NOTE: PREVIOUS ORDERS PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES REMAIN IN FORCE. SEE FOOTNOTE 3 HEREOF.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA450/2020
[2025] NZCA 455

BETWEEN	SCOTT WATSON Appellant
AND	THE KING Respondent

Hearing:	10–14 June 2024 (further submissions received 19 June, 29 July, 4 September, 5 September, 10 September, 17 September, 4 October, 21 October and 20 November 2024)
Court:	French, Courtney and Thomas JJ
Counsel:	N P Chisnall KC, K H Cook, J Ding and H Z L Krebs for Appellant M F Laracy, S C Baker, R M A McCoubrey, T R Simpson and L C Hay for Respondent
Judgment:	9 September 2025 at 10.00 am

JUDGMENT OF THE COURT

A **The application to adduce further evidence is granted in respect of the evidence of the witnesses listed at [85] and the evidence in the first part of the Report by Drs Wells and Quigley-McBride.**

B **The application to adduce further evidence is declined in respect of the evidence of Mr Ruhfus and the second part of the Report by Drs Wells and Quigley-McBride.**

C **We find there was no miscarriage of justice. We accordingly decline to exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act 1961 to quash Mr Watson's convictions for the murders of Olivia Hope and Ben Smart.**

D **We make an order prohibiting publication of this judgment, the media release, and any information therein, until the judgment is made publicly available at 12.00 pm on Wednesday 10 September 2025.**

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] It is a case that has gripped but troubled the nation. On 31 December 1997, Olivia Hope, aged 17, and Ben Smart, aged 21, attended a New Year's Eve celebration at Furneaux Lodge, Endeavour Inlet, Marlborough Sounds. Olivia and Ben were last seen boarding a boat in the Endeavour Inlet in the early hours of 1 January 1998 in the company of a lone man. They have not been seen, dead or alive, since. Following a three-month trial in the Wellington High Court in 1999, a jury found Scott Watson guilty of the murders of Ben and Olivia. Some 26 years later, Mr Watson remains in prison. He maintains his innocence. The Governor-General has referred the convictions to this Court to decide whether a miscarriage of justice may have occurred (the Reference).[1]

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1 "Reference to the Court of Appeal of the Question of the Convictions of Scott Watson for Murder" (13 August 2020) *New Zealand Gazette* No 2020-ps3636 [the Reference]; and Crimes Act 1961, s 406(a). The Reference is annexed to this judgment as Appendix A.

[2] Although it was not conceded at trial, there was no serious challenge and it is now accepted that both Olivia and Ben died at the hands of the lone man in circumstances which amounted to murder.[2] The issue at trial was whether Mr Watson was the lone man with whom Olivia and Ben boarded a boat on the last occasion of their sighting.

[3] Olivia had arrived at Endeavour Inlet on a charter yacht called *Tamarack*. She met up with Ben, whom she knew, at Furneaux Lodge in the late afternoon or evening of 31 December 1997.

[4] Mr Watson had arrived at Endeavour Inlet on 31 December 1997 in his sailboat, *Blade*. *Blade* was a sloop which is a sailboat with a single mast. He rafted it to two other vessels, *Mina Cornelia* (a 36-foot sloop) and *Bianco* (a 26-foot sloop) a short distance out from Furneaux Lodge's jetty. He then attended the New Year's Eve celebration at Furneaux Lodge.

[5] This decision addresses the issues raised in the Reference as to the reliability of forensic evidence given at Mr Watson's trial about two hairs found on *Blade*. It also considers the identification evidence given at the trial and whether its admission caused a miscarriage of justice, as well as the case against Mr Watson overall.

CROWN CASE/OVERVIEW

A circumstantial case

[6] The trial involved over 500 witnesses. The Crown case against Mr Watson was circumstantial and included reliance on:

(a) evidence relating to Mr Watson's behaviour on the night in question;

(b) evidence from witnesses at Furneaux Lodge relating to the description and identity of the lone man with whom Olivia and Ben were last seen;

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2 *Watson v R* CA384/99 CA507/99, 8 May 2000 [2000 appeal] at [2]. Mr Watson's counsel conceded that it had been open to the jury to conclude on the evidence that Mr Watson's guilt had been established beyond reasonable doubt: see at [1].

(c) evidence relating to Mr Watson's behaviour in the days immediately following the last sighting of Olivia and Ben;

(d) evidence relating to the number, type and mooring positions of boats in the vicinity of Furneaux Lodge on New Year's Eve 1997 and movement to and from those boats;

(e) evidence about the recovery and forensic examination of hairs found on a blanket on *Blade*;

(f) evidence relating to Mr Watson's behaviour prior to New Year's Eve 1997; and

(g) evidence of Mr Watson's discussions with other prison inmates when Mr Watson was in custody following his being charged.

An overview of the evidence

The water taxi ride on 1 January 1998

[7] In the early hours of 1 January 1998, a water taxi driver, Guy Wallace, took Olivia's sister, Amelia, and her friend, Rick Goddard, to *Tamarack* in a water taxi, colloquially referred to by its brand name, Naiad. With them was a lone man and another young couple, Sarah Dyer and Hayden Morresey. Mr Wallace dropped Amelia and Rick at *Tamarack* and Ben and Olivia, who were aboard *Tamarack*, took their place in the Naiad. They said there was no room for them to sleep on *Tamarack* and were looking for somewhere to spend the night. The lone man offered his boat. That offer was accepted and Mr Wallace drove to a boat that was moored with other vessels, where Ben, Olivia and the lone man alighted. Mr Wallace then took the remaining couple to a jetty at the nearby area known as The Pines.

[8] Mr Wallace said the lone man was the same person he had served at the bar over the course of the New Year's Eve celebrations and he had seen him a number of times that night. He gave a description of the lone man and a sketch was made of him by computer (a compusketch) under Mr Wallace's direction. In April 1998,

Mr Wallace identified Mr Watson as the lone man when shown a photograph montage compiled by the police which showed head and shoulders photographs of Mr Watson and seven other males (Montage B). Although not referred to at trial, in January 1998 Mr Wallace had been shown a black and white photograph of Mr Watson taken about eight years prior but did not identify Mr Watson from that.

[9] Mr Wallace described the lone man's yacht as a "big ketch". A ketch has two masts. He maintained that *Blade* was not the boat at which he dropped the trio, principally because it was too small and single-masted. Mr Morresey also thought the lone man's boat might have had two masts. He also ruled out *Blade* as the boat to which the trio were dropped.

[10] There were over 100 boats moored out from Furneaux Lodge that New Year's Eve. On the Crown's case, only two boats were occupied by a single male. One was Mr Watson's and the other was excluded on the basis it could not have been the boat to which Olivia and Ben were taken. At trial, the officer-in-charge of the boat phase of the police inquiry conceded that, if a boat had arrived late during the hours of darkness on 31 December 1997, was anchored alone, beyond the 300 metre radius (out from the jetty), and the occupant used his or her own transport to go to shore and back, then it was possible that the boat had not been identified.

[11] The defence called 11 witnesses who provided sighting-based evidence to support the existence of the ketch described by Mr Wallace. A number claimed they had contacted the police but received no response.

Mr Watson's movements on 31 December 1997

[12] Before going ashore, Mr Watson had attended a gathering on *Mina Cornelia*, where a photograph was taken which shows Mr Watson apparently clean shaven (the *Mina Cornelia* photograph).

[13] Mr Watson went ashore, taking his rum with him. He was stopped at the jetty and told that he could not take his alcohol ashore. Mr Watson stayed at the jetty and consumed the alcohol, during which time he interacted