, how was it deployed by the Crown and we have got plenty of references about that and then how was it dealt with by the trial

Judge. With great respect, what's frustrating for Mr Lundy, no doubt is when you have a Court of Appeal saying its admissible pre-trial, with the advantage of a very full judgment from His Honour Justice Kós which sets out, in great detail and clarity the issue and they review it and you have one Judge says this is pivotal, but section 8 it is out and you have got the other two Judges saying, in their words, highly relevant, highly critical to the Crown's case, potentially highly prejudicial to Mr Lundy but not unfairly so. Then when the trial Judge allows the evidence to be admitted and says, here is the handout on it and I remind you as well, this is really important issue, does that not inevitably tell an appellate court on review that this evidence is just not evidence of a nature that we can let, have it be heard by a jury and still find the trial to be fair; it strikes at the root of the trial.

WILLIAM YOUNG J:

There must be a middle slot where evidence is sufficiently significant to be likely to have affected the verdict to the jury and so section 385(1)(c) is engaged but its admission did not preclude the application to proviso.

MR EATON QC:

Yes, that's right. There is no suggestion that every inadmissible ruling which gave rise to a miscarriage would disqualify application proviso. That's where the case specific inquiry comes in.

O'REGAN J:

Well just focussing on the cases where inadmissible evidence has been allowed in at the trial. You say the tipping point is where the inadmissible evidence relates to a key issue in the trial and as an important factor in the grounds, prove of that element?

MR EATON QC:

And I would add to that, and if it comes from an expert, of those or a combination of factors and then if you want to test that theory, in this case you would go back and look at the way the parties dealt with it pre-trial because defence wouldn't bother committing those resources to fighting something if

they thought it doesn't really make any difference. It is a probability only; we don't need to worry about it. We can deal with that in a submission when plainly that wasn't how anybody dealt with it, including the Court of Appeal pre-trial. So yes the key factors here – expert evidence on an issue that strikes at the heart of the very key issue at trial and it is substantial evidence at trial both in terms of quantity –

WILLIAM YOUNG J:
Just remind me about *Howse*. The evidence was inadmissible, was the effect that *Howse* had sexually abused the two victims. It was hearsay.

O'REGAN J:
They were going to tell somebody.

MR EATON QC:
Well it was about the inadmissible hearsay where it was deployed as to the truth.

WILLIAM YOUNG J:
Yes, it was deployed to the truth of the fact that he had sexually abused them, so it was pretty prejudicial when he is alleged to have murdered them.

MR EATON QC:
Yes, but there was already evidence going before the jury that they had complained about him doing it. So that was already in but it goes to motive. But the key distinguishing factors with *Howse* is, which influenced the majority but not the minority because the minority effectively are saying look, based on that confession, I am pretty sure he is guilty but I will not let that influence my assessment about his fair trial right because that's absolute and the majority said, we find it so overwhelming, his confession, that we find his trial was fair.

O'REGAN J:

Did the majority engage with the comment that you took us to before from the minority, about the Crown not being able to say post-trial it didn't matter, when at pre-trial it said it was important.

MR EATON QC:

No the minority comment on the majority but not vice versa. So the majority is pretty simplistic in approach in the sense they say, this confession is so overwhelming, that's the end of –

WILLIAMS J:

So I guess your point must be that you don't have the same swamping here that you had in *Howse* from another piece of evidence, that the DNA, CNS evidence simply does not overwhelm the trial in the absence of the mRNA evidence. And therefore, unfairness is established.

MR EATON QC:

Yes. I know in my friend's submissions they say really in *Howse* there was a multitude of errors and here is a single error and my answer to that is, that's true, if you define as being one error being the admissibility ruling but it pervades so extensively over the trial process in terms of it was being mentioned regularly; it was the subject of such extensive evidence. Four days of evidence at trial as a starting point, when you are saying, fairness, significance.

WILLIAM YOUNG J:

How long was the trial?

MR EATON QC:

Six weeks.

WILLIAM YOUNG J:

So that's 30 days of trial, were there days off?

MR EATON QC:

I am not sure. It was a long trial. I won't take you back to the deployment factors but they are in our written submissions and I do stress the defence position that there is some irony that the High Court and the Court of Appeal allowed this evidence, in part, recognising the cautious nature with which she gave her evidence but then the Crown basically said, well why do they have to be so conservative; they are just scientists, that is the way they are.

WILLIAM YOUNG J:

I didn't really read that. I thought he was saying, there is a whole lot of evidence that points to the same conclusion. Don't worry too much about – you don't have to prove any building block in a circumstantial case beyond reasonable doubt. It is the totality of the evidence and doesn't he actually say that. Use the whole of the evidence.

MR EATON QC:

Well page 536, it is expressed extremely conservatively. "I'm not sure what it is about these scientists, members of the jury." With respect Sir, it is not that. This is saying, the scientists are all conservative, page 538, it is two-thirds of the way down. At the bottom of that page, the scientists do express themselves in an extremely conservative manner.

WILLIAM YOUNG J:

Isn't that by reference to the fact that they didn't conduct a test on the mRNA of every animal in the world.

MR EATON QC:

No, no. These are general observations about the way in which the evidence is expressed.

WILLIAM YOUNG J:

And then he says, "Ms Vintiner's evidence. You are told likely the DNA result is that it was one billion, billion times more likely."

MR EATON QC:

Yes, yes.

WILLIAM YOUNG J:

Isn't it a reference to that?

MR EATON QC:

No because it starts off you are looking for supporting evidence. Go to Sijen and the Netherlands Forensic, that's what we are talking about.

WILLIAM YOUNG J:

If you want evidence of conservation, think of Ms Vintiner's evidence.

MR EATON QC:

Yes, yes.

WILLIAM YOUNG J:

"And that provides extremely strong scientific support." Well I mean that is probably a legitimate comment isn't it.

WILLIAMS J:

Top of the next page.

MR EATON QC:

Yes it goes on. This conservative nature of these scientists which my friend is criticising is –

WILLIAM YOUNG J:

And then he goes on to say, "We had such a lot of evidence about it, because I say, on what I've already said to you, this is plainly Christine Lundy's brain." That's why he is saying they are conservative.

MR EATON QC:

He is saying they are conservative because of the way they express their opinions.

WILLIAM YOUNG J:
Yes, I think what he is really saying is that they are talking about particular aspects of the case, he is looking at the whole of the case.

MR EATON QC:
Well when you have got somebody who has said, "I express my opinion on probabilities and the Court have applauded that person and admitted the evidence in part because of that" is a danger zone where you start criticising the conservative nature of an opinion.

MILLER J:
He is misusing the scientific evidence there. He has just repeated the prosecutor's fallacy in relation to the DNA evidence.

MR EATON QC:
Yes.

WILLIAM YOUNG J:
Yes except it is a billion, billion times more likely.

WILLIAMS J:
I thought it was 450 billion, billion actually, the actual number.

O'REGAN J:
But was that a factor in the Court of Appeal's post-trial concern about the admission of the evidence, the way it had been used in the trial?

MR EATON QC:
From memory, I mean we certainly had raised it in terms of the issue but no, the Court of Appeal ruled it out on the basis of the lack of foundation or validity as it stood as opposed to how it is being deployed. Because if you go over to

539 there is my friend talking about Professor Bustin who was the key defence expert in response to this evidence and Bustin was basically saying, look I am not saying this evidence is complete junk, I am just saying it is not at a stage where it can safely be before a jury and my friend takes an example that Bustin has given, where he said, with this particular protein gene fat, it is not human specific because I found if you compare it with the genes of a horse and the genes of a golden hamster, there is a risk of a false positive." And so my friend then sort of takes the mickey out of it and says, well there is a risk of a false positive but only if Mr Lundy had horse brain on his shirt or golden hamster on his shirt, which wasn't a fair way of responding to the way the expert was giving his evidence.

WILLIAM YOUNG J:
No, agree.

MR EATON QC:
But this was again, over stating the significance of the NFI evidence although it had been expressed conservatively.

WILLIAMS J:
Mr Hislop, in his close, attacked that pretty effectively though by working with Professor Bustin's evidence, didn't he?

WILLIAMS J:
Yes but it is a pretty brief reference in the defence closing about the science.

WILLIAMS J:
Yes it is rather a good one though. 626, 627. And it looks to some extent as if the prosecutor was referring to the same weaknesses in his own evidence at 538.

MR EATON QC:
Yes. So I think that deals with the question of deployment and the three relevant paragraphs in *Howse* that talk about – and we have read one of them

in paragraph 62, 63 and 68. We basically say, well look if you have deployed it, don't come on appeal and say well we didn't need to; if you are strategically engaged in using it, then in assessing fairness you are stuck with that and it is all very well to come and say I didn't particularly mean it. They are strong passages.

MILLER J:
Shouldn't we rest though with the way in which the trial Judge has instructed the jury to deal with it?

MR EATON QC:
Yes.

MILLER J:
That is merely as one piece of evidence and not fundamental.

MR EATON QC:
Yes. Yes the difficulty around how the Judge dealt with it is of course complicated by the fact that it is subsequently been a ruling and it shouldn't be there at all. But the Court of Appeal wrongly thought the defence case was arguing that this was the central piece of the Crown case but that wasn't the defence argument. The argument was this was a piece of evidence that was relevant to the central issue in the case and it was important, along with the DNA and the CNS, and it was the fact that it's deployed along with those other two is where it gets its significance at trial.

We refer to the Judge's handout, and of course his descriptions of it as being significant. What he says, if I can just go to 690, I have a reference there to take you to, you'll see two-thirds of the way down the page under the heading of, "The NFI evidence," in addition to the issue whether it's human brain, the NFI evidence has been used to advance the proposition that Dr Sijen's evidence work at least rules out that the source of the tissue is cow, pig, sheep or chicken. And again, you know, perhaps regrettable language but

that's ruling things out, which again, you know, we're sort of fudging the nature of the conservative opinion.

The Court of Appeal recognised, and I use this reference because of the test in *Wilde* about the significance of the evidence and whether it had significant additional weight, at 378 of the decision – no that's not the reference I was looking for. Sorry it's 382. "We have no doubt that the Crown called Dr Sijen's evidence because of concern it would add significant weight to its case that the tissue on Mr Lundy's shirt was likely to be Mrs Lundy's." Now in my respectful submission having made that finding, which was entirely appropriate, and reflected the way it had been dealt with pre-trial, that in terms of *Wilde* and the fairness limb answered the enquiry whether the evidence was so significant that its admission at either trial wasn't fair.

WILLIAM YOUNG J:
Are you referring to 382?

MR EATON QC:
382. So why did the Crown call it. Was it just a little bit of a cherry on the top? No. The Court's view is, and –

WILLIAM YOUNG J:
Sorry, I went on to look at the rest of the paragraph. I mean the truth is, say one was of the view that on the probabilities associated with the DNA and the CNS tissue it was more likely that it was Mrs Lundy's brain than anything else, in that sense Dr Sijen's evidence didn't add anything. I suspect I've got some sort of probabilistic error, thinking error, in that because it's independent, but it probably didn't add a lot to what might have been implicit, what was implicit in the other two strands of the evidence.

MR EATON QC:
And effectively that's a question which this Court will have to grapple with on the inevitable guilt limb.

WILLIAM YOUNG J:

I mean the Court of Appeal was satisfied beyond reasonable doubt that the tissue on the shirt was Mrs Lundy's brain.

MR EATON QC:

Well –

WILLIAM YOUNG J:

Just stop there. Now let's say there's a margin of error. Say they're not wrong on that but it was at least 50/50, or more likely than not that it was her brain, then on that basis Dr Sijen's evidence on a simplistic probabilistic view of the situation didn't add anything.

MR EATON QC:

Yes but –

WILLIAM YOUNG J:

Now I know that's not the way it was looked at before trial.

MR EATON QC:

No, no, and Your Honour is taking a very forensic assessment of the strength of the evidence, whereas this is a focus on what's a fair trial. You see what we see in 382 is the problem that Mr Lundy is confronted with presently is effectively the Court is saying we know, and we can see from the history, that the Crown called this because they thought it added significant weight, because they thought they had a significant hole they needed to fill, but we don't agree. We don't agree with the way you pitched your case or ran your case. You didn't need this. You had him hook, line and quartered –

WILLIAM YOUNG J:

But Judge's sometimes say that.

MR EATON QC:

And the question is –

WILLIAM YOUNG J:

But Judge's do sometimes say well, you know, this last bit of the evidence was disputed but I'm satisfied on the basis of –

MR EATON QC:

That's right, but with respect it's not a proper process when applying the proviso which needs to be exercised cautiously because you're starting off from the point of a miscarriage and in my respectful submission the Court has basically said, look, we disagree with the way the Crown ran their case, they understated it and we've come to a different view about it, and I say that's a factor. We talk about that in terms of whether you're right or not under the inevitable guilt limb, but under the fair trial limb, that must strike at the heart of whether the trial's fair. If I was asked to answer the Crown's allegation at trial, I try to answer it and then I answer it and I struggle and I lose on the basis of inadmissible evidence, and then the Crown says, I know, the Court says I know the Crown got it in there because they thought they needed it but they didn't, and therefore your trial's fair.

WILLIAM YOUNG J:

But you say the Crown thought they needed it.

MR EATON QC:

Well just use the words of the Court. "We have no doubt they called it because they considered it would add significant weight."

WILLIAM YOUNG J:

Yes, but that's the formulation I would prefer, because I think the closing addresses and the Judge's summing up make it clear that the Crown case was that they didn't need it.

MR EATON QC:

Well that's not fair. The Crown made that argument but it's all a bit rich to say, here's my case and you can hook him this way, but I've got this as well so you can hook him that way. That's not an uncommon scenario. You might reject

this evidence. But if it's inadmissible the question then becomes well what's happened to the fair trial and even if there was another basis which we talked about, you didn't commit to that strategy, you committed to a strategy which says we're putting it before the jury, and not just fleetingly for one witness for half a day, for four days of evidence.

MILLER J:

That was the Crown case but I wonder what you have to say about this. When you look at the Judge's handout that he gave the jury, one does get the impression that he himself had reservations about this evidence, and he conveyed those to the jury. If you look at the Italicised comments, for instance, on page 699, he talks about the lack of validation of this technique among the wider scientific community. In each of these criticisms, which are laid in quite a lot of detail, he's really saying to the jury be very careful about the weight you place on this evidence, isn't he?

MR EATON QC:

Yes. I agree. He was.

MILLER J:

We've accepted since that it shouldn't have been in at all but nonetheless on this part of the case what you're saying to us is it assumes such significance in the trial that he didn't really have a proper trial at all, according to law.

MR EATON QC:

Yes.

MILLER J:

And I'm putting to you that when we ask ourselves that question we have to look at the way in which the Judge has told the jury to be very careful about the evidence.

MR EATON QC:

Well that's, I accept that that's right. Just as you would look at the way the Crown encouraged them to use the evidence, but ultimately what His Honour has said in terms of what, I suggest, tells us most about how important the evidence was, where His Honour makes that comment, "This is really important evidence." You have to be really careful because it's really important because if you accept it the consequence of that, he was saying, I read between the lines, is pretty fatal for Mr Lundy and that's why you need to exercise care because we can see where it would go.

I'm almost at the end of this issue, but just a point I note on a footnote in my friend's submissions, it seems that we still don't have a concession that it's inadmissible. So the Crown have said, well we're not appealing, but we don't concede admissibility as if, we'll just keep our powder dry just in case and we'll see where this goes to from here, which suggests in terms of significance the Crown aren't likely going to let go of it. That's at footnote 58 of my friend's submissions.

Just finally on this issue, we have talked quite a lot about what the Crown approach to it was. If you read my friend's closing address in full, you will see and the reference I have here is page 596. A multiple reference to the prosecution saying, "It is the collective of the evidence, it is the collective" which, of course, included the mRNA that was important; that was what established it, the guilt. He said that this was Christine Lundy's brain is the most important piece of evidence but again that doesn't stand alone, and just in terms of understanding what I suggest is an inappropriate approach from the Court of Appeal who I say took their own view which was contrary to the way the parties had dealt with it and that was wrong an approach. If you look at my learned friend 's submissions on the proviso.

O'REGAN J:

In this Court you mean or in the Court of Appeal.

MR EATON QC:

I am sure the Court understands the process.

O'REGAN J:
Yes we do.

MR EATON QC:
That we filed written submissions after the event, didn't have an oral hearing but the written submissions – so we have effectively – and this is drifting down to the other limb but the Court of Appeal we can see, I think we all agree, took the view that whatever the Crown position was, the CNS plus the DNA was enough to prove that you didn't need this other material, therefore the trial was fair, therefore guilt was inevitable. But this was the Crown's conclusion on the proviso and at paragraph 78, "Counsel accepts the critical issue is whether the Court can be sure that what was found on the appellant's shirt was the deceased's, Christine Lundy's brain tissue. That is the inference available from the fact it is unquestionably CNS tissue and the only DNA extracted from the scraps of fabric in that CNS was embedded, was the DNA of Christine Lundy." On getting to that point, the Court is entitled to look at other evidence and conclude that a guilty verdict is inevitable. So just as the Court said, the Crown said this evidence had significant weight, even when we are arguing the proviso, the Crown is still not saying what the Court of Appeal ultimately said, and that is, no, no, your game is set and match at stage 1, you are still underselling yourself.

WILLIAM YOUNG J:
Well it is not saying – I mean you say because they are arguing one, two and three, they are not arguing two.

MR EATON QC:
Well what I am saying is, in terms of fairness is that the Court has taken a different view to that which is how it was dealt with by the parties at trial and that undermines fair trial. And I don't think this Court would have any dispute with the proposition that you do need to exercise care when applying the proviso. It won't lightly be applied and I know Justice Miller and the decision

that the Court of Appeal was determined, that the 232 Criminal Procedure Act recognises the same principles in relation to 385; noted that conservative approach and the rarity with which the Court does apply the proviso and it just strikes here that as a matter of general approach, it would be an odd case to feel comfortable to apply the proviso when the evidence is at the heart of an issue. The case has got a history of trials and changing facts. You have got lots of factual contests which could have been resolved by the science, but you will never know, but then saying nevertheless we will deny a third trial by jury and we will, notwithstanding the obvious limitations we have, determine the case.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.46 AM

MR EATON QC:
I will turn to the first limb about, in accordance with *Matenga*, that guilt be inevitable. The position as Your Honour Justice Young has anticipated, on behalf of Mr Lundy, that before an appellate court can engage in the proviso, that Court must not only be satisfied on their own assessment, be sure of a defendant's guilt but beyond that they must also assess in determining a finding of guilt is inevitable.

WILLIAM YOUNG J:
So what do you say about *Cameron v R* [2018] 1 NZLR 161 and *Best v R* [2017] 1 NZLR 186.

MR EATON QC:
Well –

WILLIAM YOUNG J:
Wrong?

MR EATON QC:

Was it argued? As best I can tell from the record, it hasn't been argued.

WILLIAM YOUNG J:

I think if you look at *Best,* doesn't the footnote deal with your argument?

MR EATON QC:

Well there is a comment to that affect.

WILLIAM YOUNG J:

Where is *Best?*

MR EATON QC:

In the Crown bundle, tab 3, page 116 of the decision.

WILLIAM YOUNG J:

Well it is pretty explicit.

MR EATON QC:

Well it strikes as – if that is the Court's view that it is a considered position it has taken, then Mr Lundy's position is that it is wrong.

WILLIAM YOUNG J:

I think I said the same thing in *Cameron* didn't I?

MR EATON QC:

Was *Cameron* a proviso case?

WILLIAM YOUNG J:

Yes. That's really the vice position.

MR EATON QC:

Well it's – and I guess it is a question of whether the Privy Council were engaging in semantics in *Lundy* when they applied *Matenga* because it was

the clear the Court said that the Court would have to be sure and find that guilt was inevitable.

WILLIAM YOUNG J:
Have we got the Privy Council decision?

MR EATON QC:
Yes. It's in the case on appeal, it's not actually in our bundles

WILLIAM YOUNG J:
Additional material 7 is Professor Bustin's report.

MR EATON QC:
Volume 3, number 7 in volume 3 of additional materials. And they deal with the legal issues 160, paragraph 160 of the decision. So, at 160 seek to apply *Matenga* and then conclude, by reference to *Matenga* and *Stirland v Director of Public Prosecutions* [1944] AC 315 at 162 expressed simply, "Before the proviso could be applied, the Board would have to feel sure of the appellant's guilt and be satisfied that a guilty verdict was inevitable." And what we know is –

WILLIAM YOUNG J:
I understand that.

MR EATON QC:
And it is consistent with the approach, you will see the Supreme Court is taking in Canada.

WILLIAM YOUNG J:
Can we just stay with this for a minute. The whole point of *Weiss v R* (2005) 224 CLR 300 was that you don't look at it through the eyes of the jury. *Matenga* is a difficult case because I suspect more than one hand was involved in the drafting of the judgment because what is essentially the same thing is said on a number of occasions in different ways. *Best* and *Cameron*

are unequivocal. The problem with *Matenga* is that, in a sense, it tends to assimilate *Weiss* with the earlier approach which is what the Privy Council did in the *Lundy* appeal by citing *Stirland*. I mean if we are not interested in what the jury, in a hypothetical or actual jury, what does inevitable guilt mean? Does it mean we have got to be satisfied to a standard higher than beyond reasonable doubt?

MR EATON QC:

Well if the philosophical approach to the proviso is, I am denying a defendant a constitutional right to a jury trial and I will only do that in rare conditions and I recognise that there are essential limitations on the role that I carry out because it is a trial on the papers, then in my respectful submissions, entirely consistent that reviewing appellate court would place an additional onus in terms of being satisfied of guilt, beyond the standard that the jury applies, otherwise it is effectively we are carrying out the same role as a jury, when we can't. And although there is no significant analysis in the cases that we have before us in the Supreme Court in Canada, you will see that the Court there regards it as being a significantly higher standard when one seeks to apply the proviso in a serious error case.

WILLIAM YOUNG J:

Have we got a copy of the Canadian appellate provision? Is it the same as section 385? I know they talked about proviso so it may be.

MR EATON QC:

We have got the *Trochym v R* [2007] 1 SCR 239 which is at the defence bundle at tab 11 and the provision is at paragraph 80 of that decision which is at page 284. It is section 686 of the criminal code. We are in the *Trochym* decision which is at tab 11, and if we go to paragraph 80 which is at page 284 of the decision, top left is the page numberings. It's pretty much identical wording.

WILLIAM YOUNG J:

Yes I know, it is. It is. Okay, I agree with what you're saying.

O'REGAN J:

So what do you say. If the appellate court says we're sure of guilt and we're satisfied the trial was fair, what else do they have to do?

MR EATON QC:

Well, there has to be a determination based on *Matenga* that the verdict of guilt, guilty was inevitable in the sense of it being the only reasonably possible verdict.

O'REGAN J:

But *Matenga* equates that with the appellate court being sure so, whereas you're saying there's something more than that, aren't you?

MR EATON QC:

Yes, I don't accept that it does equate that, and it's a bit of a question mark around the different language that's being used and the purpose for it because plainly the Courts are all familiar with the expressions of jury standard of beyond reasonable doubt and sure, but this Court, and others throughout the Commonwealth have seen fit not to focus the enquiry simply on that jury standard of sureness, and we have this range of terms. So *Matenga*, no room for doubt. Not only reasonable but inevitable. *Lundy*, need to feel sure of guilt and be satisfied guilty verdict inevitable. *Barlow v R* [2009] UKPC 30, the only reasonably possible verdict. *R v Fulton* CA280/96, 7 April 1998, if the jury would, without doubt, have convicted. Then the Canadian cases, the standard is not the ordinary standard of proof. A higher standard is appropriate to reflect appellate review. It's a substantially higher test. Then *R v Mayuran* [2012] 2 SCR, which is another Canadian case, is the evidence so overwhelming that any other verdict would have been impossible to obtain. So you'll see from that range of language it must be interpreted as being deliberate to say to an appellate court your task is not to undertake the same task as a jury and simply apply the beyond reasonable doubt standard. It must be something cumulative to that. That might be stage 1, and then stage 2 is I am satisfied beyond that, however it might be

expressed, and the appellant's submission is that's entirely appropriate, recognising the fact that you are –

O'REGAN J:
But isn't that effectively reintroducing the Exchequer Rule? I mean in a case where evidence has been admitted incorrectly, on that standard you would say there'd be, almost never would a Court say, notwithstanding that there was no other verdict, it would have been impossible to come to another verdict?

MR EATON QC:
No, no, no. It will always very much depend on the nature of the evidence.

O'REGAN J:
Because to have got to the proviso we've already satisfied ourselves that the admission of the evidence caused a miscarriage, so it's not just trivial evidence.

MR EATON QC:
Yes.

O'REGAN J:
So it's hard to see on your test where the proviso would ever be applied, isn't it, in a wrongly admitted evidence case?

MR EATON QC:
Well if the, let's apply *Howse* using the same language if there's a confession. If it's a very simple trial where there's no jurisdictional disadvantage in terms of what a jury might have been able to have access. If the issue is plainly one that doesn't turn on any issue of credibility or reliability. There might be categories of cases where the Court is sufficiently armed, conscious of the limitations of an appellate court exercising review, to make a very positive and definitive finding that I'm so satisfied of guilt at such a level beyond beyond reasonable doubt that you will not have a further jury trial.

WILLIAM YOUNG J:

Well the High Court of Australia doesn't say that. They just say beyond reasonable doubt. Well that's what's said in *Matenga* at paragraph 24, "The standard of proof to be applied was the criminal standard of guilt beyond reasonable doubt. Reference to the jury was liable to distract attention from the statutory task." So *Matenga* then says they propose to adopt the general approach in *Weiss* but then use language, which I agree, at least leaves room for doubt as to what was intended, but my impression was that that doubt had been resolved in *Best* and *Cameron*.

MR EATON:

Well I, with respect Sir, just don't see the issue being confronted in *Best* and *Cameron* as being – I have issue where the Canadian position that the *Lundy* Privy Council position had been debated or the philosophical arguments around –

WILLIAM YOUNG J:

Well the *Lundy* decision has added something to *Matenga*. They've said, in *Matenga*, that in order to come to the view that the verdict guilty was inevitable the Court must itself feel sure of guilt of the accused. But *Lundy* in the Privy Council, they say you must a), be sure of guilt, and b), think the verdict of guilty was inevitable, which is not an accurate…

MR EATON:

With respect, doesn't that seem inevitable though from a read of *Matenga*. "The provider should only be applied where there is no room for doubt about the guilt of the appellant." What does that mean? It's something beyond –

WILLIAM YOUNG J:

Well I don't know what it means. I've said that it's a difficult judgment, but I do think that it has been unequivocally stated in two subsequent Supreme Court judgments, and you say well, it wasn't properly argued. I can't recall now what, if any, argument there was. I'd be surprised if there hadn't been some argument about it.

MR EATON:

Yes, and I guess it would turn on the facts of the case as to whether it's likely to rear its head as an issue because the primary argument in support of there being an additional layer, a higher standard, of course focuses on the disadvantage that the appellate court has and if that, in a particular case, is not significant then it might be less likely to rear its head as an issue.

WILLIAM YOUNG J:

Well that's, I mean the real problem with applying the proviso is that in most cases there is oral evidence and there is, I suppose, a general disadvantage of not being at the trial, which inhibits appellant Judges from applying the proviso. But that doesn't necessarily always apply and in that case it's satisfied beyond reasonable doubt of guilt. At least, for myself, I would have thought that's probably a reasonable basis for applying the proviso.

MR EATON:

Yes, which is effectively to say the appellate court wears the same hat as the jury.

WILLIAM YOUNG J:

No it doesn't. No, it's not saying that at all. It is saying that on occasions an appellate court will not be at a disadvantage to the jury. It's not saying that an appellate court will always be in a position to substitute its own, to rely on its own verdict – rely on its own conclusion.

MR EATON:

Well that perhaps might be reflecting a floating standard dependent upon the disadvantage of the Court faces in the case to hand, and in this case a two month trial, so eight weeks of trial, thousands of pages of evidence, 140 witnesses. I know the Court said that really there wasn't any credibility or honesty issues or reliability issues, but of course there was. There was one particular which was very significant because the Crown called a jailhouse snitch, which was the, the Crown relied on in closing and said that tells you why Amber was killed. Boy if that doesn't strike at the heart of credibility, but

there are other significant reliability issues as well because the whole defence case on contamination attacked the police and their dealing with exhibits, and reliability loomed large, and for Dr Miller the ProPath man from Texas. The Crown launched a quite scathing attack on the defence expert Ms Leak who was an international forensic expert in terms of her evidence, so there were certainly reliability issues there, which all begs the question, you know, was this a good case to apply the proviso and I guess what it highlights is that the Court said here, I'll see if I can find the reference, the Court said that, this is at square 6, 363, “This isn't a case that requires more than the usual degree of care.”

WILLIAM YOUNG J:
Well if they were satisfied that is was Mrs Lundy’s brain tissue on the shirt, then probably that was end of story, wasn’t it?

MR EATON QC:
Well to determine guilt as being inevitable, to use that phrase, you then have to discard categorically contamination or any other possibility.

WILLIAM YOUNG J:
But that is assuming that they are satisfied beyond reasonable – I suppose that is fair enough but there really wasn’t a contamination narrative that was pressed was there?

MR EATON QC:
Well in terms of an articulated explanation about what happened, no. But in terms of, was contamination a live issue in this case? Yes, very much so.

WILLIAM YOUNG J:
Well it had to be because –

MR EATON QC:
But it wasn’t just theoretical, no there were examples in the evidence where there was contamination, for example. So 2014 they go back to Dr Miller in

Texas and say, can you do DNA testing on the paraffin blocks you have got over there, assuming it will give the same result as the ESR results in 2001 and it came back, "No DNA from Mrs Lundy, but we've found an unidentified female" who they assume is one of his laboratory staff and the Crown case, well that was contamination. There was significant debate at trial about a dab slide which was the slide taken off the shirt and it was examined and said you can't see anything on it and yet what was left as the remains, was said to be CNS tissue which you could see and one of the explanations that was offered by the experts, well that is some form of contamination going on. That was a live issue. Dr Miller who was at the heart of the analysis of the tissue was not forensically trained; he had no forensic accreditation.

WILLIAM YOUNG J:
This is whether it is CNS tissue?

MR EATON QC:
Yes, that's right but there were contamination issues alive throughout the course of the trial. So it comes back to Your Honour's question. Well if the Court concluded that this was rightly or wrongly CNS plus DNA equals Mrs Lundy's tissue, unequivocal, would that leave them in a state of being sure? I guess arguably it could and that is the test they applied. In my submission they didn't go beyond being sure.

WILLIAM YOUNG J:
Well they just seem to have taken the view that *Matenga* means sure, are you sure of guilt.

MR EATON QC:
Yes well I didn't actually read the judgment as making a finding about it because they referenced *Matenga* and talked about inevitable but ultimately reached a conclusion on this limb of the proviso by applying the standard of being sure. And so the defence answer on this limb is number one. The Court misdirected itself because it was required to impose another level of assessment and had to engage in assessment about inevitability which

would have meant we need to explore these issues in more detail and find it so overwhelming that they are not reasonably possible and secondly, of course, we say the analysis about CNS plus DNA equals Mrs Lundy was simply flawed and wrong.

MILLER J:

Can I take you back to the Canadian cases. I have just been looking through them to see what is the source of this proposition. It is a constitutional right to have a jury decide this issue. The cases you have given us don't take us there. They just refer back to earlier cases. Is there a charter dimension to that?

MR EATON QC:

Look I haven't got the earlier cases from where that transpires but I assume in terms of similarity to our Bill of Rights and the right to trial, there is a charter issue that arises.

WILLIAMS J:

A right to a trial by jury isn't a charter right though is it? A right to a fair trial is.

WILLIAM YOUNG J:

Well you are entitled to be tried by jury at the time if faced with imprisonment of more than three months.

MILLER J:

I was really just asking what is the source of it because you will appreciate that in *Weiss,* the High Court of Australia said quite clearly that right is not comprehensive in the sense that if there is any kind of error, the appellate Court must send it back because legislation itself recognises that the appellate Court has to make the decision. So I was wondering what is the reason for the Canadians taking a different –

MR EATON QC:

As you say in the *Trochym* decision itself, there is not a lot of, there's some very strong statements about what the –

MILLER J:
There's one paragraph and it refers back to other cases, one of which is in this bundle, but the others aren't.

O'REGAN J:
But the Charter does have a right to trial by jury I think, for an offence of more than five years' imprisonment I think.

MILLER J:
That maybe the explanation.

MR EATON QC:
Yes well that is the logical explanation for the Court taking the view that we need to put a higher threshold on if we're going to take away that right to trial. Just on the High Court of Australia position we've referred in the submissions to an observation by Justice Kirby in the *Gassy* decision that's at tab 4 of the bundle, and it may well be that the Australian approach is, although as we've discovered applying a standard of beyond reasonable doubt but a more cautious approach as to when you are to apply the proviso at all, because His Honour said, and this is at paragraph 100 of the *Gassy* decision, "Apart from their role in resolving resulting contested issues of credibility raised during the trial, the jury in this trial had one significant advantage over an appellate court. The jury sat for weeks listening to and watching the prosecution construct its case. Absorbing the entirety of the evidence is a very important function of the decision-maker, especially in a very long trial (81). Whilst this Court can certainly comprehend the gist and substance of the case, there are distinct risks in pretending that the appellate court can accurately and fairly comprehend the *entirety* of the evidence." Which would seem to be a steer that if you've got a long case then the Court would be reluctant to engage in the proviso and therefore the issue about what test you

might apply to be satisfied of guilt or inevitable guilt is not so much in sharp focus.

I'm not sure I can take the issue much further other than to say as matters stand the language of *Matenga*, of *Lundy*, of the Canadian cases, is all consistent with a view that an appellate court conducting the review is going beyond being sure before the proviso ought to be applied. It is something more than that. What that might be may well be reflected in the case to hand in terms of the nature of the evidence and it's being ruled inadmissible.

MILLER J:
This question of the impossibility of an appellate court doing the job of the jury based on the record, can we just look at *Weiss* at paragraphs 39 and 42? It's tab 13.

MR EATON QC:
Weiss is 12 I think.

MILLER J:
I beg your pardon. Yes it is. So the proposition I want to put to you is that what you see in 39, and repeated in 42, are the only general propositions for which *Weiss* stands. That is generally applicable to all cases. And I say that because if we look at 36 we see the Court saying, "In cases, like the present, where evidence that should not have been adduced has been placed before the jury, it will seldom be possible, and rarely if ever profitable, to attempt to work out what the... jury actually did with that evidence." So this is a case, like *Lundy*, of evidence being before the jury that ought not to have been there.

MR EATON QC:
Yes.

MILLER J:
But when we think generally about the impossibility of an appellate court deciding on the record whether the appellant was guilty or not, we have to

bear in mind that that was the case that *Weiss* was, like *Matenga*, and there may be a case like *Wilde* where we know from the pattern of the jury verdicts that they didn't take the inadmissible evidence into account or we may have other cases where what has happened is that new evidence has come along after the trial. So the proposition I am putting to you is detracting from your general submission that the Court has to adopt this high standard because it is simply impossible to judge guilt or not, based on the record, and what I'm suggesting to you is that there may be circumstances in which the Court can be aided by what the jury did. The actual jury, not the hypothetical jury.

MR EATON QC:

Well, plainly the law in New Zealand is that the Court undertakes its assessment quite independent of the jury, that's where *Matenga* adopted *Weiss.* I am not suggesting that it is an impossible task, it is simply meeting a balance to recognise the challenges that might arise in a particular case to approaching that task, meaning another layer of security needs to be embedded into the process to protect the defendant's rights. And it does seem to be the entrenched position in Canada and it seems to be what the Privy Council think what we are doing here in New Zealand.

WILLIAM YOUNG J:

If you look at *Weiss,* look at 39 and 40. Thirty nine says that the standard of proof is beyond reasonable doubt. It then says, "Reference to inevitability of result or converse references to fair or real chance of acquittal are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken to pointing to natural limitations that exist in the case of any appellate court proceeding wholly or substantially on the record, but reference to a jury, whether a trial jury or a hypothetical reasonable jury, is likely to distract attention from the statutory task". Suggest the Appeal Court is to do, other than decide for itself, whether a substantial miscarriage of justice has actually occurred. Now I suspect in *Matenga* got inevitable from paragraph 40 but in paragraph 40 it is simply saying, this emphasises the high standard of criminal proof.

MR EATON QC:
Yes.

WILLIAM YOUNG J:
It is not saying, you not only got to be sure of guilt, but you have got to be sure that a verdict of guilty was inevitable. Now your approach would involve doing the very thing that the Court in *Weiss* was anxious to avoid and that is, looking at the case through the prism of the actual jury or a hypothetical jury so it would be effectively nullifying the result in *Weiss.*

MR EATON QC:
Well certainly *Weiss* is different –

WILLIAM YOUNG J:
Weiss is again you.

MR EATON QC:
Yes, that's right. Canada is with me. *Lundy*, I guess we'll put a question mark over it, but on the face of it appears to impose a cumulative obligation but even *Weiss* there. If you are an appellate court reading that, being told that the standard is beyond reasonable doubt, I struggle to see if that is the beginning and end, why then referring to inevitability can be helpful.

WILLIAM YOUNG J:
Well, likewise.

MR EATON QC:
And the reference there is, if we translate that to what this Court of Appeal did where they said they were satisfied in the sense that we are sure, I would say they haven't engaged in even the *Weiss* assessment which is, and we are – because we have carried out this assessment of the view that guilt was inevitable.

WILLIAM YOUNG J:

No but the High Court goes on to say, “But a reference to a jury, whether the trial jury or a hypothetical reasonable jury distracts attention.” I mean they are not that keen on the language.

MR EATON QC:
No.

WILLIAM YOUNG J:
Nor, I confess, am I for the reason they give. It just adds a level of indeterminacy to, I suppose, which seems to me to be unnecessary. I mean you have got to be not just sure of guilt, but really, really sure of guilt.

MR EATON QC:
Well that is it. Perhaps not certainty but pretty close to it/

WILLIAM YOUNG J:
But somewhere less than certain but beyond beyond reasonable doubt.

MR EATON QC:
Curiously a number of the authorities that we are talking about, talk about there being no doubt, they drop the word “reasonable”. All suggesting it is just a heightened sense of obligation, go beyond being sure. And even *Weiss*, with reference to “inevitability” seems to be saying to a Judge, you know, use some language that we don’t commonly use for the jury to make that assessment.

WILLIAM YOUNG J:
Alright, well your proposition is, sure should come down to very, very sure, or really, really sure.

MR EATON QC:
That’s right and in this case, it means this Court was obliged to undertake an assessment about sureness for sure, undertake an assessment about inevitability.

WILLIAM YOUNG J:

But inevitability by reference to the verdict of a jury?

MR EATON QC:

Inevitable finding of guilt.

WILLIAM YOUNG J:

By a jury?

MR EATON QC:

No. On their assessment. So from *Matenga* –

WILLIAM YOUNG J:

The trouble is, if I am satisfied that someone is guilty, then in that sense, finding guilt is inevitable. I know, in a way it is playing with words unhelpfully.

MR EATON QC:

Well I think that's right. That is the Crown position, it's semantics and ignore it. But I don't think the Court can ignore it because the words are there and are being referred to across all jurisdictions so it is an invitation to do something more than simply apply a test of beyond reasonable doubt.

ARNOLD J:

I must say I think this is being a little unfair to the High Court because they are making the point that the concept of inevitability has got two elements. One is the criminal standard of proof, the other is the limitations that appellate courts have. So the use of the term inevitable, is intended to remind the appellate court of those two dimensions and it is just a word for doing that. They have explained what it means. But it doesn't seem to me that it means that the burden of proof beyond reasonable doubt has changed.

MR EATON QC:

No well they have expressly said that in the paragraph above, that is not the case.

WILLIAM YOUNG J:

I sort of find it puzzling that *Matenga* would specifically adopt *Weiss* when that is absolutely fundamental bit of *Weiss* and then by phraseology which isn't particularly, I suppose, certain, just disagree with it. I mean if you are going to adopt *Weiss,* I mean if you weren't going to adopt the view that proof beyond reasonable doubt is the standard, then you are not adopting *Weiss.*

MR EATON QC:

Yes except I think *Matenga* saw *Weiss* as being, what was being adopted there was that the appellate review is conducted by the Court for itself as opposed for a hypothetical jury.

O'REGAN J:

So your inevitability analysis, does not involve a consideration of what the jury in the actual trial would have done. You are just saying, the Court of Appeal, in its own exercise, has to come to the conclusion. A, it has to be sure and then it has to go beyond that and say, and we are so sure that we think the verdict is inevitable.

WILLIAM YOUNG J:

They are so sure that no other person could come to a different view, no reasonable person could think differently.

MR EATON QC:

Yes and whether that be, as Justice Arnold says is the Court reminding itself that I need to be cautious about this approach and that is the rationale which it is and that seems to be the approach in Canada. It is something more and, in this Court, of course, mention inevitability, applied a test of sureness and doesn't undertake any assessment about inevitability. I don't need to go into the detail because it is all in the written submissions but we have critiqued the approach of the Court, having said *Weiss* tells us we don't look at the jury and

then as the Court has gone through and dealt with arguments for the Crown, arguments for the defence, they said, well the jury rejected this and so do we. So they have buttressed their own views by reference to what the jury in fact did, albeit in a trial where there was inadmissible evidence which could have influenced the verdict, so in our respectful submission, the Court of Appeal got into a circular process in terms of then going and assessing the various factual contests.

WILLIAM YOUNG J:

There are two possible responses to that. One is, does it matter anyway because this is an appeal by way of re-hearing and we have to substitute our view for that of the Court of Appeal. Don't we have to deal with it as afresh?

MR EATON QC:

Well yes and the other argument which deals with our complaint is that our primary argument is that the Court said CNS plus DNA game over and that was wrong and so that has influenced –

WILLIAM YOUNG J:

I am just dealing with your complaints about the Court of Appeal referring to jury, what they thought the jury considered.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

One is, it doesn't really matter because we've got to start afresh, consider whether we think the proviso should be applied. So errors arguably made by the Court of Appeal aren't particular material, are they?

MR EATON QC:

Well perhaps not in terms of that overall question for this Court about the application –

WILLIAM YOUNG J:

Then secondly, maybe what the Court of Appeal had in mind was assuming that the, you know, that the prejudice suffered by Mr Lundy was that the jury concluded that the material on his shirt was his wife's brain, the other, it's clear that the other factors relied on did not raise a reasonable doubt as against that central core finding. Now that may be debatable whether that's appropriate in terms of *Matenga* or *Weiss* for that matter, but it's not entirely sort of devoid of common sense.

MR EATON QC:

Yes, well –

WILLIAM YOUNG J:

They'd normally, and so do we, they'd normally finish, the jury obviously thought it was not inconsistent with guilt and so do we.

MR EATON QC:

Yes, but what an appellant is entitled to have the appellate reviewing court do is undertake its own independent assessment of it, whether you're calling it sureness or inevitability, and come to a view, as opposed to well you raised it on the jury and it didn't work there and we agree, that's not carrying out the cautious approach that's required in the application of the proviso.

So perhaps if I turn to the key factual dispute, that is the Court's determination the CNS and DNA did it effectively dictate the outcome, and in my submission there's a starting point. This Court ought to be dubious about that proposition given, as I've just said, that wasn't even the Crown position when they filed their proviso submissions. They said well it's an inference and then you look to the rest of the evidence for proof beyond reasonable doubt. If it was the Crown case that CNS plus DNA was inevitable guilt, then I would suggest we would not have spent so many hundreds of hours arguing about the mRNA evidence. So the position, with respect, seems inconsistent. But the written submissions do focus on the Court's view about the DNA evidence because the Court of Appeal have said that it's an irresistible conclusion that

Mrs Lundy's DNA came from the CNS tissue. Now that was not the opinion of the experts who gave evidence at trial. In fact the experts said that is not what you – they say a conclusion that can be drawn in a scientific perspective, but they were far more guarded than that, and inexplicably the Court makes no reference whatsoever to the evidence of Dr Vennemann, who was the –

WILLIAM YOUNG J:

Can I just ask you, I'm looking at volume 1 of the additional materials, and what looks to me to be page 357.

MR EATON QC:

I don't have that to hand. What document did you say? Oh yes, yes. Yes Sir?

WILLIAM YOUNG J:

So that's the shirt.

MR EATON QC:

I've got a hard copy of that somewhere. Thank you Sir.

WILLIAM YOUNG J:

There are four photos and they show three areas where there's a sort of a grey mark.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

What's the grey mark?

MR EATON QC:

That's where a piece of fabric's been cut from the shirt.

WILLIAM YOUNG J:

Okay, so those are the fabric that's been cut.

MR EATON QC:

The two on the upper part of the shirt, the third one's a control sample.

WILLIAM YOUNG J:

Yes, and the one on the bottom right is the control sample. Okay.

WILLIAMS J:

Bottom left of the photo.

WILLIAM YOUNG J:

Yes, bottom left of the photograph, bottom right of the shirt. So the samples themselves, my note has the stain on the left sleeve was 30 by 20 millimetres.

MR EATON QC:

Yes, unfortunately we have no photographs of the stains, what's said to be stains, and we have Mr Sutherland's notes that he made back at the time as to what the measurements were, and those were the, that was measurements we put into evidence at trial.

WILLIAM YOUNG J:

And was he who described it as, "A visible whiteish brown smear with a lump of substance smeared or embedded into the material of the shirt."

MR EATON QC:

That was one of them and the other had a slightly different description.

WILLIAM YOUNG J:

And that tested positive for blood, so that's the one that's taken from there?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

And the other one was on the chest pocket was 25 mls by 10 mls, "Traces of blood observed under the microscope and the stain tested positive for blood."

MR EATON QC:

I think it was probable blood, yes Sir.

WILLIAM YOUNG J:

So the slices of the material, the pieces of the material that were taken we don't have photographs of them I take it?

MR EATON QC:

No, because they were – no we don't, and they ended up going into these paraffin blocks and being used for analysis.

WILLIAM YOUNG J:

Do we know what size they were?

MR EATON QC:

Well I think the general consensus is that that measurement reflected what he cut out.

MILLER J:

Can I ask what became of the evidence about the blood because there were three things in these samples, if we look at the evidence of Mr Sutherland, there's blood, and then we have the other expert evidence of CNS tissue and DNA, which could have come from blood. Is that right?

MR EATON QC:

Yes.

MILLER J:

So the blood hasn't seemed to feature very much at the trial as the possible source of the DNA and yet one would have thought that was significant. Can you explain that?

MR EATON QC:

No I can't, I'll let my friend explain that, but that's exactly right. The blood didn't feature and from memory the testing for the blood was probable blood

and it didn't go any further, but there was one other finding made by, I think, du Plessis, was that there was skin flakes or dandruff was found in a sample as well, which again didn't loom large as being a potential source of DNA. What was agreed was that the, Sutherland didn't cut out, try and cut out around the outskirts of the stain. He cut out a square for where the stain was within it. So that then piece of fabric –

MILLER J:
His evidence was he would have cut around it.

MR EATON QC:
Cut around it, that's right, yes. So he wasn't trying to cut as a line on the stain. So no one was suggesting that the fabric is entirely stained, and of course you couldn't because –

WILLIAM YOUNG J:
But most of it would be. I mean they're not very big pieces of material that have been cut out.

MR EATON QC:
Yes, but 50% of that is on the reverse side of the shirt of course.

WILLIAM YOUNG J:
Except that the material on the sleeve was embedded into the shirt.

MR EATON QC:
Yes, but in terms of the potential source of DNA, we have, we don't know where it came from on the shirt, and no one was suggesting we do know where it came from.

WILLIAM YOUNG J:
We know it came from those two cut out pieces.

MR EATON QC:

Yes, we don't know it came from the tissue, and that was always the issue and that was the missing link which we talked about this morning, and so the expert evidence at trial is set out in the record and it is from Dr Vennemann and Dr Vintiner who are telling the Court that we don't know what the source of the DNA is. We cannot tell from the DNA analysis what the source is. What I can tell you is that I don't think it's touch, because it's not a trace amount. If it was a trace amount then it could be from touch. So it's something more than that. And what Vintiner said was, and she was asked about what is fit in terms of categories, she said well it's not small, it's sort of more medium, possibly large, and she was asked what that might mean in terms of, you know, in terms of quantity and she said, well, that could be consistent with blood or mucus or tissue.

WILLIAM YOUNG J:

Sure. There was a dab slide taken from the stain on the sleeve which produced, was inconclusive.

MR EATON QC:

Yes it was described as being degraded and unrecognisable.

WILLIAM YOUNG J:

The two pieces of material, possibly three, the two relevant ones anyway were put in a beaker and soaked and that would have removed about 20% of the biological material.

MR EATON QC:

The evidence at pre-trial was 20 to 25% was the estimate about that.

WILLIAM YOUNG J:

So the only human DNA is that of Mrs Lundy.

MR EATON QC:

And if there was other human DNA, there was less than 10% that they wouldn't have picked it up.

WILLIAM YOUNG J:
DNA – my note, and I may have got it wrong, is DNA recovered was of good quality and quantity of a kind expected with visible blood stains or tissue.

MR EATON QC:
Well that's what the Court said and that's what my friend focusses on but if you go to the evidence.

WILLIAM YOUNG J:
What page reference?

MR EATON QC:
Vintiner's starts at page 2020. So what was key and what the Crown focussed on was that she said it was good quality, and good quantity but both she and Dr Vennemann said that doesn't tell you what the source is.

WILLIAM YOUNG J:
But they thought it was not trace DNA.

MR EATON QC:
But not trace; that was what they both agreed on, that was unlikely to be trace.

MILLER J:
Page 2021.

MR EATON QC:
Yes that is the passage thank you Justice Miller. Yes 2021, line 14 talking about this issue of good quality and quantity, any variation between bodily fluids. "Small amounts, if a touch, other sources you get medium to high. An example of that would be blood saliva, medium to high, to substance we can

have very high amounts of DNA recovered, semen, tissue, possibly blood. And so where in that category of small, medium and high would you put these? And her answer is, definitely not small, I think I would have to generally have to accept in the range of medium category, more likely high, so a blood stain, that's a good quality, you could expect to get high DNA, semen stain although irrelevant here and the third type is tissue." And so they dealt with tissue. And then in cross-examination she was asked, "What about mucous?" and she said, "Yes that would fall into that same category as well."

WILLIAM YOUNG J:
So just going on a little. Dr Miller embeds the shirt samples in paraffin producing a block from which slides are taken. Now we probably are going to have to come to this later with you. Let's just assume for the moment that he is right and it revealed CNS tissue. There was some support from that, from morphological examination wasn't there, which revealed myelin.

MR EATON QC:
Well one witness suggested that.

WILLIAM YOUNG J:
CNS tissue was fresh, unfixed and most likely uncooked at the time it became embedded in the shirt. Is that accepted?

MR EATON QC:
The issue around freshness more turned on it being in a state that it would embed. I think it was Dr Ironside who said, well he wasn't so convinced about the freshness that it could have been likely microwaved, something along those lines.

WILLIAM YOUNG J:
But cooked, would be unlikely to embed itself in the material?

MR EATON QC:
Well if it wasn't in a damp state such that it could mesh itself into the fabric.

WILLIAM YOUNG J:

All right. So obviously a reasonable hypothesis is that the – sorry. The same is effectively the position in relation to the other stain from the shirt except that there was no visible tissue present, no palpable tissue.

MR EATON QC:

It was described it was in terms of colour. One was more brown, the other more white.

WILLIAM YOUNG J:

I don't think anyone described it as link a hunk of tissue that you could feel and touch. Discernible.

MR EATON QC:

No, no and so with the sleeve there was the tissue that was seen was taken off on the dab slide. But it wasn't, this wasn't visible, this was picked up much later.

WILLIAM YOUNG J:

Yes, sorry?

MR EATON QC:

It wasn't visible at the time when it was first examined. The shirt wasn't, the stain on the shirts weren't identified as being potential stains for some 59 days.

WILLIAM YOUNG J:

Yes, I'm not sure that's right. They were not scientifically examined for 55 days, isn't that right?

MR EATON QC:

I'll get to that but we'll be able to see precisely what the date of his dab slide was.

WILLIAM YOUNG J:

Okay, I thought that the first, certainly the slide on the sleeve was quite obvious. The smear on the sleeve was quite obvious.

MR EATON QC:

I'll just have to check that.

WILLIAM YOUNG J:

So the other fact is that some DNA associated with Amber, probably blood, is also protected on what I assume was a test taken from a tape lifted from the shirt?

MR EATON QC:

Yes, but that was completely explicable by way of innocent explanation in that it was a particle or flake of blood that was seen on that tape lift. I mean it was dry blood which the experts said is not an uncommon expectation in a shared household, and she had a healing wound on the inside of her ankle. So that took us nowhere.

WILLIAM YOUNG J:

Well it doesn't take the Crown all the way, but it's not entirely to be dismissed –

MR EATON QC:

Well it wasn't associated with what was said to be stains. What's…

WILLIAM YOUNG J:

What puzzles me a bit is an explanation for meaty tissue being on a shirt that he was wearing that night. Now is it his case that it was already there when he put the shirt on?

MR EATON QC:

Could well be. Remember this issue didn't rear its head until 2013 so 13 years after –

WILLIAM YOUNG J:
Well it reared its head –

MR EATON QC:
No, but at trial 1 he conceded it was his wife's brain tissue so in terms of what else it could be was never explored.

WILLIAM YOUNG J:
All right.

MR EATON QC:
Can I say something? In terms of the coincidences and the remarkable coincidence which the Court of Appeal focused on, the rest of the shirt was never tested for DNA so we just don't know. Was Mrs Lundy's DNA all over this shirt and other parts of it that were just not visible to the eye, and hence the scientific opinion was expressed appropriately but the Court then discarded it and said –

WILLIAM YOUNG J:
Let's just follow the line, because I just want to understand the issue. He said, he gave a description of a meal he had that night which doesn't seem to have been a likely source for the CNS material.

MR EATON QC:
Yes.

WILLIAM YOUNG J:
All right, so on this hypothesis presumably he put a shirt on that had this smear on it.

MR EATON QC:
Well there was an exhibit, which I don't think is in the bundle, exhibit number 104 which showed on three days earlier, and again the week before, he'd made purchases of fresh meat from a meat place. So what was

possible, yes. There was no narrative that defence pointed to and said here's how we explain that this is actually an animal, a food explanation for it. That didn't arise but rather what the defence said is we don't know what that is and we don't accept it's human. The experts said that there is animal DNA in our environment via food, and we are exposed to it, and that is a possible explanation, and then we strike, of course, what seems to, with respect to the Court of Appeal talking about remarkable coincidence, the most remarkable coincidence of the case is when the Crown then send this same solution off in December 2014 to UC Davis in California, to an animal DNA specialist, looking to shut down this animal food narrative defence, it comes back and says, we're picking up through mitochondrial DNA testing sheep, cow, chicken, in the same solution.

WILLIAM YOUNG J:
Yes, so these, but were these not described as trace DNA?

MR EATON QC:
Yes, yes. But what a remarkable coincidence they happened to be there in a case where you're looking to say, let's just prove this is nothing to do with an animal, and it comes back and says, no in fact it doesn't do that at all.

WILLIAM YOUNG J:
Well if it wasn't Mrs Lundy, if the DNA from Mrs Lundy didn't come from blood or CNS tissue, where did it come from?

MR EATON QC:
Well the evidence which the experts both accepted was that this would be explicable by mucus. So let's say she's sneezed and deposited mucus onto her shirt, let's say she's –

WILLIAM YOUNG J:
And then the tissue gets deposited on top of that?

MR EATON QC:

Well not necessarily because we're talking in terms of the, what might be a source of DNA. You know, measurements that are less than a pin prick.

WILLIAMS J:

Is it possible that the tissue is on one part, the DNA is on the other cutting, and –

MR EATON QC:

No, the two cuttings were tested separately.

WILLIAMS J:

Yes, but, and then folded together.

MR EATON QC:

Yes.

WILLIAMS J:

Or held together.

MR EATON QC:

Yes.

WILLIAMS J:

One transfers to the other?

MR EATON QC:

Yes, and Ms Leak gave evidence for the defence as an expert and said that, it may well be there was only one original and, so long as it was in a state where it was still transferable, meaning wet, then it could be one.

WILLIAMS J:

But that could account for Mrs Lundy's DNA and the tissue being in one place at the time of assessment but actually originating from two separate places on the shirt.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

Sorry, you'll have to run past, were the two pieces of shirt put in different solutions?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

Were they kept separate?

MR EATON QC:

Well, the two pieces of shirt were in a paper bag in the officer in charge's desk in his office.

WILLIAM YOUNG J:

For 55 days?

MR EATON QC:

Yes, and he took them over to Texas. The point being, and the scientists were at some lengths to ensure this was understood by the jury, is that it's very dangerous to draw absolute conditions as to source from a DNA finding because there are so many variables, and yet the Court of Appeal have said don't worry about that, and I won't refer to the evidence, but I will make the ultimate finding. There's no doubt it, it's an escapable conclusion, and yet we have the experts saying, quality and quantity don't inform source. They simply don't. But the Court –

MILLER J:

Aren't you reading too much into the evidence about the DNA there. I mean Ms Vintiner is just being a good scientist. She's telling the Court that what she's done is she has extracted through this beaker process a liquid.

That liquid has then had a chemical applied to it. What you've done, effectively, is to extract the DNA and so when we look at the DNA she says, yes, I can't from that tell you where it came from, but the other evidence can tell us that. Put another way, what she's telling us about it doesn't suggest that it's, that we know nothing about the source of it.

MR EATON QC:

The difficulty was that the Court in the judgment recited a passage from her evidence very early on in the analysis of DNA and then next sentence made the conclusion, this is the inescapable conclusion from that evidence, and will say that's only a very small portion of their evidence, and Dr Vennemann gave other evidence which was, ought to have been equally persuasive, and both warned against making that, jumping to that very conclusion which the Court jumped to. So it was factually a flawed finding, and of course the Court said, we find that they came in the exact same places, and it's not exact. I mean you need to go no further than the fact that the stain is said to be on the outside and we've got the whole piece of fabric being tested, so straight away you're down to 50% even if the stain covered everything on the shirt. There may be cases when and where the assessment of the DNA can exclude explanations beyond trace, but this wasn't one of them, and –

WILLIAM YOUNG J:

Sorry what explanation beyond trace?

MR EATON QC:

Well to be able to say this is definitely not mucus. This is definitely not blood. This is definitely semen, you know, there may be cases, I can't imagine they would go that far, but this was one where all they had to say is there's good quantity and good quality therefore it's not trace. That's about as much as I can tell you. Where do we get this sort of quality from? Well, you know, we get it from blood, mucus, tissue, these are examples of where we get better quality, but I'm not going to draw any conclusion about what it is because I'm not permitted to and the evidence wouldn't rightly allow that.

WILLIAM YOUNG J:

So you've got to get a, really, Mrs Lundy sneezing over this area, or these two areas, or somehow bleeding over those areas, to explain her DNA in those two places?

MR EATON QC:

Well those are possible explanations.

WILLIAM YOUNG J:

What are the others?

MR EATON QC:

Well, if she's ironing and she sees a stain –

WILLIAM YOUNG J:

Well I've said sneeze.

MR EATON QC:

Spits on her fingers and rubs it in to try and rub out a stain.

WILLIAM YOUNG J:

She would hardly leave, if she were doing that, a stain that had a big lumpy bit of tissue in it.

MR EATON QC:

No, no, she's rubbing a stain, as one might do when you see a stain, spit on your finger and try and rub the stain out.

WILLIAM YOUNG J:

So she's rubbing a stain that was there on the left sleeve?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

But it's got nothing to do with, prior to the CNS –

MR EATON QC:

Nothing to do with the CNS.

WILLIAM YOUNG J:

– tissue getting, and then the CNS tissue gets onto that same spot.

MR EATON QC:

No, the CNS tissue is already there.

WILLIAM YOUNG J:

But why – would she really leave a shirt with a lumpy bit of tissue embedded in?

MR EATON QC:

Well I don't think, I think, well I'll take you to the evidence of Sutherland I think Sir. Your impression of what it might have looked like, and without a photo, might not be fair to what was presented to Mr Sutherland.

WILLIAM YOUNG J:

Well I've noted, and I may have got it wrong, a lump of substance smeared or embedded into the material of the shirt. I got the impression it was palpable, you could feel it with your finger. It wasn't just a sort of a discolouration.

MR EATON QC:

Well the difficulty with –

WILLIAM YOUNG J:

I may be wrong.

MR EATON QC:

The difficulty with this analysis is of course he took whatever it is he saw off by way of dab slide and they couldn't say what it is. If they had then come back

and said it's CNS tissue, well, different question, but they looked at that and no one is saying it's CNS tissue.

WILLIAM YOUNG J:

Well that's a different issue because we're going to probably have to come to that after lunch because you want to say it's not CNS tissue, or hasn't been proved to be, which I'm not sure you can actually.

MR EATON QC:

Well, no, I don't, I think to be fair I don't want to say that. What I want to say is in light of the ruling and the declinature of leave on the IHC issue what I say the Court of Appeal was still obliged with the evidence that they had to embark upon in considering inevitability of guilt is are there factors that we need to be taking into account that mean we should exercise some caution over the CNS that hasn't previously been exercised.

WILLIAM YOUNG J:

Well if the universal opinion of all experts who gave evidence at trial was that it was CNS, why should they be cautious about accepting that?

MR EATON QC:

Because of the material that was put before the Court –

WILLIAM YOUNG J:

Of Appeal, but which they've excluded and we haven't granted leave on.

MR EATON QC:

Well, no, which they have said didn't justify revisiting the admissibility ruling. But the focus in this part of the argument is more on the DNA because when one reads Court's views about DNA they are at odds with the expert evidence and I don't see anywhere in my friend's address in the way he conducted the trial to say that's our position and which the Court has taken on board. I have gone back to what Sue Vintiner said before Justice Kós at the pre-trial hearing and it's a significant, and I'll perhaps get the reference just after lunch, at that

pre-trial hearing she made a comment, no I can get it now, it's recorded in the judgment, if the Court has the decision of Justice Kós handy, it's at page 309 of the case, no, 329 is the passage I'm referring to. And at 329 he, His Honour refers to evidence that she has given before him in the pre-trial hearing where she says, "From the amounts of DNA that I recovered, I think it extremely unlikely that the profile has been generated from unstained fabric. And I think it more likely its generated from the biological material." Now there's an opinion, which on the face of it, would perhaps provide some foundation for the approach that the Court of Appeal took because it is expressed in strong terms. But Sue Vintiner did not give that evidence at trial and the inference being that she had backed off that being an opinion, that was not justified and I couldn't help but think, well we did talk about the decision of Justice Kós whether the Court has assumed that that was her position at trial because that certainly was significant enough to make it into the judgment.

WILLIAM YOUNG J:
Wasn't her evidence at trial that it was consistent with having come from biological material.

MR EATON QC:
Well she said the quantity and quality was one of the explanations would be tissue. That is an opinion there which is directly addressing the question as to whether the stain is the source of it. She gave that opinion at pre-trial and did not give that opinion at the trial so in my submission, perhaps else understand why the Court of Appeal's view about the DNA became so absolute when unsupported. And that is in relation to those two factual findings about whether it came from the exact portions as well. And in the evidence, in the notes, in the submissions, we have referred to the informative evidence of Dr Vennemann. I am looking at paragraph 93 of our submissions. She was asked, "Does the DNA quality and quantity tell you anything about where it might have come on that piece of fabric?" "No it doesn't."

WILLIAMS J:

Can you give me the paragraph.

MR EATON QC:

This is at paragraph 93 of our submissions. "No it doesn't." Ms Vintiner pointed out "the DNA profile was relatively strong so there is quite a lot of DNA that originated from Christine Lundy found the solution but that doesn't help us in linking this to a certain cell type. I certainly agree it is probably not only touch DNA but apart from that it is really impossible, it is pure guess work to think about a possible source of this DNA." That's the expert opinion and yet we have a Court, in applying the proviso where caution needs to be exercised because you didn't hear the evidence and you didn't test it, saying, well beyond pure guess work I am going to make that guess and I am going to fix it as an established fact. And if you look at His Honour's handout which is supposedly specific to mRNA he talks about DNA there and he says, about DNA, "What we know about that, it is not uncommon for one spouse to have the other spouse's DNA on it." That's the starting point. Certainly, no suggestion by the Crown or by the Judge that the effect of the evidence was that it was absolutely established that the CNS was the source of the DNA and indeed the evidence was, no one can say that and no one should take that finding, it is not justified on the evidence.

WILLIAM YOUNG J:

Justice Kós' judgment does suggest the IHC evidence was challenged.

MR EATON QC:

There was a challenge.

O'REGAN J:

But in the end, it was just a formal charge, they just kept the initial alive.

WILLIAM YOUNG J:

But also there was a challenge to the processes carried out by Dr Miller. It was pursued, I think.

MR EATON QC:

Yes. It was a peripheral challenge. So as I say, I saw that reference in the judgment about Vintiner. It is a very strong opinion that does, in fact, link the stain to the DNA. She did not give that evidence at trial and you have the references as to what evidence she gave which effectively said, quality and quantity does not inform source.

It is important as well because the Court of Appeal, having been told by the experts that quality and quantity doesn't inform source, then in order to dismiss the animal DNA which I say was perhaps the most remarkable coincidence in trial, that it happened to be in the same solution, they dismissed that on the basis that, well don't worry about it because the quantity is so low. So it is quantity, quality, means don't worry about that at all, begging this question, how on earth did animal DNA, animals in the food stream, come to be in this elusion in a case where the defence say, I don't know what that tissue is but it could be animal and it turns out there is animal DNA. And as I say, the Court said don't worry about it at all because it is of quality and quantity, and I thought we were not supposed to draw any conclusions about from quality and quantity, but there we go.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.15 PM

MR EATON QC:

Before the break the Court was enquiring about when Mr Sutherland, who was the ESR man who examined the shirt, did so. It does seem his first examination was on the 27 October 2000 so it was 59 days later and he does talk there at page 1309 about being referred to a lump and I have got his notes here which talk about a lump of brown substance and in relation to the other mark on the pocket, some light smearing and he has got descriptions of one of them being white brown, opaque and one of them being opaque white, smearing, so yes it was that period later. His evidence is 1309.

WILLIAM YOUNG J:

I may have misunderstood you this morning but were you suggesting that the way the shirt was folded, when it was stored, may have produced two smears out of one.

MR EATON QC:

Yes Ms Leak who was the defence forensic expert gave evidence and proffered that as a possible basis for there having only been in fact one area of staining.

WILLIAM YOUNG J:

But that would mean that the material would still have had to have been damp.

MR EATON QC:

That's right, yes it would have had to have happened in a state when it was able to transfer and the evidence I read recently talked about whether – I think the prosecution suggested to her it would require some sort of pincer movement or whether it was something more than just a mere touch but that was a possibility that was floated.

WILLIAM YOUNG J:

That probably didn't advance the defence case much. Because it would suggest that the smear was still damp.

MR EATON QC:

Well I think the way it was dealt with in closing by my friend was that it might halve the coincides that the Crown was seeking to rely upon.

WILLIAM YOUNG J:

But it would also suggest that the material was still damp when stored.

MR EATON QC:

Or – no whenever, whatever it was on the shirt, was folded over, it was in a damp state regardless of what it was and when it was.

WILLIAM YOUNG J:

And there was no evidence from the police officer as to what he saw when he recovered the shirt.

MR EATON QC:

No that's when I said before and no doubt my friend will correct me. I am not sure but I am assuming somebody who sees the shirt, which was inside out, somebody at some stage did something with it before 59 days later when Mr Sutherland carried out his examination.

WILLIAM YOUNG J:

So the shirt was inside out when it was found.

MR EATON QC:

When it was handed over by Mr Lundy, yes.

WILLIAM YOUNG J:

So the only biological material found on the paraffin slides, was CNS, is that right?

MR EATON QC:

And what is called squamous and dandruff, they called it.

WILLIAM YOUNG J:

Should that testing have detected other significant quantities of biological material? You would say no, because it is a useless system anyway perhaps.

MR EATON QC:

Well that's right but this is one of the fundamentals is about what testing process was used to identify this as being CNS tissue because that all is

being looked for. The defence say was CNS tissue so if you were looking to find other cells that might react under your immunohistochemistry, you would be using different protein markers.

WILLIAM YOUNG J:
And so was that a common ground between the forensic?

MR EATON QC:
They basically used the same markers which were intended to establish whether this came back as CNS tissue so what they believe to be markers that would react and the stain positively fit CNS.

WILLIAM YOUNG J:
So did they look for anything else?

MR EATON QC:
No, I don't believe so. No.

WILLIAM YOUNG J:
So if there was other tissue capable of producing a DNA, it wouldn't necessarily have been detected?

MR EATON QC:
No and we know that at least initially they had probable tests for blood.

WILLIAM YOUNG J:
And they couldn't find blood.

MR EATON QC:
And that's where it ended.

WILLIAM YOUNG J:
Sorry?

MR EATON QC:

That's where it ended. There was no other evidence about blood or anything else being seen other than CNS and dandruff or skin particles. So the fundamental point about the DNA which the defence raise is the Court has reached an unreasonable view determination about its strength and what you draw from it which was not consistent with the expert evidence and not how anybody, including the parties or the Judge dealt with it at trial, and then, of course, I just deal with it briefly. I know Your Honour has already given me an indication of your view about it, but the CNS was the second essential limb for the Court's assessment that we have got inevitable guilt without going much further, notwithstanding how everybody else may have seen it.

WILLIAM YOUNG J:

I am looking at a Court of Appeal judgment, para 175. "Professor Ironside first confirmed that the IHC work done with the paraffin embedded slide samples established they contained CNS tissue, whether it be brain or spinal cord, and nothing else." So is that not right?

MR EATON QC:

That was Ironside – and there is a reference here; there is a reference to du Plessis had also found skin flakes.

WILLIAM YOUNG J:

But sorry, the passage I have read suggests that they were looking for material other than CNS and found nothing, except perhaps the dandruff or skin flakes.

MR EATON QC:

Yes, well I am not sure that –

WILLIAM YOUNG J:

Quite an important issue because if the only material, capable of producing DNA in reasonably abundant quantities on these pieces of cloth was CNS, then that is helpful for the Crown, not helpful for you. If, on the other hand,

they only looked for CNS and didn't look for other material, then that might be helpful for you.

MR EATON QC:

Yes. Can I just come back to you to be exactly clear on that but as I understand the IHC analysis was carried out; the stains that were used which is the foundation of that process, were stains that were believed to react to CNS tissue. But I don't believe that any of them said that they saw anything foreign; that might give them an indication there is something else worth looking for.

WILLIAM YOUNG J:

So let us assume for the moment that all that was found was CNS tissue and nothing else, then there is no tissue, innocent tissue was Mrs Lundy, capable of producing reasonably abundant DNA evidence on these two pieces of material.

MR EATON QC:

Well that's right but on the slides that were examined, they have seen nothing else other than CNS that they say could link to the –

WILLIAM YOUNG J:

Well that's the sort of guts of the case isn't it?

MR EATON QC:

Well again, if it was that black and white, we would not have spent so many hundreds of hours arguing about mRNA.

WILLIAM YOUNG J:

Well I am not sure it is as simple as that. Because it was so sufficiently black and white for counsel at the first trial to concede it was Mrs Lundy's CNS material.

MR EATON QC:

Well that, that was based on the advice he was given at the time and there was, at that stage an issue which the Privy Council talked about, about non-disclosure of a conflicting opinion but have changed that concession that was made. Look I will just reflect on that and just try and remind myself exactly what these various experts who undertook the IHC, said.

WILLIAM YOUNG J:

Assuming that there was – all that was found was CNS material and that if there was other material capable of producing reasonably abundant DNA, it would have been located. Then you would have to say, I guess, that whatever that other material was from Mrs Lundy deposited innocently on the shirt, somehow or other it got lost in the elusion damage or the dabbing process, or something of that sort?

MR EATON QC:

Well it simply wasn't picked up when it was analysed later at IHC. And we know that, and this is the issue around the reliability of the DNA. In 2014 they went back and did DNA tests on the paraffin blocks that Miller had and as I say we got an unidentified female and nothing of Mrs Lundy.

WILLIAM YOUNG J:

Professor Ironside was Mr Lundy's witness.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

So it is a defence witness conceding that it is CNS tissue and there is nothing else.

MR EATON QC:

Well. Looking at that paragraph 175, he confirmed that the work done with the blocks on 03, ¾, established CNS whether it brain or spinal, and nothing

else. That's what it confirmed. So you don't look at it and there's nothing else that can be confirmed about being present. Whether that feeds into the next proposition which is there was absolutely nothing else there.

WILLIAM YOUNG J:
I thought the embedded slides samples contained nothing else other than CNS tissue. I haven't read Professor Ironside's evidence, I have done a fair bit of reading but I haven't gone into that granularity but I am just looking at the judgment.

MR EATON QC:
When I just spoke briefly with my friend before, his indication was that nothing else was tested for so I will go back and read that and come back to you. So the second half of the equation is about the CNS and what conclusions you draw from that and accepting as Mr Lundy must, that the IHC was admissible before the Court and the only question in terms of application for the proviso is, what was the obligation of the Court of Appeal having accepted further evidence about criticisms' limitations of IHC, to reflect on that, when about to make such a significant factual finding; that is inevitable guilt of CNS combined with DNA.

WILLIAM YOUNG J:
Where did they deal with that in their judgment, the IHC analysis?

MR EATON QC:
That's in a separate heading starting at 132 of the decision and you will see at 183 it sets out the appellant's submissions which was referring to evidence critiquing the reliability of IHC. I can summarise it briefly for the Court about what the issues were. What had happened is, since the trial the report published in the States called the PCAST report had been published which was about various forensic techniques, mainly comparative techniques and their foundational validity and it was effectively a reminder to the Courts about the gatekeeper role that the Courts play before admitting new science and so it defined terms like scientific and foundational validity and gave indications

about what type of comparative testing would be safe to rely on and what wouldn't and there was no question that if you applied that test to IHC, that it wouldn't meet the criteria. There was no dispute about that and Dr du Plessis filed a lengthy affidavit for the Crown in reply saying, well I could never meet that threshold but basically saying we are all experts, we know what we are doing and if we say we see it, then that is good enough. But it was unquestionably novel use in the sense that it was being used to identify a tissue when normally IHC is used in a clinical setting to identify disease in an identified tissue. It is a non-forensic analysis.

WILLIAM YOUNG J:
Just looking at this. These people who were relied on by you in the Court of Appeal had actually given evidence before Justice Kós.

MR EATON QC:
Yes one of them had, Sheard.

WILLIAM YOUNG J:
Associate Professor Sheard, and also Sean Doyle.

MR EATON QC:
No I don't think he did.

WILLIAM YOUNG J:
At 194. As with the Associate Professor Sheard, Mr Doyle had provided evidence for the pre-trial hearing before Justice Kós. It was not called at trial.

MR EATON QC:
Right. So the arguments raised in the Court of Appeal were essentially framed against the PCAST report and what that meant. The issues being, Your Honour, that the Court of Appeal view was, and perhaps not surprisingly, that if the handful of experts who have professed to have experience in immunohistochemistry say that we have looked at these slides or carried out tests, and we are satisfied that you can see CNS tissue, then that answers

any issue about admissibility and the defence argument for the purpose of the proviso is well, you still need to rethink when you are going to put such significant weight on it in explanation of the proviso about whether anything more, anything new we know about it since trial, warrants more careful consideration because it doesn't have any established error rates, the measurement is subjective, plainly it wouldn't meet the *Daubert* factors for admissibility of new science and it fell short, as I say, on the PCAST indications because it was effectively novel in its use and I don't understand it's been used again since in a similar manner deployed to identify a tissue.

So when you come to exercise judgment on the proviso, and whatever language we might use, proof beyond reasonable doubt, or being sure by regard as the Court said to CNS plus DNA, well DNA are critiques and I say they got that fundamentally wrong. CNS, well yes on the face of it, it seems impressive but its new and untested and –

WILLIAM YOUNG J:
We have been over this though haven't we. We didn't give you leave to appeal on this issue.

MR EATON QC:
No but it is a question of weight that might be attached on the proviso.

WILLIAM YOUNG J:
Where is Professor Ironside's evidence?

MR EATON QC:
It is around the number of 2482 he starts.

O'REGAN J:
The Court of Appeal conclusion was that the evidence was clearly admissible and I know you obviously contested that; but did that really create a position from which they had to take particular care in considering it on the proviso? I mean, as with any other evidence that is clearly admissible.

MR EATON QC:

My response to that Your Honour is when undertaking the proviso analysis, and when you are going to make a definitive finding based on but two components of the evidence, then the Court undertaking that evaluative assessment must be obliged to very carefully scrutinise it regardless of rulings they have made in a different context because the proviso context is novel, is different.

O'REGAN J:

Would they have to give it any greater weight than they would give to expert evidence which had been admitted and wasn't subject to appeal to the Court of Appeal?

MR EATON QC:

Well yes because if it was a form of expert evidence which has been well established over many years, where no doubts had been cast on its reliability, then that sets a platform against which you assess its weight. But if it is not in that category then I have got nothing to compare or contrast it; all I have got is the opinions I have got in this case so I need to tread carefully because assessing what weight to attach to them. While Your Honour has got Professor Ironside there, you will see – and I will just give you the reference, at 2408 is where he talked about contamination as being a possible explanation for the CNS tissue.

WILLIAM YOUNG J:

So the question is. "By contamination, do you mean a mixture or do you mean simply a different substance?" Answer: "The way that I view this it would have to be a different substance rather than a mixture, there's no evidence of a mixture of tissues in the shirt fibres it's purely CNS tissue and it is therefore possible..." So he is saying there, it's purely CNS tissue.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

Does that change later or not?

MR EATON QC:

Well the passage I am looking at is the one that ends up talking about neck chops or lamb.

WILLIAM YOUNG J:

Yes.

MR EATON QC:

And his opinion, that fragments of CNS tissue from animals enter the human food chain. And we also raised this morning a question about freshness, at 2438 is the note I have that Ironside spoke to that and said that he wasn't convinced it was fresh. Its appearance was consistent with being lightly heated or microwaved to a limited extent and that was all part and parcel of his opinion at 2430 where he said that the animal DNA evidence from Dr Wictum lent support to the suggestion that this was a food stuffs not a central nervous system tissue.

WILLIAM YOUNG J:

2438, line 15. "But what we have, what you've seen here in all of your work and review of everybody's else's work including your own work on Dr Smith's slides is what I suggest is more fresh central nervous system tissue and nothing else, is that right?" He says, "It's certainly central nervous system tissue and nothing else. The raw and fresh I'm not so sure about," and he goes on to say that it could have been lightly heated or microwaved. So what we are missing is the innocent material from Mrs Lundy that produced her DNA and the elutions. And that is what the Court of Appeal really foundered its conclusion on I think.

MR EATON QC:

Well the Court of Appeal did undertake that type of analysis. They simply referred to the Vintiner evidence about quality and quantity and from that, took

the view that it must be CNS as the source, that's what the Court of Appeal did.

MILLER J:
So where did the Court of Appeal say that exactly?

MR EATON QC:
That is at 336 and the conclusion 337.

WILLIAM YOUNG J:
Well at 338 they pick up the point I have made by adopting what Mr Morgan said. At Mr Morgan put it, in this Court, it has been demonstrated that Mr Lundy apparently going about his ordinary activities and staying overnight in a motel, eating routine food had ended up with fresh CNS tissue and nothing else embedded into his shirt in two separate places. The conclusion that it was Mrs Lundy's CNS tissue can then quite easily be reached in two small steps. First on the night that the appellant was reaching the shirt, Mrs Lundy was murdered by having her head attacked with an axe and secondly the only human DNA found in association with the CNS tissue was that of Mrs Lundy, was a good quantity and found in substantial amount." So that is the proposition I have been putting to you.

MR EATON QC:
Yes and of course what the defence say is well when the Court talks about defence explanation, what the defence say is well when the Court talks about defence explanations, we say well in 2013 trying to explain what potential exposure she might have had, is extremely challenging but secondly and more significantly perhaps, that same DNA elution contained mitochondrial animal DNA.

WILLIAM YOUNG J:
In trace amounts, though.

MR EATON QC:

Yes, yes but these paragraphs are about remarkable coincidence and as I said before lunch, if you want to derive the conclusion that the Court draw from this evidence, didn't there need to be evidence to say "And her DNA is not anywhere else on this shirt."

WILLIAM YOUNG J:

Why?

MR EATON QC:

Well because otherwise we don't know if it is a coincidence that it was on these particular pieces that were cut out.

WILLIAM YOUNG J:

The evidence suggested that the DNA came from something visible I think. Wasn't it that it was likely to have come from blood or tissue that would be visible? I thought that was Ms Vintiner's evidence and presumably the shirt was looked at.

MR EATON QC:

There was no talk about linking it to a cellular substance that was visible. It was talk about what it might be, saliva is one, mucous. It is the danger of DNA; that is why the experts are so careful about the way they advance their opinions. That there are unknowns in my submission which have been overlooked.

WILLIAMS J:

How realistic though is it to suggest that the rich source of DNA at the two spots is potentially going to be replicated everywhere else in the shirt. It would have to be dumped in a bucket of her mucous.

MR EATON QC:

Well I am not talking about a shirt laden with it. I am talking about other spots on the shirt, other tiny portions of the shirt where there is similar –

WILLIAMS J:
Well that will just mean they are more stains, won't it. That won't help you at all, probably make it worse for you.

MR EATON QC:
Not if there is no signs of CNS tissue associated with them.

WILLIAM YOUNG J:
How elaborate was the other DNA testing of the shirt. I know they put tapes on.

MR EATON QC:
No there wasn't any. They put tape strips and then if they saw something on the tape strips, they tested some of that and that is where we got Amber's DNA in relation to –

WILLIAM YOUNG J:
So it is not a case of there was no other DNA testing. The whole shirt wasn't DNA tested is what you are saying?

MR EATON QC:
That's right. The process that was conducted on the two pieces of fabric was not repeated anywhere else on the shirt.

WILLIAM YOUNG J:
But the shirt was examined for visible signs and where there were visible signs they were taped.

MR EATON QC:
For visible signs, that's right. I mean, finding Mrs Lundy's DNA on Mr Lundy's garment –

WILLIAM YOUNG J:
Would not, in itself, be remarkable, I agree, entirely agree.

MR EATON QC:

Is not remarkable at all and then you ask yourselves, well okay, is there anything about the particular finding that allows us to draw an irresistible conclusion about it, quantity and quality which is what the Court relied upon and I say well that would only tell you it is not trace, that was as far as the evidence went. Where do you go from there? Well can you be satisfied that whatever else is in that stain, must be the source of the DNA. Answer? No, because we can't tell you where within this piece of fabric it came from. Could it have come from the inside? Well of course it could. Well that's over 50% of the fabric. So there are questions that aren't answered but they were answered in this case by the mRNA because that is what I say, that was the effect of deployment of that evidence.

Can I just – I made a reference before to Mr Lundy, having on his credit card statement, made purchases of fresh meat in the days prior. The document where that was included is called – it is a compendium of financial documents produced by a witness Hardwin, and it was given reference number RT1223 and it was at page 175 of that. Page 175 of RT1223 and that was produced by that particular witness who was giving financial information regarding Mr Lundy's affairs. So that is what I wanted to say about the factual analysis that the Court engaged in with CNS and DNA. Generally the appellant's position is that when one looks at this case, and asked you the question which I would anticipate is a proper question for an appellate court seeking to review, would ask, and that is, is this the right case to be exercising the proviso at all or is there some impediment to embarking on that process, that means we are doomed to fail by trying to embark on this process and my submission, this was one of those cases where you are doomed to fail, having regard to just the history of the case and as I said in my first submission this morning, very deliberately, you as an appellate court going to make determinative factual findings that will deny a jury trial, in a case where there has been a miscarriage of justice. You are going to do so in a case where we know historically the Crown have advanced successfully, completely unreliable factual allegations that the Court of Appeal have then said were compelling. There is a track history in this case of the facts being very, very

difficult to nail down and commit to and that is a very unusual feature and then, of course, we know there is lots of witnesses, lots of evidence, loads and loads of factual disputes within the trial, meaning in my submission, it was never a proper case to engage on the proviso. It was just simply not a case that was fit for proviso application, unless, of course, there had been a concession as there was at trial one that this was Mrs Lundy's tissue in which case – or some form of other confession like in *Howse.* So that is my submission in my relation to those issues.

WILLIAM YOUNG J:

So just something that no doubt reveals my forensic naivety. But if it wasn't Mrs Lundy's CNS tissue, what was the DNA, why didn't it produce DNA, different DNA? Say it is an animal. Say this is you know, why wouldn't that have produced abundant DNA in the elution tests?

MR EATON QC:

Well if it was an animal, then the ESR didn't initially test for it at all.

WILLIAM YOUNG J:

And then they did later, but they just found trace elements.

MR EATON QC:

And then 14 years later, yes. I guess the answer to that is possibly the same answer to the question, why in 2014, when there was DNA testing done of the paraffin blocks that Dr Miller had made, couldn't we get Mrs Lundy's DNA.

WILLIAM YOUNG J:

Was that addressed at trial that issue. It is a fairly obvious issue.

MR EATON QC:

Yes. Yes, the fact that it wasn't found and in the same analysis, the unidentified female was found, this is part of the defence contamination.

WILLIAM YOUNG J:

Yes but was an explanation given for why DNA wasn't found.

MR EATON QC:

No again I will have a look to see how it was explained, but test of the DNA not found. Conclusion to be drawn? Well negative, don't draw conclusions.

WILLIAM YOUNG J:

So no DNA was found other than –

MR EATON QC:

Well there was another female. So I was just saying, in terms of the other various factual matters, for which there was strong contest at trial, our position in terms of this appeal is that the case which the Court of Appeal found was really focussed on this CNS plus the DNA so I haven't troubled the Court to deal with those mattes but I can do so if necessary.

MILLER J:

The Court of Appeal has approached the case on the basis that the CNS tissue cannot show whose tissue it is, or even whether it is human in origin. So in other words, you are not going to get DNA from that. The DNA has come from a different source. I thought that was the point; the reason why the coincidence is so important. The DNA has come from somewhere else, not from the CNS tissue itself. They may have found an association in the sense that whatever force it was that put the CNS tissue there, would also put blood there, say.

MR EATON QC:

Well that is not how I understood it Your Honour and I will get the reference while my friend is addressing you but the Crown invited the further testing in 2014 of the paraffin blocks that had the tissue embedded, to look for DNA, to re-test the DNA.

WILLIAMS J:
When you say “re-test the DNA.”

MR EATON QC:
To re-test for DNA.

WILLIAM YOUNG J:
To test the CNS material for DNA, as opposed to that original elution test.

MR EATON QC:
That’s right. So, it was a separate test which would indicate that there was an anticipation.

MILLER J:
It might have ended up there for the same reason that the two substances –

WILLIAM YOUNG J:
Isn’t there evidence on this? I may have a slightly different understanding from Justice Miller. I thought it was possible that the DNA had come from CNS material.

MR EATON QC:
Yes that is what I understood. May it please the court.

WILLIAM YOUNG J:
Okay thank you. Mr Morgan.

MR MORGAN QC:
I had proposed, Your Honours, to address you on the reasonable doubt/inevitability issue first, then the fairness of trial issue and then the issue of the facts that you have just been discussing with my learned friend. I am happy to continue in that order.

WILLIAM YOUNG J:

That is fine thank you Mr Morgan.

MR MORGAN QC:

So on the first issue which is this question of beyond reasonable doubt inevitability. Naturally enough I rely on *Weiss, Cameron* and *Best.*

WILLIAM YOUNG J:

Sorry what was the first one?

MR MORGAN QC:

Weiss, the Australian one.

WILLIAM YOUNG J:

Matenga as interpreted in applied in *Cameron* and *Best.*

MR MORGAN QC:

And I take up the point raised by Justice Arnold and of course of the discussion with my learned friend that perhaps that use of the word inevitable, or inevitability, is really just a reminder to the appellate court about it being a high test and the need to exercise caution for an appellate court to conduct a review on the papers. And really another way of looking at it is this, in my submission which is that if, on review, an appellate court like the Court of Appeal, having reminded itself of these things, says that in this case, because of the nature of the case. These are of course all case specific. If we are of the view that this is a case where the appellant's guilt was proven beyond reasonable doubt, is not the use of the word inevitability simply a reflection of the fact that if that is our finding, then really any other outcome, other than a finding of guilt would be perverse. It is just another way of saying, well it is inevitable and really in my submission, when one reads the whole of the Court of Appeal judgment in dealing with this topic, it is essentially what they were saying, was it not. That the various strands of the Crown's case, of which there were many, but there were two critical ones, simply drove the Court of Appeal to the view that they, and expressed it themselves, is that

notwithstanding any other criticisms, they were satisfied beyond a reasonable doubt and any other finding would be a perverse one.

O'REGAN J:
Do you say that the caution that is required, means that in some cases, it is just not appropriate to apply the proviso? I mean I think Mr Eaton's point is that in a case that has been as controversial as this and given the length of the trial and the complexity of the expert evidence, now affected by the fact that the mRNA evidence was found to be inadmissible. That it was just better not to embark on this exercise?

MR MORGAN QC:
Well if that is what he is saying, that is bringing back the Exchequer Rule in a different sort of guise.

O'REGAN J:
Well it is bringing back the Exchequer Rule for some cases.

MR MORGAN QC:
For some cases, yes that is a good way of expressing it Sir.

WILLIAMS J:
But if you look at *Weiss*, the history that the Australian High Court digs out, makes it reasonably clear that the term "miscarriage" pre-1907 simply meant mistake, procedure or otherwise, including irrelevant or immaterial ones. Now miscarriage doesn't mean that anymore so I am not sure it is right to say it is a return to the Exchequer Rule. It is a return to the Exchequer Rule to the extent that there are sub-standard justice issues at stake, but not otherwise.

MR MORGAN QC:
Yes I accept that Sir, that there is a clear demarcation between just the mistake which couldn't have affected the verdict and miscarriage.

WILLIAMS J:

Yes but the old Exchequer Rule didn't make that demarcation.

MR MORGAN QC:

No it didn't but the statute does recognise that even in the case where there is a miscarriage, the proviso can still be applied.

WILLIAMS J:

That's right.

WILLIAM YOUNG J:

The cases before, I suppose, prior to the last 10 years, tended to blend, has there been a miscarriage, has there been a substantial miscarriage and then it gets split out. Was this an error which could have affected the verdict, if so, miscarriage but is the Court satisfied of guilt. If so, no substantial miscarriage. Now I will paraphrase myself in *Cameron* but that is my understanding of the big change that happened, initiated by *Weiss* and then adopted perhaps, slightly awkwardly, in *Matenga.*

MR MORGAN QC:

So as to go back to your point, Sir, which I was getting to. Yes and that is where, with respect, I agree with my learned friend because he says actually it has got to be case specific. Just because it is long and just because there is an unhappy history and just because there is science involved, doesn't create a sort of a different sort of case. You still actually have to look at, well does the history have a bearing on this. Does the length of the case have a bearing on this and does the nature of the science have a bearing on this. And being a case specific inquiry, my submission and answer to all that, for this case, is that actually the history is all thoroughly irrelevant and then my learned friend has made much of what has been said by the Privy Council – in this case Justice Kós in this case and by the Court of Appeal pre-trial in this case and you know, there has been a lot of water under the bridge since all those things happened and they are, in my submission, for the purposes of the exercise conducted by the Court of Appeal, just utterly irrelevant.

Yes, there has been a case back in 2002 where the Court of Appeal has upheld the appellant's original conviction and some 11 years later, the Privy Council reversed it.

WILLIAM YOUNG J:
I haven't re-read the 2002 Court of Appeal decision but presumably it went off on the basis that if it is brain tissue, if it is his wife's brain tissue on his shirt, then he must have done it.

MR MORGAN QC:
Yes. The concession that it was Christine Lundy's central nervous system tissue was still there before the Court of Appeal in 2002.

WILLIAM YOUNG J:
Yes but on the basis of that, the Court of Appeal brushed away some of the other difficulties with the case.

MR MORGAN QC:
Absolutely, the timing issue. Could he have driven Petone to Palmerston North in the early evening.

WILLIAM YOUNG J:
But although the prosecution has re-cast its case to avoid the timing issue, the central thrust of the case, has remained the same. That it is Christine Lundy's central nervous system tissue on his shirt and there is no innocent explanation for it.

MR MORGAN QC:
Yes indeed and curiously enough, if you look carefully at the Privy Council decision, Mr Behrens, who was then acting for Mr Lundy, was the only person who had a neuropathologist advising him. And here we, some 14 years later, we have all come to recognise that actually this was a field for neuropathologists, which was why we had four of them in this case. So just going back to your point again Sir, the fact that all that happened in 2002, is

just in my submission is all irrelevant and I make exactly the same point about the observations of Justice Kós and the Court of Appeal pre-trial, saying this mRNA might be very important. Yes it was at that stage, recognising that the Crown was preparing for a case in which counsel for Mr Lundy and the Privy Council had actually made a submission that the meat had got on his shirt from a visit to a deli. But at the trial there just wasn't a narrative for this man, somehow, managing to get central nervous system tissue from the food chain, on his shirt, in two different spots. So in my submission, again returning to this question of what can you apply the proviso in a case where there is a history, where evidence has been referred to important at pre-trial and where it is scientific evidence, the answer is, in my submission, well it depends and in this case, it simply has to be recognised that by the time of this trial, 2015, there was no doubt at all that this was central nervous system tissue. As the Court of Appeal themselves say, everybody agreed. That is the people with the expert knowledge, ie the neuropathologists, who are not just testing with stains. They are actually looking down a microscope at cell structures they recognise and indeed it was the defence case, they called, two leading neuropathologists, Professor Ironside and Professor Colin Smith to give evidence.

WILLIAM YOUNG J:

Well Professor Smith found it a bit awkward to explain why there was CNS tissue and nothing else found.

MR MORGAN QC:

No, I think they all –

WILLIAM YOUNG J:

No but when cross-examined, he found that awkward, in terms of an innocent explanation is what I meant. I will find you the reference.

MR MORGAN QC:

I have to say I can't really remember that but I mean he did his own testing. He had fresh slices from the paraffin block and all these experts; by that I

mean Dr Miller, Dr du Plessis and Dr Smith. They used different IHC stains, so there was a –

WILLIAM YOUNG J:

I am looking at para 331 of the Court of Appeal judgment. It was put to Professor Smith or Dr Smith, "Let me paraphrase. So, the point being, is that as a consequence of your IHC, Dr du Plessis's IHC and Dr du Plessis's electron microscopy about which you and he collaborated. It is the notion that is very odd that only central nervous system tissue was present, is that right?"

MR MORGAN QC:

Yes I don't he found it awkward at all.

WILLIAM YOUNG J:

He is saying that, "It is odd if there is contamination and the notion in the fact that only central nervous system tissue is present, is just completely against the notion that this is some food contaminant, is that right?" "Yes, to my mind, I would agree."

MR MORGAN QC:

Yes that reminds me Sir. This all comes back to the notion that there was something sinister in the dab slide. That there might have been something different and Dr Smith was very important on that topic because he said, it's only CNS. The dab slide is irrelevant. That's the only thing we saw, or the only thing I saw, recognising he did his own IHC and he reviewed Dr du Plessis's and he reviewed Dr Miller's. So yes to get back to our point about the issue of beyond reasonable doubt and inevitability. Yes, accepting there was this history, accepting this was a long trial, and accepting we were talking about scientific evidence. Recognising that this is a case specific inquiry. In this case, the long history, what had happened in the past was irrelevant and on the two critical issues, which were is it central nervous system tissue and whose DNA it was, there was just no doubt at all. And the argument that my learned friend put up, that this is the Court of Appeal re-casting its case, or sorry the Court of Appeal re-casting the Crown's case and the argument he

put up, that the Crown made the mRNA the centrepiece of its case, you only need to read the closing addresses; the bulk of the Crown closing address, certainly in the first part, is all about the CNS and the DNA. And there is a small passage on mRNA, about a third of the way through it and Mr Hislop barely touched on it. That was the significance it ultimately had in the end, barely touched on it.

WILLIAMS J:
I got the impression that, I mean he put up, was it Bustin?

MR MORGAN QC:
Yes.

WILLIAMS J:
He put up his witness Bustin, and he spent a couple of paragraphs doing it, but he did it to pretty good effect I thought from reading the transcript, he nailed the points he needed to make.

MR MORGAN QC:
He did, yes.

WILLIAMS J:
So why more? His witness said that your witness didn't know what she was talking about.
1550
MR MORGAN QC:
You are referring there, when he referred to the Crown treating Mr Lundy as a lab rat, is that it? He made that submission at some stage.

WILLIAMS J:
Oh did he. I missed that one.

MR MORGAN QC:

Yes, he did. I mean in fairness to him he did a wonderful job on this topic, and as I acknowledged at the leave hearing, the whole mRNA thing did become a bit complex and soaked up some more trial time than it needed. But again I say that if you read the Crown closing address, the defence closing address and the Judge's summing up, which, of course, the Court of Appeal particularly relied on, you can see that really this is not the Court of Appeal re-casting the Crown's case or running it in any way differently, than there were two key bits of evidence.

The central nervous system tissue and the DNA and then everything else was an add-on and hence – just going back finally on this topic, notwithstanding the history, notwithstanding what was said pre-trial, notwithstanding the fact that there was inadmissible evidence at the trial which did occupy a bit of trial time, mRNA, there is, in my submission, nothing fundamentally wrong at all with the Court of Appeal doing just exactly what it did, which was to say this was definitely central nervous system tissue, there just was no doubt about it at all, and my learned friend has referred to quite a substantial portion of the judgment where they deal with the fresh challenge to the IHC and in fact in truth there was no challenge to it. All there was, was this PCAST report but the additional witnesses, who the defence attempted to call in the Court of Appeal, didn't challenge the evidence of all those who gave evidence at the trial itself. So there was just no basis for the Court of Appeal to have come to any other conclusion but that.

It has been proven overwhelmingly, and I think they used the words there, that this was central nervous system tissue and then of course you get to, well what was Mr Lundy doing with central nervous system tissue on his shirt and whose it was and that, of course, was, well there was no basis upon which he could have got central nervous system tissue on his shirt and it simply had to be Christine Lundy's.

O'REGAN J:

The Judge also, in addition to his summing up, he also gave the jury the handout that Mr Eaton took us to. I mean that obviously showed that he attributed a degree of significance to it and was a bit concerned about the way the jury was going to deal with it.

MR MORGAN QC:

Yes he did and I do take up Justice Miller's point, particularly the bits in italics. He was, I think, giving a clear sort of caution to the jury about, having a bit of care as to whether you rely on it at all.

WILLIAMS J:

Yes it rather looked like it would have been relatively comfortable in an admissibility judgment, going the other way.

MR MORGAN QC:

Yes but he was the trial Judge and he elected to deal with it in that way. I mean it was the only contest in terms of the science and of course prefaced by the fact that the undoubted facts were the central nervous system tissue and the DNA.

WILLIAM YOUNG J:

What is important is central nervous system tissue and nothing else.

MR MORGAN QC:

Yes, apart from blood and blood vessels.

WILLIAM YOUNG J:

Was this picked up on the slides, the blood?

MR MORGAN QC:

Yes there are photograph micrographs taken by Dr Miller at ProPath in 2001 where he has taken a photograph of blood cells and blood vessels and it is in the evidence. I can give you the page numbers if you would like them. And

Dr du Plessis used an addition, when he did his IHC in 2014, used an additional stain that should react to blood and not central nervous system tissue and got a positive outcome. So there was quite clearly blood and blood vessels in the material, which of course was –

MILLER J:
It would be helpful to have those references. So the photo micrographs that I refer to are in the additional materials volume 1. And the blood cells are at 140 and the vessels are at 141. And actually, in the same little group of photographs, there is a photograph of the two little pieces of material that have been cut out of the shirt. It is at additional materials Court of Appeal.

WILLIAMS J:
You said 140 and 141?

MR MORGAN QC:
I did, Sir.

MILLER J:
So it says H and E, Lundy shirt, 400 times. What is H and E?

WILLIAMS J:
Histology and something a rather.

MR MORGAN QC:
Haematoxylin and Eosin, yes.

WILLIAM YOUNG J:
So where are the photographs of the pieces of shirt?

MR MORGAN QC:
The little pieces of shirt, Sir, at 140 in the same volume.

MILLER J:

140 is blood, blood on the slides.

MR MORGAN QC:

My apologies, 104. Yes 140 is the blood on the slides and 141 is the blood vessels and 104 is the little pieces of material.

O'REGAN J:

There didn't seem to be a lot made of the presence of blood in the Court of Appeal judgment or at the trial.

MR MORGAN QC:

No I think that is because the neuropathologists were just so content, if you like, with this being only central nervous system tissue because – again, and this is something that goes back to the Privy Council of all things. If it was central nervous system tissue it should have had blood and blood vessels in it and in the Privy Council, at least some of the witnesses for the appellant in the Privy Council, had criticised Dr Miller's 2001 work on the basis that if it was central nervous system tissue, there should have been blood and blood vessels in it. In fact, there was but again it became a little bit irrelevant – blood and blood vessels are what you would expect in central nervous system tissue.

O'REGAN J:

So it didn't add anything, to either side's case.

MR MORGAN QC:

It didn't add anything at all. As we have touched on already, all the neuropathologists, and remember they are all looking at different slides at various times. There was Mr Miller's work in 2001, Dr Miller's work in 2014, Dr du Plessis's work in 2014 and Dr Smith's work in 2014. They were all looking at different slices off the paraffin block and so all of them essentially say, central nervous system tissue. They are not just looking at the same slides.

O'REGAN J:

Why was it that the Crown didn't raise the proviso initially?

MR MORGAN QC:

I guess that is my fault. I thought the mRNA evidence was admissible. I mean I did have a judgment from Justice Kós that it was admissible and a judgment from the Court of Appeal that it was admissible and I had a trial Judge who had been at pains to address the jury on it.

O'REGAN J:

So you didn't think you needed it?

MR MORGAN QC:

No I didn't.

WILLIAM YOUNG J:

You have been accused of underdoing it and overdoing it have you?

MR MORGAN QC:

Yes. And can I just – on that issue of the application of the proviso. The submissions that were made and they were made after the hearing, and it became quite obvious that the Court of Appeal were not happy with the mRNA evidence, the Crown's proviso submissions were all directed to this very topic which is, if you just put the mRNA to one side, what other conclusion can you come to from the finding and questioned that it was central nervous system tissue and unquestioned that it was Christine Lundy's DNA. That is where some of the quotes from the evidence in the Court of Appeal's judgment come from. Not so much the debate about the mRNA, but about what else remains, once you take the mRNA away. Right so that was what I wanted to say on the issue of the guilt, reasonable doubt inevitability subject. The point being, in my submission, that recognising the Court was perfectly entitled to consider the proviso, and taking into account all those matters that my learned friend has been referring to, it still came down to the fact that this was and extraordinary unlucky coincidence for Mr Lundy to have ended up with fresh

central nervous system tissue on his shirt in two places and only central nervous system tissue. The neuropathologist couldn't find anything else and that the only DNA that came out of the eluted material from the same pieces of fabric, had Christine Lundy's DNA in it and it wasn't trace. It was, as Ms Vintiner and the defence witness, Dr Vennemann said, it was high quality, there was a lot of it, it was consistent with blood or tissue.

WILLIAM YOUNG J:
What do you say as to whether there might only originally have been one smear?

MR MORGAN QC:
That was an issue in the trial and you will see that I addressed it in my closing. The difficulty with it was that Ms Leak who came up with the theory, accepted that it couldn't have been just an accidental thing, like if you –

WILLIAM YOUNG J:
Like to rub it?

MR MORGAN QC:
Yes and she described it, pincer movement. So you would need to sort of get your fingers, on exactly the right spot and squeeze them together because the tissue, the central nervous system tissue, had got embedded in the fabric. And that was something all the neuropathologists spoke about. This is not something sitting on the surface, it was actually in the material so it had to have been squeezed and of course it had to have been squeezed when it was fresh and again relying on Ms Leak, little pieces of brain tissue like this dry very quickly and they become crumbly and unable to be pushed into the fabric. So the defence theory then needed to be that Mr Lundy had somehow got central nervous system tissue from the food chain on one part of his shirt. Then he'd needed to have got his wife's DNA consistent with tissue or blood on that bit and then there needed to be, the shirt being taken off while they were still fresh and then picked up in that pincer movement which forced the two together or alternatively that he had got the central nervous system tissue

onto his shirt in one place and then his wife's DNA consistent with blood or tissue on another place and then there had been this picking up mechanism, while they were both fresh for them to have mingled in this way. So it was all pretty unlikely.

WILLIAMS J:
They wouldn't have to both be fresh, only the CNS would have to be fresh.

MR MORGAN QC:
Only the CNS. Just let me think about that for a moment. Yes you are probably right Sir with respect. Because you couldn't see anything else, you didn't know what else it could be, I guess other than blood; the evidence is that it was the central nervous system tissue which had been embedded in the fabric. So yes you are right Sir.

WILLIAMS J:
If he pulls it off, one has got her DNA and the other has got the tissue, pulls it off; those two parts naturally do come together in that removal movement. He could have grabbed it and put it in his case or his case could have been packed, a pair of shoes on top of it, and closed it and that would have done it. I mean it is easy to retro fit this stuff but as you said, it had to be on exactly the same spot. Well, of course, it would have to be on exactly the same spot now but the person who is holding the garment doesn't know what the exact correct spot is, it just happens that way.

MR MORGAN QC:
Yes but again I go back to Ms Leak's evidence. There needed to be pressure, to have squeezed the fresh CNS into the shirt.

WILLIAMS J:
Or he could have dropped his case on the shirt.

WILLIAM YOUNG J:
While it was fresh.

WILLIAMS J:
Or a shoe, or he could have stood on it. The idea that he had to go – that really is unrealistic.

WILLIAM YOUNG J:
It didn't need to be squeezed to get the first one in because presumably there is a bit of velocity behind it, and then it would embed. Was that the Crown case or not?

MR MORGAN QC:
No. How it got embedded, we didn't really say. It just was, it was smeared into the fabric.

WILLIAM YOUNG J:
But in terms – so I want to understand what you are saying. Was Ms Leak saying that in order for the first smear to create the second, there had to be pressure.

MR MORGAN QC:
Yes, they couldn't just touch each other, you needed pressure and that is where she gestured with her fingers, the pincer movement.

WILLIAM YOUNG J:
So she wasn't talking about for instance, the smear on the left sleeve, at the original source of how that CNS material became embedded in that sleeve.

MR MORGAN QC:
I mean both were smeared and she seemed to suggest that the central nervous system tissue might have landed on one place and then somebody picked up the shirt and with sufficient pressure, got into both pieces of material.

WILLIAM YOUNG J:
Oh I see, okay.

MR MORGAN QC:

So yes that was something that was postulated at some stage. I am not even sure David Hislop really even touched on it in his closing and just while I am on that. You know, it needs to be remembered here that whilst the defence raised the possibility of this being central nervous system tissue from the food chain, really just based on it being put to a witness that there is central nervous system tissue in the food chain and a defence exhibit, which was a photograph of some pork chops, that was it. The rest of the defence case proceeded on the basis that if it is Christine Lundy's central nervous system tissue, it was because of contamination somewhere by the police and the thrust of the defence case was on their three impossibilities. The issue about the contents of the stomach, the issue of the petrol in the car and the issue of the witness, Tupai, having seen lights on at 11pm. So there wasn't actually a huge contest about this topic, and there was no contest about this being central nervous system tissue and no contest about it being Christine Lundy's DNA and part of the defence case is, oh well look it might have been, we don't know how it got on there, whatever it was, we have got these three impossibilities.

MILLER J:

But the DNA evidence comes from the elution doesn't it?

MR MORGAN QC:

Yes it does.

MILLER J:

So that has just been extracted from fabric. We don't know what its source was and that is why we have this possibility of mucous.

MR MORGAN QC:

Yes what is tested is the eluted material which the scientists, that is both the defence scientist and the Crown scientists, said, elution will take something like 20 to 25% of the biological material in the fabric out.

MILLER J:

And this 400 million, million whatever it is number comes from that, right?

MR MORGAN QC:

Comes from the liquid.

MILLER J:

But the evidence about her DNA does not come from the paraffin blocks?

MR MORGAN QC:

Well I agree with that Sir. They hadn't gone into the paraffin blocks at that stage so the little bit of material is cut out because Mr Sutherland can see blood and tissue. That little piece of material goes through this elution process which is just putting it in a beaker and then it is taken out and the material - and the liquid in the beaker is what is subject to DNA testing and the scientists say that that process, the elution would have removed some 20 to 25% of the biological material, which the Crown of course said was the central nervous system tissue or the blood and that is what gave the DNA outcome and it's only after that, that the little pieces of material dried, later go to Texas and are then form and fixed and paraffin embedded where they have remained ever since and the expert evidence at the trial was, that, well by 2014 we wouldn't really have expected to find Christine Lundy's DNA in there anyway.

MILLER J:

This is why the messenger mRNA becomes important doesn't it because the DNA evidence at trial has been separated from its source. We don't now know just from the DNA evidence whether it came from blood vessels in central nervous system tissue or from mucous or some other source.

WILLIAM YOUNG J:

They were neuro physicians, were they?

MR MORGAN QC:

Neuropathologists.

WILLIAM YOUNG J:

Would they have expected to see traces of mucous in the slides or not, in sufficient quantity to produce DNA as detected.

MR MORGAN QC:

Well none of them said anything of the kind. They all said, the only thing we saw was central nervous system tissue.

WILLIAM YOUNG J:

Would they have expected to see mucous if it was there?

MR MORGAN QC:

I would have to confess. I don't they were ever actually specifically asked that and can I just say that they don't actually just test for central nervous system tissue. The methodology they use is to use a series of stains such as a stain that will stain with liver. Or a stain that will stain with muscle and stomach lining and if they think it is central nervous system tissue, they would expect a negative reaction with those and they get a negative reaction and they get a positive reaction for the stains that they use, that they would expect for central nervous system tissue.

WILLIAMS J:

Yes but the tests were organ tests, organ identity tests weren't they?

MR MORGAN QC:

A better way of putting it might be tests for cellular material of whatever kind.

WILLIAMS J:

Yes but the stains were designed to tell you which bit of the body they were from.

MR MORGAN QC:

Well no because they tested for blood and they got a reaction for blood.

WILLIAMS J:

Okay, so cell identity.

MR MORGAN QC:

Cell identity, that's a good way of describing it.

WILLIAMS J:

So if the dab, off the t-shirt, had survived, this problem may or may not have been an issue here at all. Because you could have said, this is CNS and the DNA proves that this CNS is Mrs Lundy's.

MR MORGAN QC:

We did attempt to do that.

WILLIAMS J:

I know and you couldn't because it had degraded.

MR MORGAN QC:

Yes but we also attempted to do it with the cellular material that was still in the paraffin box but it didn't work; it all had got too degraded. So there was an effort made to see if individual cells could be identified as, say, central nervous system tissue cell and then to see whether that cell was Christine Lundy's cell but it didn't work. So I was proposing to move on now to the issue of the fair trial. And again really I rely on not what was said on the topic by the Court of Appeal. I mean I think we can all accept that this was a topic that occupied the defence pre-trial but it occupied the Crown as well but the trial record demonstrates in my submission, that the defence were very well prepared. This was just one of the topics on which they joined issue with the Crown.

O'REGAN J:

It was in the end though the only contested element of the science wasn't it?

MR MORGAN QC:

It was.

O'REGAN J:

I mean, in effect, any contest about the DNA and the CNS have both fallen away by then?

MR MORGAN QC:

Yes it was the only contest on the science.

O'REGAN J:

So it must have occupied a fair bit of everyone's time if that was the context.

MR MORGAN QC:

Well we managed to spend a lot of time on that dab slide as well as to why it had degraded and we did have a lot of witnesses on the central nervous system tissue. There was Dr Miller, Dr Gown, Dr Brat, from the United States and then Dr du Plessis, Dr Smith and Professor Ironside from the UK so we did actually spend a lot of time on central nervous system tissue and the dab slide. But in the end there was nothing in any of that and the point – it has just escaped me. I was just trying to deal with that notion of the defence being distracted by the topic. But I revert to where I was which was essentially that the defence case was very well prepared. They engaged on all other topics. It is not as if – oh yes that was the point I wanted to make. My learned friend, in his written materials, said, and he said it both in the Court of Appeal and here, that it forced the defence to choose its battles; suggesting that, well we were so distracted by the mRNA that we didn't challenge the IHC. In my respectful submission, that is entirely wrong. The defence had a raft of expertise to assist them on the IHC as well and they called it and noteworthy is that they did not call any of the witnesses who had given evidence for the appellant in the Privy Council. There was a group of pathologists and

scientists who had filed evidence in the Privy Council in support of Mr Lundy's appeal, all saying that you can't rely on immunohistochemistry to prove central nervous system tissue and not one of them surfaced at the trial.

WILLIAM YOUNG J:

Could I just ask you to go back to, I suppose the aspect of the case I am most interested in and I don't know what the answer to this question is otherwise I wouldn't ask you. But if the CNS was not that of Mrs Lundy, why didn't it produce a strong DNA signal?

MR MORGAN QC:

Because there was no other human and the ESR's testing was for human DNA. The ESR testing did not test for all other mammals which is why it went to Ms Wictum in the US who was able to say, well we have tested, but we have tested for different DNA. We are not testing for this DNA that the ESR were testing for. We were testing for mitochondrial DNA which is in the environment, in these tiny, tiny quantities and testing for mitochondrial DNA, we were able to pick up these tiny fragments.

WILLIAM YOUNG J:

There is no strong signal in the elution of any other DNA source other than Mrs Lundy's?

MR MORGAN QC:

Well there is an unknown one which of course the Crown said was Mrs Lundy's.

WILLIAM YOUNG J:

Yes, that's right. So assuming the CNS material would produce a strong DNA signal, is that one way of putting it?

MR MORGAN QC:

The only strong one was Christine Lundy's. And to the extent there was any other DNA signal for any other mammal, yes I am confident about mammal,

was just this tiny portion of mitochondrial DNA which Ms Wictum said might be consistent with a spatter from a sausage.

WILLIAMS J:
Is that because you could no longer test for DNA by that stage?

MR MORGAN QC:
No because she used the eluted material, so it's the same material. So it hadn't degraded. It had been kept.

WILLIAM YOUNG J:
But at trial that wasn't relied on as explaining, as I understand it, the DNA, the CNS smear?

MR MORGAN QC:
No Mr Hislop barely touched on it. The Court of Appeal themselves noted that it hadn't featured in Mr Hislop's closing address and with respect to him, entirely correctly so.

WILLIAM YOUNG J:
And I suppose if the CNS was from the food chain, and there is nothing of moment found other than CNS, it is odd that Mrs Lundy's DNA is there in reasonably abundant quantities, but only trace elements of anything else.

MR MORGAN QC:
More than odd was the Crown's case. And just whilst on the topic of the defence being distracted by this notion of the mRNA evidence so that it might have affected their trial preparation; my learned friend in his opening to you submitted that this isn't a case where the defence only learnt on the eve of the trial that the Crown was changing its theory of the case to something other than about seven, 7.30 at night. With respect that is entirely wrong. The Crown put in writing, in June 2014, that really the time of death was anywhere between when Christine Lundy was known to be alive and when her body was found the next morning and the indictment was amended, with

the consent of the defence, to include the early hours of the morning of 30 August in October 2014.

WILLIAM YOUNG J:

Well I was a bit surprised at that because I think I knew that the Crown case had expanded timewise.

MR MORGAN QC:

And you knew that from Justice Kós' decision, so they had plenty of time. I just don't accept for a moment that there was any surprise in all of that.

MILLER J:

Bit hard that the unfair trial argument seems to me to come down to the proposition that on this central issue, was it his wife's brain on his shirt. You were able to rely on this inadmissible evidence.

MR MORGAN QC:

Yes that's the way my learned friend puts it and I say in answer to that, if you read the Crown closing address, you can recognise, I say, that what the Crown was in fact relying on was central nervous system tissue and DNA and there is a small passage in there, where I did refer to it and rely on it but let's go back to what was said on this topic by the majority in *Howse* where they say, look if there is inadmissible material but otherwise the case is a strong one, then you apply the proviso. And here as the Court of Appeal had done, having reviewed all this evidence, particularly the IHC and the DNA, excluded from consideration in the mRNA, they say well actually we are satisfied beyond a reasonable doubt. And really I just endorse their reasoning; you can see how they have come to that conclusion. It was, in my submission entirely available to them. It was entirely available to the jury as well and it is quite wrong, in my submission, to argue that the Crown sort of hinged its case on the mRNA.

O'REGAN J:

It has to be a bit more than "available" doesn't it?

WILLIAM YOUNG J:

And sufficient to persuade the Court of Appeal that it is beyond reasonable doubt.

MR MORGAN QC:

It is not as if they sort of glossed over all this. They spent a lot of time on the IHC and then a lot of time on the conclusion you can draw from the IHC and the DNA and then they looked at the other evidence as well and that was not recasting the Crown case or a case that the defence was never called upon to answer. That was precisely the Crown's case in which the defence attempted to answer. And it is really on the same topic, the argument that my learned friend put forward, that this was the Crown recognising that it had a gap, an acknowledged gap, that it was attempting to fill in. Yes the work was done. Yes the evidence was called. Yes a lot of effort was put in to having it made admissible. I might add that the eight day pre-trial before Justice Kós did not focus just on the mRNA, it also focussed on the IHC and the DNA as well. But as I say, at the trial itself, when no narrative emerged as to how Mr Lundy managed to get central nervous system tissue on his clothes at all, and in particular, how it could be that he got central nervous system tissue that was fresh on his clothes, no narrative as to how he could have been near and able to get central nervous system tissue on his clothes. After all he was selling sinks in Wellington.

WILLIAM YOUNG J:

He was sorry, what?

MR MORGAN QC:

Selling sinks in Wellington. We knew what he ate because he told the police what he ate and even had the receipts of what he had purchased and by the time the closing addresses came round, the fact that this issue was hardly a major one, I say, is apparent from the two closing addresses and the Judge's summing up which is exactly the way the Court of Appeal saw it.

WILLIAMS J:

Well you did say, “I don’t want this issue to dominate the trial.”

MR MORGAN QC:

I did, because it had become a bit irrelevant by then.

WILLIAMS J:

Yes but obviously inherent in that statement is that there is a danger it would.

MR MORGAN QC:

Well there is a danger we could spend a lot of time in debating it. Well a lot of time – how can I put this. What I was saying is, I am not going to spend a lot of time on this topic because it is actually not all that important now. That is why I said it and I say that that is actually reflected in how Mr Hislop addressed the jury in his closing and how the Judge summed up.

WILLIAM YOUNG J:

There are some strong passes in *Howse* about what makes a trial unfair, there’s a high threshold; radical, fundamental, departure from central requirements as to a private appellate or proper trial, et cetera.

MR MORGAN QC:

And this was a case where really the defence were able to make a lot of mileage out of the mRNA evidence really and my learned friend ‘s comment about the Crown are treating him like a lab rat but none of that really addressed the critical issue, which, as I say, is that it was unquestionably central nervous system tissue and it was unquestionably Christine Lundy’s DNA, when he should have been in Wellington. Then, of course, we have got the other pieces of evidence. I particularly rely on the petrol consumption evidence.

WILLIAM YOUNG J:

I see you also cite *Barlow* I see.

MR MORGAN QC:

Yes I did.

WILLIAM YOUNG J:

Where some evidence that bullets at the murder scene matched the brand and date of manufacture of bullets in the appellant's possession, was held to be unscientific and unreliable but the proviso was applied.

MR MORGAN QC:

I take Your Honour's point about the *Tamihere* case and the watch being found on the decreased later. I mean these are just illustrations, of the point, really we have both made, that this inquiry is case specific and so the Court of Appeal in this case has done exactly that.

O'REGAN J:

What do you say to the minority observation in *Howse* that if the Crown has attributed a lot of significance to a piece of evidence at a trial, it can't then say at the appeal, it didn't matter?

MR MORGAN QC:

Yes they did say that but they were also troubled about the way that the trial Judge had summed up on it in unduly terms so there was a compounding if you like and it was particularly prejudicial if you remember rightly.

WILLIAM YOUNG J:

Howse also pre *Weiss* so they are looking at it through the prism of a jury's eyes.

MR MORGAN QC:

But I do make the point that what happened in *Howse* is light years away from what the Crown say happened here which was up strand of its case, being held to be inadmissible. In *Howse* it had dominated the trial and dominated the Judge's summing up.

WILLIAM YOUNG J:

You are just about running out of steam, aren't you?

MR MORGAN QC:

No I am not running out of steam.

WILLIAMS J:

"I'm just getting warmed up."

WILLIAM YOUNG J:

I didn't mean it in that sense but I thought, you have just about covered the case haven't you, if I could put it in more flattering terms.

MR MORGAN QC:

No you are right Sir, I have. I am just conscious on some of the factual matters. It is not an easy case because so much time was spent on something which has now been ruled inadmissible.

WILLIAM YOUNG J:

I don't want to cut you short but on the other hand if you have sort of come to the end of your run then we might take a brief adjournment and hear Mr Eaton if he is ready to go.

WILLIAMS J:

Would you mind me asking you? Can you say in short pithy sentences or paragraphs, what your answer is to the three impossibilities?

MR MORGAN QC:

Yes I can. The three were Mr Tupai. His evidence was that he was using a phone, neighbour of the Lundys, at about 11 o'clock and he noticed the light on and the door open. The answer to that was (1) he was a very unsatisfactory witness. It was difficult to know whether he was actually talking about the night of the killing at all or whether he had used the phone on the night of the killing but was talking about what had happened the previous

night but more importantly is that 11 o'clock was around about the time Christine Lundy turned her computer off, which was 10.52. So the position was, the Crown argued that if Christine Lundy was alive at 10.52, when she turned her computer off, she could not have got herself undressed, scattered her clothes all over the bedroom, got into bed, watched a bit of TV, fallen asleep before somebody came in at 11 o'clock with an axe and started striking her. That was the answer to Mr Tupai. The next impossibility is this –

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WILLIAMS J:

I thought the defence closed on the basis that whoever got into the house, got into the house and waited.

MR MORGAN QC:

Yes that was a theory.

WILLIAMS J:

That's possible.

MR MORGAN QC:

That's a possibility, snuck into the house, left the lights on, left the door open. But pretty confident that – the defendant himself admitted that Christine Lundy was pretty security conscious and would have turned all the lights off and locked the door.

Then there was the stomach contents which is Dr Pang's evidence that the stomachs of both the deceased were "full" about which there was quite a contest as well, what do you mean by "full". Because you look at a stomach, it can have one litre in it and look full and it can have four litres of food in it and look full. And then there was the issue over the no emptying into the duodenum which Professor Horowitz considered important but which Dr Sage really dealt with very easily by saying that actually, if you do a post-mortem on a dead person, the duodenum is always empty.

And third and again most importantly is that again Christine Lundy was alive at 10.52 because she turned her computer off. If she turned the computer off at just short of 11.00 pm then she must have eaten again after the McDonald's meal which everybody spoke of; lightly consumed much earlier in the evening unless she decided to reheat it later. And the fact that both stomachs were "full" to use Dr Pang's expression, demonstrated that they both must have eaten again after the McDonald's meal. And there was evidence about the food being consumed, things like a banana skin in the kitchen, crinkle cut chips, not the sort of things you get from McDonalds, being found in the stomach, that sort of thing.

The third impossibility was the petrol consumption.

WILLIAMS J:
Sorry what do you say to the – it was a school night, child goes to bed at 8 o'clock. Is the child really going to be got up at 10 o'clock to have some cold McDonald's? Or 11 o'clock or whatever it might be.

MR MORGAN QC:
Well her mother was alive at 11.52, sorry 10.52.

WILLIAMS J:
Daylight saving.

MR MORGAN QC:
So she must have been alive then too. So if she'd had McDonalds early on and gone to bed at her normal bedtime, one would have expected her stomach to be empty and it wasn't. She simply must have had something extra to eat.

WILLIAMS J:
Or died earlier.

MR MORGAN QC:

But she turned her computer off at 10.52. The computer evidence became quite important because the computer experts spoke of it being turned off gracefully, ie somebody had closed all the applications being used, just not somebody just pulling it out of the wall and really it simply had to be Christine Lundy. So, she was alive at 10.52, she had a full stomach, there it is.

So the third impossibility was the petrol consumption and on this topic the Crown's case was that actually the petrol consumption added to the Crown's case. It wasn't an impossibility at all. As it had turned out that night, Mr Lundy had filled his car up at the Naenae petrol station and if he had stayed in Petone as he maintained, he would have only had a few kilometres around the Petone area of what he had done in the morning and his trip back to Palmerston North when he heard that there was something going on at his home and really on the petrol consumption for that car, which was established by two different methodologies, he should have had half a tank of petrol left but he didn't, it was nearly empty. Which the Crown said, that is consistent with another trip from Petone to Palmerston North and back. So the defence case was that relying on work done in 2000 by the police, that he didn't have enough petrol but that case was, that work was done by the police at the time when they thought that he had made three high speed trips from Petone to Palmerston North before the killing, back to Petone after the killing and back from the Johnsonville area back to Palmerston North when he had heard the police were at his home the following day.

So, if a car, such as Mr Lundy's car had been driven very fast and hard for those three trips, yes he might have run out of petrol but that was not the Crown's case. The Crown's case was that he had filled his vehicle up in Naenae, so he had a nice full tank then and if he had done the little bit of travelling he had spoken of, on the 29 and 30 and had then done one fast trip back to Palmerston North he should have had about half a tank of petrol left and he didn't, it was empty. And the two methodologies that were used to work out his fuel consumption were essentially the statistics from the

manufacturers and the motor trade association for what a car like that could achieve, both in the city cycle and the country cycle but equally importantly is there had been a previous fill-up of this car.

WILLIAMS J:
Yes I think we have gone through all this, we are familiar with this argument, you have got nothing new.

MR MORGAN QC:
Nothing new. It was all quite remarkable how he'd managed to get so far on the previous tank of gas and had so little left if he had stayed in Petone. So those were the three impossibilities and you will see all this argued in the closing addresses and the Judge summed up, largely consistently with that as well.

Can I just check my notes to see if there is anything else I want to add?

WILLIAM YOUNG J:
I am not trying to bounce you, we can sit tomorrow.

MR MORGAN QC:
Yes I did just want to touch on the fair trial right issue because my learned friend seems to argue that the Crown in closing invited the jury to not be cautious about the mRNA evidence but as the Court of Appeal themselves found, this really was an argument about – it wasn't that I was saying put aside the caution of Dr Sijens about her results. The argument I was putting forward is that actually if you look at all of the evidence, it was absolutely plain that this was Christine Lundy's brain tissue. I do accept that from time to time in the Court of Appeal's judgment, they do refer to what the jury must have found but equally in almost every passage where they say something like that, they go on to say "And this is our decision."

WILLIAM YOUNG J:
I don't think it is material, I think we have to re-do it.

MR MORGAN QC:

Right, well in that case perhaps I should go back to the facts again.

WILLIAM YOUNG J:

Or would you rather finish this tomorrow?

MR MORGAN QC:

I think I would.

WILLIAM YOUNG J:

That is fair enough. I mean it is an important case and it is no point trying to fit it into an arbitrary timetable.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON WEDNESDAY 28 AUGUST 2019 AT 10.00 AM

MR MORGAN QC:

Your Honours I would just like to start today by tidying up something I said yesterday. You will recall that my learned friend for the appellant spoke of the indictment being amended on the eve of the trial and I chided him about that when I responded, saying that the amendment had happened in October. We are sort of both a bit right. What happened is that it was in June 2014 that the defence were notified that the Crown would no longer set its sights on a 7.00 pm time of death. That was confirmed in the submissions filed for Justice Kós which were filed in September 2014 and the defence were notified of the intention to amend the indictment in October and asked if there was any suggestion to that. The answer was no there is no objection so my learned friend may be right that the actual amendment didn't occur until January 2015 but it was all well heralded. I think what my learned friend is referring to as anything happening on the eve of the trial is advice given to the defence about seven or eight days prior to the trial in response to a direct question about whether the Crown contended for a time of death before the computer was turned off and they were obviously told no.

So that is the background; this is all related to the fairness of the trial issue. My learned friend making the point yesterday that the inadmissible mRNA evidence is called in context of a trial where there had been substantial and very late notice of the change in the Crown case and the point I was making yesterday is that this was all well heralded by advice in writing and the evidence on which everyone was relying. The evidence from Dr Sage which challenged that of Dr Pang had been served in May 2014 and the evidence from the computer experts, which was to the effect that they couldn't find any evidence of computer manipulation, had been served sort of August, October, November 2014 so just to repeat. On behalf of the Crown I submit that there was no taking by surprise here, everything was well heralded.

The second topic I just wished to touch on again was in response to Justice Williams questions of me yesterday about the Crown's response to the so called three impossibilities. When I responded to him yesterday on that topic, I spoke of Mr Tupai and I think I said something along the lines that he was uncertain, whether he had the correct night, namely the night of 29 August. Now I was wrong about that. He did have the correct night. We know that because we had a record of the telephone call that he was making when he said, something like 11 o'clock he saw lights still on and the door ajar. The point I was attempting to make and I fell in error yesterday, is that he gave evidence, both in chief and in re-examination that he had seen that the previous night as well, when Mr Lundy was actually at home. So there was nothing particularly sinister at 11 o'clock at night in the Lundy household. Lights still being on; the security lights still being on and a door being either open or ajar. Hence the Crown's argument before the jury that Mr Tupai's evidence did not admit to there having been a killing by a random stranger at around about or shortly after 11 pm. It was just a piece of evidence that on that night, as on the previous night, the lights in the house had still been on and the door wasn't closed, which was actually quite consistent with Mrs Lundy being a bit of a night owl, according to Mr Lundy when he was being interviewed.

So those really were the two matters that I wanted to tidy up and similarly really I just wanted to draw your attention to the petrol discrepancy again if I may because that was only one limb of the issue about the appellant's car. You will recall from the discussion, both from my learned friend and in the Court of Appeal that the petrol discrepancy figured; the defence saying that the discrepancy showed that it was impossible for Mr Lundy to be the killer. The Crown case being that in fact the petrol discrepancy added to the Crown's case because he must have done a great deal more driving than he had admitted to because when he arrived back in Palmerston North his tank was almost empty. The other limb of that was what was described at trial as the mileage discrepancy because as it had transpired, the Crown were able to work out from service records of the car and the mileage on the car when it was taken into the possession of the police, the number of kilometres that it

had done in the previous, some nine days. In fact it might have been a bit longer than nine days. The car had really only been used for one other major trip, a trip between Palmerston North and New Plymouth and really by just a series of calculations, the Crown were able to demonstrate that this car had done a lot more kilometres in this critical period, than the appellant had admitted to when he was interviewed by the police.

So the car was an important piece of evidence for the Crown. Essentially the Crown argued that the petrol demonstrated there had been a lengthy unexplained trip on the tank of petrol he had purchased in Naenae on the night of the killings, and the mileage discrepancy of the car demonstrated that it had driven much further than the appellant had admitted to in the course of all his interviews with the police. Now really beyond that, I didn't really want to add anything further.

My submission is that the Court of Appeal have essentially addressed all of these issues. Proceeding from the uncontroversial fact that this was unquestionably central nervous system tissue, the prospect of it being from some other source. The Crown argued and the Court of Appeal accepted was nil. The finding of Christine Lundy's DNA in the eluted material which will have extracted some 20% of the biological material from the little fabric scraps being that of Christine Lundy, leads to the inescapable conclusion that it was Christine Lundy's central nervous system tissue. That being the case it really could only have got on there due to some contamination in the police conduct after the deaths of the deceased and before the shirt found its way to Mr Sutherland at the ESR who saw the marks in the shirt. And that was a trial issue but really with respect, the defence were unable to make any real mileage on it because the shirt in question was only found several days after the killings. It was found inside out, it was found in a suit bag, it was found in the appellant's car and the officer in question just took it out, checked that it was dry and put it in a bag. He didn't conduct any sort of an examination at all so the prospects of fresh central nervous system tissue being able to become embedded in the fabric, at that point or thereafter, the Crown always argued was nil and again as the Court of Appeal themselves said, there was really no

narrative for how such a thing could have occurred in exactly the same way as there was no narrative as to how Mr Lundy could have found himself to be in a position to get fresh central nervous system tissue from other source on his shirt in this way. Hence, in my submission, it was very much a case of the Court of Appeal saying, as they did, that actually we just have no reasonable doubt about all this for the appellant to have had his wife's brain tissue on his shirt in two different places. The shirt he was wearing the night she was killed and had had her brain exposed really led to a very, very compelling inference.

And, of course, then there was all the other evidence and it has been touched on by the Court of Appeal so I won't repeat it all but there was really almost a concession from the defence at the trial that the killer had to be somebody who knew Christine Lundy and hated her. This was not just a killing from a random burglar at all because of the way in which she had been attacked when she was probably asleep; the way in which the killer had been so careful to get himself out of the house without leaving any forensic trace anywhere, elsewhere in the house other than in the bedroom and immediately where the deceased Amber was killed.

WILLIAM YOUNG J:
Without footprints?

MR MORGAN QC:
There was just nothing. The killer simply had to have been covered in blood and gore, particularly brain tissue – the pattern of human material splattered about the room, even onto the roof, was such that he simply had to have been covered in it and yet that person managed to get themselves out of the house without leaving a trace and without touching anything elsewhere in the house. It was quite a small house admittedly but to get out either the front door or out through the ranchslider that led to the sunroom, it really was quite a formidable achievement for a person to have been so covered in bodily material, as he must have been, to have done that without leaving a trace, nothing dropped on the floor, no footprint, no brushing of clothes against the wall or anything. The scene was absolutely confined to Christine Lundy's

bedroom and the area immediately outside it where the deceased Amber Lundy had died, leading me to the point of, as I say, the defence rather conceded that the killer had to be somebody who knew Christine Lundy and had a particular antipathy towards her because of the way he had attacked her lightly in her sleep.

Then, of course, there was the weapon used. The Crown's case was and it was formidable on this topic, is that the weapon used must have been painted with orange and blue paint and we know that from little paint flakes which were found in and around the bedding but even embedded in some of the skull fragments of Christine Lundy's skull. So there was just no question. The person who did this had to have been using a sharp heavy implement, like a tomahawk or an axe or some sharp implement that had to have, on its cutting edge, blue and orange paint, of particular colours and the appellant was somebody, who had a habit of painting his tools, blue and orange. There were blue and orange tools, quite distinctive, in his garage. There was blue and orange paint in his garage and some of those, not all of them, were indistinguishable, not matching I know, but indistinguishable from the little flakes that were found at the scenes of the killings, which, of course, was almost more of a hallmark because this was not a case where the appellant only ever used one pot of orange paint, or one pot of blue paint. The evidence was that he just repainted his tools but in the basic colours most years. So the fact that such a tool had unquestionably been used was a compelling piece of evidence against the appellant. His tools were all kept in the garage which was locked. It was all locked at the time and again it was something that was rather against this being a random killing by a burglar who had come into the house and stumbled upon a tool and had decided to attack Mrs Lundy in her sleep, is that the killer had carefully taken it away. So the tool that had been used for this purpose, was never, ever found.

WILLIAM YOUNG J:

So the tools were locked in the garage at the Lundy house.

MR MORGAN QC:

Yes.

WILLIAM YOUNG J:

What was the state of the garage when the body was found?

MR MORGAN QC:

It looked like a garage Sir.

WILLIAM YOUNG J:

But was it locked.

MR MORGAN QC:

It was locked the following morning, the police checked.

O'REGAN J:

But you say the paint wasn't – there wasn't a match was there? So it was a similar colour?

MR MORGAN QC:

The scientists used those sort of equivocal words. I have to confess I don't – Ms Coulson was the witness and just off the top of my head. My memory is that in the first trial she said some of the flakes matched but then in the second trial she said, oh we have changed our terminology and it is now indistinguishable from, or something like that. But not every piece of orange paint or blue paint from the scene was indistinguishable from the orange and blue paint found in the pot, in the garage or the other tools, which was consistent with somebody who just did this regularly.

WILLIAMS J:

Well he hadn't done it since 1986 had he?

MR MORGAN QC:

He hadn't done it since 1986, or '87.

MR MORGAN QC:

No I don't think that was the evidence Sir.

WILLIAMS J:

That is what he said to the police?

MR MORGAN QC:

That he had not done it since then.

WILLIAMS J:

He hadn't repainted since 1987, he hadn't used his tools for years because he was a bit busy.

MILLER J:

He was on building sites and he was no longer doing that.

WILLIAMS J:

So it was a long time ago.

MR MORGAN QC:

Yes it had been a long time ago and the tools in his garage did show signs of wear but they had orange and blue paint on them almost, most of them had orange and blue paint on them.

MILLER J:

Did the Crown attempt to account for how the killer exited the house without leaving any trace and yet material ended up on the shirt?

MR MORGAN QC:

No and then the simple point must be that the appellant must have been wearing other clothes over the top and the way it was put by the Crown at the trial was that he was wearing something over this shirt and something inadvertently got on the shirt when he was clearing up or some such.

WILLIAMS J:

How do we get no footprints through the house in a murder like this. Never seen that not happen before. I mean was this guy so organised he ran a sheet along the floor.

MR MORGAN QC:

Well maybe he got changed in his own bedroom. Took his dirty clothes off there because the bedroom was just covered in detritus.

WILLIAMS J:

Yes but no sign of any of that movement in the bedroom and no tracks through the gore on the way out?

MR MORGAN QC:

The answer to that Sir, is no. There wasn't a sign of somebody having cleaned up or changed their clothes and changed their footwear in the bedroom, for example, and there wasn't a sign of tracks of somebody leaving the bedroom but the bedroom was so affected by biological material sprayed everywhere, floor, random clothing, items of furniture, roof, walls, curtains, that you really wouldn't expect it, there to be a sign, and once the killer got out of the bedroom and dealt with Amber Lundy, there is no sign from there of movement from that spot. So really quite a formidable achievement.

WILLIAM YOUNG J:

Was there a tomahawk missing or no one knows?

MR MORGAN QC:

Well again one of these very vexed issues. So there were witnesses who said that he didn't have a tomahawk and borrowed theirs and the appellant himself, at quite a late stage said, oh he did have a tomahawk, that had been in the garage at the time, an unpainted one and produced it to the police from a storage shed later. So there was a mixed bag on whether he had a tomahawk and whether it was painted or not. But the one that he produced to the police

was definitely not the one that was used. There was no traces of anything on it and didn't have any paint.

And then from that point Your Honours there is the other little bits and pieces of evidence that have all been listed by the Court of Appeal and their reference to these is quite an important one because they actually say that they themselves found these powerful contributors to the Crown's circumstantial case. That is the paragraph at page 345 where after they have given their conclusions, about the central nervous system tissue and the DNA at paragraph 338, and referred to the defence criticisms of that, they then at 345 say, "The discussion of the fuel consumption and distance travelled discrepancy leads us to the view that a jury would find that Mr Lundy would have been able to carry out the murders having regards to the amount of petrol available and the time available."

As I have touched on earlier, I think that rather downplays that point. Those were positive aspects of the Crown's case. They then say, "Added to this, may be the following considerations which were in themselves powerful contributors to the Crown's circumstantial case. There is the orange and blue paint" item (a), the red particles which were thought to be blood that had been tape lifted off the shirt, found to be Amber's DNA. This not being a killing by a random burglar" their item (c), "No evidential foundation for any other person close to Christine Lundy," their item (d). The bracelet evidence, item (e). Misleading the police, item (f), an insurance policy over her life, (item g) and conflict over financial matters between the two, item (h). And without sort of trolling you through all of those, the Crown submission is that the Court of Appeal were entirely correct to look at those as being powerful pieces of circumstantial evidence in support of the Crown's case.

MILLER J:

To the extent that you appeal to the Court of Appeal's reasoning and ask us to conclude there is nothing with it, you have to address the problem that they did at various points refer to the actual jury's reasoning or hypothetical jury's reasoning?

MR MORGAN QC:

Yes they did and I think I touched on that yesterday. Making the point that for the most part, when dealing with all those topics, they essentially say the jury must have, and so do we, and I have picked those passages out in my written submissions and I think, my submission anyway, reading it as a whole, the Court of Appeal were actually pretty careful to say, whilst this must have been what the jury thought, actually it's what we think as well.

There was a point here that I wanted to make again, in response to my learned friend, that these other items of circumstantial evidence shouldn't have been relied on by the Court of Appeal because they were discounted by the Privy Council, and the obvious point to make, of course, is that these are different cases. Before the Privy Council the defence concession that the central nervous system tissue was Christine Lundy's was withdrawn and the defence argued that there was real doubt about whether it was central nervous system tissue at all and the Crown had attempted in the Privy Council to rely on these other pieces of evidence to show that he was still guilty and to apply the proviso and for the reasons the Privy Council gave, but primarily driven by the fact that there was this doubt which had been engendered by the experts in the Privy Council about whether it was central nervous system tissue at all. The Privy Council said no, we don't consider any of them sufficiently powerful enough but for this case now, recognising the trial that took place in 2015 and the analysis of the Court of Appeal in 2017, when it is accepted as it was and undoubtedly correctly so, that this was central nervous system tissue and the prospect of it somehow having got on to Mr Lundy's shirt in some other way and being other than Christine Lundy's being discounted, then these other pieces of evidence were very powerful and hence my submission effectively saying to you that the reasoning of the Court of Appeal was entirely correct and supportable.

Now without wanting to go over the facts again, I think I have said all I feel I should in response to the appellant's case. In short that the reasoning of the Court of Appeal is impeccable, that there was the evidential foundation for it. The inescapable conclusion was, and this was how the Crown's case was run

at trial, putting aside all the other bits of evidence and the mRNA evidence is that this was central nervous system tissue and nothing else. That the DNA of Christine Lundy is extracted from it, when some 20% of the biological material is extracted and no one else, recognising that it was the shirt that the appellant himself admitted wearing on the night of the killings, simply led to and indeed this is the finding of the Court of Appeal, the inescapable conclusion that the appellant was responsible for the killings. Now those are my submissions Your Honour.

WILLIAM YOUNG J:

Can I just ask you one question? Page 67 of the Court of Appeal additional materials, volume 1. There is a picture there of a tomahawk, as there is on the preceding page. And it says "Lundy lock-up" so that's somewhere else.

MR MORGAN QC:

Yes you are absolutely right. So that was the one that sometime after the police investigation was underway and at a time I think the police had already heard that Mr Lundy didn't have a tomahawk, he borrowed the neighbour's, that was the tomahawk that Mr Lundy drew to the police's attention. He said at the time he drew to the police's attention, it had been in the garage at the house, locked up with the other tools but by then his belongings had been moved out of the garage and were in a lock-up and that was the tomahawk that he surrendered to the police.

WILLIAM YOUNG J:

Thank you, Mr Morgan.

MR EATON QC:

I will just, if the Court pleases, deal with some matters my friend has raised this morning, first while they are at the forefront of our mind. The issue about the shift in the Crown case and the notice of it. I don't think there is any dispute that following the Privy Council decision, it became clear that the Crown were likely to seek to expand the time options in terms of when the homicide was alleged to have taken place. What the defence didn't know and

was still seeking confirmation about up to what I have described as the eve of the trial is, have you just abandoned this fast trip. Just to give it some context. The evidence in relation to fuel usage and any alleged kilometre discrepancy came from a police analyst named Ellwood whose report was only disclosed to the defence in December 2014, so just weeks before the trial. And she was, at that stage, not talking about any fast trips at all and that led to this exchange. On 20 January one of the junior counsel for Mr Lundy said, "Are the Crown still contending for a time of death prior to the computer being shut down, or precisely do we need to prepare for a Crown contention the time of death was around 7.00 pm which was the base of the last trial," and my learned friend responded, "The Crown does not contend for a time of death prior to the computer being shut down" that being 21 January. So whilst, yes there was earlier notice at the pre-trial hearing that we are not committing ourselves now, we are opening the door because the pathology evidence which had been criticised in the Privy Council meant they were revisiting that issue. The question for the defence is, we've had no new evidence briefed about fast travel mileage kilometres and then suddenly in December we get Ellwood. Where does this all fit in? Are they actually abandoning that now and that is, of course, as it transpired to be exactly what had happened.

So if I just touch on that particular aspect of the evidence because it was discussed yesterday, the defence ran it as an impossibility saying it didn't have enough fuel. That relied on attempted reconstructions by an officer Johanson close to the time and he undertook a series of trips and reported back as to what his mileage consumption usage was.

WILLIAM YOUNG J:

They were fast trips, were they?

MR EATON QC:

They included fast trips, yes. He was trying to reconstruct what they believed at that stage Lundy had done and so the defence were content to rely on that but were also planning to call evidence at trial regarding fuel consumption.

That was ruled inadmissible late in the day, hence in the Court of Appeal the defence sought to adduce this evidence from an engineer at Canterbury University who had conducted tests on a race track to show exactly what the variable was between normal driving and hard driving to show how the consumption rates change because Ellwood did not factor in any fast driving at all. And when you read the Court of Appeal decision, it records in full the trial Judge's direction about this issue, the competing cases.

WILLIAM YOUNG J:
So what paragraph?

MR EATON QC:
The fuel evidence is at 259 and at paragraph 276 is the full directions that were referred to like His Honour Justice France and what they record is the Crown position which I don't think shifted is that we accept it must have got very tight, in terms of there being enough fuel, but there was enough and the defence position was that there wasn't enough and at trial they said well that is reliant on Johanson's fuel consumption but also on the basis that Ms Ellwood did not take into account any fast drive. And there was no dispute at trial that on the morning of the 30, Mr Lundy drove at an extraordinarily fast rate from Johnsonville back to Palmerston North. It had been calculated because there were police who had seen him on route, that he had travelled an average of over 100 kilometres an hour.

WILLIAMS J:
I thought it was 140.

MR EATON QC:
The average was 100. He was reported as travelling at 140, up to 180 kilometres an hour and hence the issue about, well how much extra fuel would you use if you were going flat out, was a relevant issue. Now the Court of Appeal recorded what was said to be a defence submission that Ellwood didn't take into account, the hard driving and that is at page 271 of the judgment. The last paragraph, "It was suggested that her analysis had not

taken into account Mr Lundy's very fast drive from Johnsonville to Palmerston North on 30 August," but in fact if we look at the evidence, and it is page 905, it was put to her. "You did not take into account any fast driving?" And she said, "No I didn't." All she did was look at the manufacturers' indications as to what they said, typical urban and non-urban driving was in terms of fuel consumption and she applied those numbers to this case.

MILLER J:
I think the gist of the evidence was that those manufacturer figures were optimistic. Is that the case?

MR EATON QC:
Well that is implicit that that is what the manufacturers' figures would be and of course the defence were seeking to show, through Mr Robinson, the engineer, that in fact they were widely optimistic. But the Court of Appeal said that Robinson's evidence wasn't cogent because he conducted it on a race track as opposed to try and – I don't know where we were expected to conduct that sort of test other than a racetrack. But anyway what that shoes is the fuel was at best for the Crown, very tight and if you accept as Ellwood did, she didn't take into account any fast driving, then the defence position was, and it was led by the defence, this made it impossible.

On the mileage I can answer that very briefly. Plainly the enquiry as to where Mr Lundy had been travelling in the days or weeks preceding the 29 August was not the subject of close scrutiny at the time. So we were doing a reconstruction well after the event about what his trips might have been but, and this answers my friend's submission, that there were unanswered kilometres. The police case was that we have eight days that are completely unaccounted for. What we can say is that he wasn't travelling outside of the towns where he was at those times but we don't know what he was doing and Mr Hislop had said in his closing address. If you think about that, in a man who was a salesman, that's about 37 kilometres a day. How would that not reasonably explain what they said were the unexplained kilometres. So the

kilometres were not an issue that in my submission, could ever be described as compelling in terms of guilt.

WILLIAM YOUNG J:
Just so I understand it. Why would Mr Lundy, on the postulated secret trip, drive hard. He wouldn't want to draw attention to himself.

MR EATON QC:
No, drove hard after he gets the call from the police.

WILLIAM YOUNG J:
Yes I understand that but why would he drive hard on the postulated trip, associated with the murder?

MR EATON QC:
Well that wasn't the defence theory.

WILLIAM YOUNG J:
Wasn't it?

MR EATON QC:
No the defence theory was what they haven't taken into account is the hard drive back to Palmerston North on the 30th, on the morning.

O'REGAN J:
After he was told that the police were at his house.

MR EATON QC:
Yes he gets told and he goes and we know he went flat out to get home.

WILLIAMS J:
This is all on the basis that Ms Ellwood said, driving according to specs, you'd just have enough.

MR EATON QC:

Yes. So that was the debate that we were seeking to clarify with reliable evidence because of course at trial one, the Crown said, we have got Danny Johanson, he did it all and here's what we rely upon. Trial two, they still called Johanson but said, no our issue about fuel consumption is now being dealt with by an analyst on a paper examination and Johanson is not reliable, far too many variables. So the defence said, oh well let's put some science around it, let's do a proper test and the Court of Appeal said no, not cogent, too many variables because it is on a racetrack, not on the open road.

WILLIAM YOUNG J:

Well just coming back to the point I asked you, I am looking at paragraph 76 of the judgment. Journey one, this is the Judge summing up at the defence focus. "Journey one was meant to be a pretty exact replica of the Johnsonville-Palmerston trip, hard driving, it used 35 litres. Mr Hislop submits that if you then assume the same driving on the secret journey, you need 84 litres." So, doesn't that suggest the defence was suggesting hard driving on the secret journey?

MR EATON QC:

Well that does but that wasn't the core of the defence case about fuel. The reality is, nobody knew what the – we knew it was a flat-out journey first time round when Mr Johanson tried to replicate it for sure. What that showed was if you drive flat out, you use more fuel, that was the essence of it and we know that for a 150 kilometre trip back to Palmerston, he had driven flat out.

The broader point in terms of this appeal is how did the jury resolve the fuel issue and the defence say, well they were entitled to resolve it on the way the case was run by saying, the combination of CNS, DNA and mRNA gives us the answer. That was what I wanted to say about fuel.

My friend said this morning the evidence was, this wasn't, didn't suggest it was a random killing and I guess that is right but this Court would have seen many files where we talk about domestic killings and they don't look like this

either so I don't think it takes it particularly far, and my friend didn't talk about motive this morning but the motive was said to be financial. You are in financial trouble, you would be better off if your wife is gone and maybe you are not entirely happy in your relationship but again it would be an extraordinary way to kill. Of course, the question then is, and what about Amber, and the Crown answer was, we have got a secret witness, a jailhouse, a snitch who gives us the answer about that, and I said yesterday that the police called evidence from a witness, Jennifer Curran who is a police officer, who was cross-examined about the suspect compulsion order that they sought in relation to another man, who had mental health issues and who knew Mrs Lundy.

O'REGAN J:
Sorry, could you just say that again? Another man who?

MR EATON QC:
Who was one of the original suspects. They applied to the High Court for a suspect compulsion order in believing he could be the offender. He knew Mrs Lundy and he had what were described as these mental health issues, which was why he was (inaudible 10:45:05) the suspect, as they were looking for somebody who might engage in an outrageously violent homicide. It has been talked about the scene being left so impeccably, forensically clean. In fact, and it was noted at the Court of Appeal decision at paragraph 357(a), there were unidentified fingerprints and an unidentified footprint which was found in the sun room, so I just point that out.

WILLIAM YOUNG J:
A footprint, what sort of footprint?

MR EATON QC:
I will just get the evidence, the reference for it. The witness is Andrews, at the notes of evidence at 1197. It wasn't a bloodied footprint or anything like that but there was a footprint which the police picked up in a fine tooth examination.

O'REGAN J:
It wasn't a blood footprint?

MR EATON QC:
No. My friend said, and I understand this was part of the theory at trial, that Mr Lundy must have been wearing overclothes. What we know is that the police would, on analysis, be exhaustively looking for any fibres that might link them to any clothing and we know that in relation to Christine and to Amber, there were a significant number of fibres found under their fingernails, none of which matched to Mr Lundy's clothes. But if he was wearing overclothes, then we might have reasonably expected, when the police engaged in tape lifts off his shirt, to find some unidentified fibres that might give a tell-tale sign of outer clothing that had been recently worn but no such evidence.

My friend talked about the paint and if I can just respectfully correct what the relevant witness Sally Coulson said. At trial one, she used the language, "indistinguishable". At trial two she had abandoned that and she said she can't exclude them being a match. So significantly backtracking in terms of the certainty of any matching of paints. What she said was, on her analysis of all the various bits of paint dust that were collated, was that there were nine different paints that were not matched to anything in the Lundy household, nine. And most significantly on the paint from the defence perspective, was that the only paint associated with Amber was a larger chip that was found near her body in the hallway, and it was a dark blue paint and it was on a piece of paper. So quite inconsistent and distinct from what was being found in relation to Mrs Lundy, which either suggested the offender had a second weapon or the Crown were reading far too much into the paint. So there was a dark blue that was not associated –

WILLIAM YOUNG J:
Or one weapon had two colours of paint on it.

MR EATON QC:
Well no other weapon had different colours of paint.

WILLIAM YOUNG J:

Sorry, two different shades of blue.

MR EATON QC:

Yes this was not a shade of blue that was found on anything else. And they looked at all Mr Lundy's paints in his garage, nothing to do with it. Same with those nine others but this was on a piece of paper.

WILLIAMS J:

A splatter?

MR EATON QC:

It was a piece of paper with the dark blue paint on it.

MILLER J:

A chip of paint you mean?

O'REGAN J:

You mean painted onto the paper?

MR EATON QC:

Well that's right. The paper, underneath the layer of paint was paper. So where did it come from, what did it have to do with the attack?

WILLIAM YOUNG J:

Well it might have had nothing to do with the attack.

MR EATON QC:

Well it had nothing to do with anything, it was found at the scene.

WILLIAM YOUNG J:

Have you got a photograph of it?

MR EATON QC:

Yes it is.

MILLER J:

So it is a paint chip that has paper underneath it, is that what you're saying?

MR EATON QC:

Yes that's right. So my friend said this morning that the Crown theory on the paint was that the cutting edge of whatever was used, had to have the paint on it but of course that just makes no sense at all. You don't mark your tools by painting the cutting edge. You mark your tools by painting the handle and when they went back at looked at Mr Lundy's shed, it was the handles of his tools that had this orange and blue paint. Not the cutting or using edges of them and that was the defence theory at trial which said, this doesn't make any sense because you have got what is said to be orange and blue embedded in the fragments of skull and, of course, that would be consistent if the cutting edge was painted.

MILLER J:

I think the photograph of the tomahawk has paint on the head of it as well as the handle.

MR EATON QC:

On the back of it.

MILLER J:

On the head.

MR EATON QC:

Not the cutting edge.

MILLER J:

Correct, yes.

MR EATON QC:

And so what the defence had said is, well an explanation for the paint dust that has been found, if indeed it is a match which we don't concede, it simply can't be excluded as being a match, is that Mrs Lundy is in and out of that shed regularly. There is lots of dust and dirt in the shed, it's on her, it's on her surface, it's on her bed, in these tiny little fragments and it must have been in her hair at the time she was attacked and so it may not be telling us anything about what relationship the weapon might have had to the property. Mr Lundy was said to have painted his building site tools from years ago when he worked on a building site. Obviously, a tomahawk is not a building site tool. He said, and people said, he didn't have a tomahawk. The neighbour, Debbie Malcolm, gave evidence and said he used to borrow my tomahawk for cutting kindling.

How did the jury deal with this evidence? Well if they accepted the mRNA, the DNA plus the CNS and said, well it's definitely Mrs Lundy's tissue, then they would no doubt say well the paint is definitely a match and it has come from her own tomahawk. I will just check my notes to see if there is anything else I want to say about paint. Sir have you found that photo of the dark blue paint?

WILLIAM YOUNG J:

No.

MR EATON QC:

My friend also made but passing reference to the bracelet, again which the Court of Appeal describes as one of these powerful indicators which the Privy Council had said wasn't. The theory being Mr Lundy had sought to stage a burglary and rather than taking a wallet, as such an obvious example of what you might seek to take, he took a jewellery box. The evidence – and I don't think it was contested at trial, and you can see it loosely in the photographs, was that where the jewellery box was, was in an area where there was blood and brain matter around it so the jewellery box would have been covered in material. So he took a jewellery box and then somehow got

rid of that before he got into his car, that was the theory but took out of it a bracelet which he erroneously left in his car and this was evidence to show that linked him back to the jewellery box, therefore linked him to the incident because it was part of the staged burglary. The only reason it became an issue at trial was because at interview, Mr Lundy had said that this bracelet could be his wife's but he was wrong and he was the only person who said that. And we know he was wrong because a number of Mrs Lundy's friends gave evidence at trial and said she doesn't wear that type of bracelet. I can't remember whether it was silver or gold, or gold or silver, the other way round, but if it was silver, she only wears gold. If it was gold, she only silver.

ARNOLD J:
Silver it was, yes.

WILLIAMS J:
Gold, she only wears gold.

MR EATON QC:
It was gold, she only wears silver.

WILLIAMS J:
No, no she only wears gold.

MR EATON QC:
So that didn't fit. It was too small, it wouldn't fit her. It was analysed for DNA as part of this extraordinary fine-tooth examination and none of Amber's DNA, none of Mrs Lundy's DNA found on it but there is someone else, some unidentified DNA and of course if the jewellery box had gone into the car, then that car was exhaustively searched on two occasions. Why wasn't there some evidence of a transfer of forensic material? So all you had was Mr Lundy, and when he was more closely interviewed, he said that in relation to the jewellery, "He's hopeless at that sort of thing, that he thought it was Mrs Lundy's." But it was only him, the evidence just didn't support that.

That photograph Sir is at page 65 and 66 of the volume 6 of the additional materials. No it is volume 2 of the additional materials, 006 that is.

WILLIAMS J:
What was your page, sorry?

MR EATON QC:
It is at page 65-66, additional materials, volume 2.

WILLIAM YOUNG J:
So that is, what, paint on?

MR EATON QC:
On paper it was described as.

WILLIAM YOUNG J:
Paper.

WILLIAMS J:
So they are not chips though are they, that is painted on.

MR EATON QC:
Mhm.

WILLIAM YOUNG J:
So is this anything to do with the murder?

WILLIAMS J:
Next to Amber.

MR EATON QC:
So my friend is saying volume 1 of the additional materials, there is a series of photographs beginning at page 332 to 343 thank you. So I don't understand the Crown advanced any theory about that but it was certainly being referred

to and loosely this evidence has been described as there paint associated with Amber and Christine, but there was, in fact, nothing on Amber at all, relevant to orange and blue paint.

WILLIAM YOUNG J:
What is at paragraph 337 in volume 1. It is paint and hair, I don't know whose hair it is.

MR EATON QC:
Is that volume 1 of the additional materials?

WILLIAM YOUNG J:
Yes.

MR EATON QC:
My friend and I are looking at Crown exhibits additional materials, volume 1.

WILLIAM YOUNG J:
Yes it is additional materials, volume 1, 337, it may be in Mrs Lundy's.

MR EATON QC:
So just finally on the paint. A couple of references at 1360. Mr Sutherland said that there were no other tools that were painted on their blades, only the handles and in fact he engaged in an experiment to see if using them forcefully the paint might come off the handles, so he wrapped, I think it was spanner in a piece of plastic bag, banged it on a table and then looked to see if any paint had come free and that is at 1302, he talks about that and there was no signs of paint coming off. The pointing being, when one analyses any one of these, what the Court of Appeal call compelling factors, there are very, very strong answers which raise questions about what weight you would safely place on them.

WILLIAMS J:

So at 342, where the wiring diagram points to the tools that are painted and then says “indistinguishable from” the blue paint fragments found in, must be skull fragments. You say that the witness resiled from that?

MR EATON QC:

Yes she was cross-examined about the change of language. I am not sure why this particular document hasn’t been updated because she abandoned the words indistinguishable and committed to a phraseology which was “cannot exclude.”

WILLIAM YOUNG J:

The paint sample, the paint that was on the paper, discovered near Amber, is at presumably 343?

MR EATON QC:

Yes.

WILLIAM YOUNG J:

But that says indistinguishable from five samples.

MR EATON QC:

No well that is not right, then. It is a dark blue which is the paint on the paper. My friend is saying it had two shades of blue.

O’REGAN J:

Is it the one at 336, 335-336. It doesn’t look very dark but it might just not be a very good photo.

MR EATON QC:

There is no question if we go to the evidence of Coulson, there was close cross-examination about it. This was a different blue from anything else she saw at the scene and it could not be matched to anything at the scene.

It stood alone and it was the only bit of paper that was on paper as well, so that is the evidence.

WILLIAM YOUNG J:
So this 343 diagram is wrong?

MR EATON QC:
If it is saying that the paint from the paper is indistinguishable from other paint found at the scene, yes that is not right. As I understand it, I am sure my friend will correct me if I am wrong.

O'REGAN J:
And in any event, indistinguishable wasn't the word used at the second trial.

MR EATON QC:
No. So then returning to my response in relation to matters from yesterday. It is so important in reviewing the Court of Appeal's decision to always bear in mind and in my submission, my friend at times failed to do so yesterday but the distinction that has to be drawn in the analysis for the application for the proviso, between the inevitable guilt limb and the fair trial limb and it is all framed against the starting point that the defence have demonstrated that the evidence was inadmissible, there was a miscarriage of justice. Parliament has seen fit to invest in an appellant court on review, a power to dismiss an appeal where there is no utility in a retrial but that is only if the guilt is overwhelming and independent of the guilt assessment. Meaning, even if the Court concludes he is guilty, that his trial was fair and the defence, the appellant submits that in terms of that fair trial limb which is what I addressed first yesterday, this Court ought to take guidance from the High Court of Australia in *Wilde* where they formulated, in terms of inadmissible evidence, the test as being, it is the significance of the evidence wrongly admitted in the context of the trial which must determine whether the error was of a fundamental kind and then pose that question, did the evidence add significant additional weight. Here the defence have said, well because it is expert opinion in relation to the science, it was always likely to add significant

additional weight and I do note that in its decision, the Court in ruling evidence inadmissible at 247, had said that the "Notion that the robustness of cutting edge scientific techniques can be established before juries, creates a clear tension with the right to fair trial." And plainly I endorse that because the power of scientific evidence is potentially so distracting from the factual determination that the jury might be provided to make. So the Court, recognise on the one hand of all the evidence inadmissible. This is a real tension about fair trial and in my submission, the Court then did not take that thinking through into the fair trial analysis. But in direct answer to what my friend said yesterday. He said that the history is irrelevant and you will remember I said yesterday morning that the defence –

WILLIAMS J:

Can you just tell me. Before you go on, hold on to that thought, that proposition you just raised. Is it from *Wilde*?

MR EATON QC:

No what I just read there was directly from the Court of Appeal in this case at 247, about the tension. Just in more response, directly what my friend yesterday. He said that the history of the way in which this evidence was dealt with pre-trial was utterly irrelevant, that it was water under the bridge. That obviously contrasts with the submission that the appellant advances, that says in any fair trial inquiry, it is necessarily broad and the Court ought not likely turn its back on guidance and here of course and I know I will be criticised for drilling it. But what stands as an indication that the legal process here is beginning to lack integrity, when you have a Court of Appeal saying pre-trial, it is highly relevant, it is critical to the Crown case, it has potentially high prejudice to a defendant but is not unfair prejudice, and then you have the same Court saying, it was unfairly prejudicial, it should not have been before the jury but it wasn't of a degree of significance that his trial wasn't fair, and the Crown are, of course, stuck with that so the submission is, don't have regard to that, that's water under the bridge.

ARNOLD J:
It must be relevant though, to have regard when thinking about this, to what happened at the trial, in relation to the evidence and if there was a very effective attack on it, it is possible I guess isn't it, that the evidence ultimately didn't live up to the Crown expectation and so the position really is as the Judge explained it, is based initially on those first two elements and later on…

MR EATON QC:
I think it is fair to say and we have deliberately and understandably avoided the reasons why this evidence didn't meet the thresholds for admissibility but I think there is no doubt that the argument that we presented in the Court of Appeal was the argument that had been presented pre-trial. We weren't shifting the argument; there was more evidence and yes, the Crown's position and the Court of Appeal's position was because the defence were, and I guess they were saying, well they were patting the defence on the back. Because you managed this quite well, in terms of confronting it, then the unfairness dissipates but what did the jury make of it? The defence are fighting this so hard. Why? Because they know how damaging it is to their case. Look at the energy they are putting in to fighting this evidence, as opposed to, I can't deal with it so I will just pretend it is not there and not give it attention. The defence did, and they rolled up their sleeves and said we need to fight this evidence, pre-trial and at trial and they did.

So I, with respect, don't accept as the Court of Appeal have found that the fact that you fought it and did well, I guess, in the sense that the points you made were valid, somehow undermines your later claim that it made it unfair. Would it have been unfair at the trial if we had done nothing about it and just stood by and then criticised it in closing. Would that have changed the scenario? With respect, once it is highly relevant and it is in, the how you deal with it as a defendant, doesn't negate any breach of your fair trial right. You don't secure a fair trial because you fought inadmissible evidence, and of course my friend is saying, water under the bridge, ignore that. But the trial Judge took the same view, as we talked about yesterday. He described it as being very important. His Honour was of course bound by the pre-trial rulings and I

think there was a suggestion yesterday that His Honour might have got slightly cold feet on the evidence himself and he may well have but he was there and so he saw fit to frame this evidence on its own, with a very detailed and helpful handout that had been carefully constructed. So that was the significance that the Judge applied to it because, it seems, he was concerned the jury may be going to give this too much weight and I have got to try and control that, which, of course, the defence say, yes of course that was the risk. That's what the Court of Appeal talk about when they said it will be highly prejudicial. Just that the Court of Appeal said pre-trial that wouldn't be unfair. So it is essential in my respectful submission that this Court recognise and guard against the risk that the true significance of this evidence at trial is now being lost or downplayed with a hindsight review following that inadmissibility ruling. Because the Crown have got to persuade the Court that the evidence wasn't of such significance that the fair trial right was breached but it is pretty well captured in the position that the Crown ran on the appeal.

If you go to paragraph 233 of the appeal decision where the Crown are of course fighting as vigorously as they have, to have this evidence admitted. We see the Court of Appeal there summarising my learned friend position.

ARNOLD J:
Sorry, what paragraph?

MR EATON QC:
At paragraph 233 of the Court of Appeal. And it starts in the middle of that section, referring to my friend. He submitted the evidence was clearly relevant under section 7, could not be excluded under section 8 because its probative value was not outweighed by the risk it was unfairly prejudicial. In terms of section 25 of the Evidence Act he maintained the jury would have unquestionably obtained substantial help from this evidence in ascertaining facts of consequence to the determination of the proceeding. The issue of consequence that my friend was referring to, was whether this is Mrs Lundy's CNS tissue. So the Crown position, on appeal, post the trial, no matter what they say now, was the jury would have unquestionably obtained substantial

help from this evidence. Now it is typically, with respect, not right to cast that aside as being some short of shallow subdivision the Crown were making just to hold on to evidence. That must be, along with what Justice Kós and the Court of Appeal and Justice Simon France said at trial, must be an indication of what is, in reality, the position in terms of how the parties were treating this evidence. Unquestionably, substantially helpful on this key issue and that itself frames this debate. Did it add significant weight to the issue and, in my submission, well everybody has acknowledged it did until the proviso has been applied, and then it is no we didn't need it, and that is where I say my friend has fallen into the very same trap that the Crown in *Howse* did as summarised in that powerful majority judgment at paragraph 62.

WILLIAM YOUNG J:
The majority or minority?

MR EATON QC:
Minority, sorry Sir, yes. They are just playing around with the quote a little bit because here it could be said the Crown may have been able to advance a case without the mRNA but counsel for the Crown decided to go further and add to it. He devised a strategy to prove this was Mrs Lundy's brain tissue and to overcome a line of defence. He deployed that strategy at trial. That's the words from the minority in *Howse* applied to this case and of course the minority in *Howse* said, "You can't now say it makes no difference and I didn't need it as a means of supporting a submission he had a fair trial."

WILLIAM YOUNG J:
I suppose it is just a question of degree that in every case where inadmissible evidence has been led, a language like that can be used?

MR EATON QC:
Yes and it will come back to those questions. What is the nature of the evidence, its expert, how central is it to the issue.

WILLIAM YOUNG J:

How cogent is it?

MR EATON QC:

Yes. That is what I wanted to say about the fairness limb on the inevitable guilt limb and with great respect to Your Honour Justice Young. The appellant's position is that the policy arguments around what the inevitable test means have not been considered in *Best* and *Cameron.*

WILLIAM YOUNG J:

Well I think you may underestimate the awareness of the members of this Court of the ambiguities in *Matenga*. That they were not throw away lines against complete ignorance of the fact that *Matenga* was ambiguous. We have had arguments where *Matenga* has been relied on and where counsel have taken us meticulously through the different signals which different parts of the judgment give.

MR EATON QC:

Well I anticipate that this decision will give some clarity to that regardless but if a simple sureness standard is applied to the application, the proviso, then that would be for this Court to interpret Parliament's intention, when creating the proviso and abandoning the Exchequer Rule as saying, you the appellate court have the same function as the jury.

WILLIAM YOUNG J:

No it is just not saying that at all. It is saying in some cases it will be possible for an appellate court notwithstanding disadvantages, vis-à-vis its position in that of the trial Court to reach an affirmed conclusion of guilt. Not in all cases, perhaps not in many cases, but it is not saying that the Appeal Court simply can reconstitute itself as a jury.

MR EATON QC:
And perhaps the clearest stumbling block to that position as a matter of law is the way the matter has been dealt with in the Canadian Supreme Court where blatantly they take a different view in terms of what the standard ought to be.

WILLIAM YOUNG J:
I agree they have taken a different view.

MR EATON QC:
I am just looking at my notes here about the three impossibilities questioned, Your Honour Justice Williams asked my friend, I think I have dealt with the fuel issue. Yes my friend has addressed the Tupai issue. It was the fact that the sliding door was open at 11 o'clock last night. There was no dispute about when and where this was, in fact it was an admitted fact, it is in the case on appeal at page 382 as to when this call was. So we had the phone records. My friend said yes he now acknowledged it was the same day. So the point was Mrs Lundy is security conscious; she has turned off her computer and she has left her sliding door of her conservatory open. That is odd, that is very odd when her husband is away and we know, of course, Mr Lundy that time was in Wellington.

There was much discussion yesterday around the fact that this was only CNS tissue discovered and I simply make the point because so much of this defence case is absolute reliance on science is a dangerous way to assess guilt but here the fact that there are questions to be asked around the science and of course the defence would say there is more questions to be asked in relation to IHC that we can't ask in this Court but the dab slide is taken off the sleeve and there is no evidence that that was CNS tissue. If that had been positively the DNA then maybe you would be on firmer footing but it just shows, something is not happening as we would have expected with the science, there are question marks.

My friend said that the possibility of animal source for the CNS was, in his words, thrown out there by the defence. With respect, it was a bit more than

that. It was raised in 2013 because it was then understood, contrary to the position at trial one, that the IHC, the immunohistochemistry, could not indicate whether what was said to be CNS was human or not. That was when that was discovered and it was then of course appreciated there is no scientific link between the CNS and the DNA.

WILLIAM YOUNG J:
Was it not appreciated at the first trial that the tissue could only be positively identified as CNS, as opposed to CNS?

MR EATON QC:
It was accepted it was human CNS.

WILLIAM YOUNG J:
I know it was accepted as human CNS, but was that based on an assumption that the CNS test established it was human.

MR EATON QC:
Yes everybody presumed on that basis.

WILLIAM YOUNG J:
Well even they proceeded. I mean, they have proceeded on that basis because of the conjunction of the CNS and the DNA. Did they proceed on the basis that the CNS testing itself established that the substance was human.

MR EATON QC:
Well my understanding of the way the case was run is that it was accepted that the IHC proved it was human CNS. There was some discussion yesterday about the 20% figure, I think it was 25% of the material is subject to the elution process and the question which, and I don't have an answer for this is well, if we are assuming that Mrs Lundy's DNA in the form of saliva or mucous of some form, is on that fabric, would that be expected to be eluted from the tissue at the same rate as if it was animal CNS which might be some sort of fatty material that is less likely be eluted in this water solution? These

are questions. At the end of the day, the evidence which the Court of Appeal has said gives rise to the inevitable guilt finding, is based on firstly the subjective opinions resulting from the IHC analysis and the fact of the matter is, this was a novel use of it. Novel and clinical but certainly novel in a forensic setting which led to a conclusion that these very, very small samples from the shirt, was CNS, not brain, CNS tissue.

WILLIAM YOUNG J:
CNS and nothing else.

MR EATON QC:
Yes. And in the second limb, was, of course, the DNA. Now the Court of Appeal said well that is an inescapable conclusion that the source of the DNA is the CNS. But the defence position is, the experts said, well the science doesn't let you draw that conclusion. The experts said, and they were both questioned extensively about it, there are other possibilities that would factor against that and the defence then set about pointing to so many other evidential features in this case that were relevant to assessing, well, how likely are those possible explanations.

WILLIAM YOUNG J:
What are the other possibilities? The CNS is animal and that there's, Mrs Lundy's DNA is there perhaps in the form of mucous?

MR EATON QC:
Saliva, mucous, yes.

WILLIAM YOUNG J:
So that would –

MR EATON QC:
The possibilities are that the CNS had been there for days, weeks if the shirt hadn't been washed and the DNA came on at a much later stage.

WILLIAM YOUNG J:

And that she sneezes over this biological material that's on the shirt and does nothing about it.

MR EATON QC:

Why is that so unreasonable?

WILLIAM YOUNG J:

I don't think I'd put a shirt on like that. So and then secondly you've got a similar position on the shirt pocket.

MR EATON QC:

Yes, well, and the experts talked about well who knows. We can't tell you whether it's one and the same or whether the –

WILLIAM YOUNG J:

I know, but if it is one and the same it must have occurred when the CNS material was still fresh, was still wet.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

Which suggests that the two incidents would have occurred at reasonably proximate in time and that doesn't really help the defendant does it?

MR EATON QC:

Yes, and if we were arguing about whether it's an argument or whether – if the test wasn't inevitable guilt under this limb, we'll be seeing these are issues for a jury to determine, and that's what the defence are saying, and that's what the defence are still saying today. The experts said, we don't let you draw the conclusion which the Court of Appeal have drawn. There are other possibilities that need to be explored. The defence say, those opportunities

needed to be explored, still need to be explored in front of a jury where Mr Lundy only faces admissible evidence and doesn't taint the inquiry.

ARNOLD J:
Can I just ask, just on this? What did the experts say about the blood vessels and blood that were found and we were taken to the slides yesterday?

MR EATON QC:
Well it seems very little, other than confirming that they were seen on forensic examination but in terms of, there was, I think, evidence that you would be not surprised to see whether it is animal or human blood vessels associated with CNS tissue.

ARNOLD J:
Well bearing in mind that there was red staining, doesn't that point powerfully to the fact that the test producing the DNA must have come from that blood. Not scientifically, just as a matter of fact.

MR EATON QC:
Well again that is not how the argument has been packaged. It is not how it was packaged in the lower Court, it is not what the Court of Appeal said either, in terms of that level of analysis. You see the arguments which we are now being forced to confront, are newer arguments because we don't have the mRNA to fall back on and they haven't been debated with the experts because ultimately the mRNA removed, the defence say, those arguments which is why it is a somewhat artificial environment, with all due respect, to then go back and say, right we will take it away and now let us go and challenge you on it. The way we dealt with it was in a case where we were confronted with powerful mRNA evidence.

WILLIAM YOUNG J:
Can I just go back to this a little? As I understand the evidence, the DNA was of a kind which could have come from the CNS material, assuming it was Mrs Lundy's.

MR EATON QC:

Yes.

WILLIAM YOUNG J:

If the CNS material was not Mrs Lundy's, why did it not produce other DNA in equally abundant quantities which were detected when the second set of tests were done?

MR EATON QC:

Well from a scientific perspective, I don't know the answer to that. But why did the tissue, when the tissue was examined in 2014 –

WILLIAM YOUNG J:

No but they are looking at the elutions. They are looking at the original elutions now. Now assuming this is, I don't know, spinal cord from a lamb, why would it not have produced a strong DNA signal of the elution that was taken back in 2001 or 2003?

MR EATON QC:

Well I guess the first question might be how long has it been there? What was its state when it was fixed, had it been partially microwaved or cooked.

WILLIAM YOUNG J:

Well, no, we know it is pretty fresh.

MR EATON QC:

Well we know it's wet, or ish. That is where Ironside talked about, he didn't think it was fresh, he thought it there was, it had been subjected to some sort of microwaving.

WILLIAM YOUNG J:

He said it was possible.

MR EATON QC:

Yes. So these are genuine questions to be explored in a trial where there is not mRNA to answer but they haven't been the focus of the evidence at trial, because the argument was, you can't rely on the mRNA.

WILLIAM YOUNG J:

All elements of this were on the table though.

MR EATON QC:

Yes but the trial, with respect Sir, was shaped by the inadmissible evidence.

WILLIAM YOUNG J:

I know, okay.

MR EATON QC:

And that is the issue and all Mr Lundy says is, after 19 years can I not have a trial where I am not being confronted with the Crown putting before a jury, unreliable expert opinion. May it please the Court.

WILLIAM YOUNG J:

We will take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 11.26 AM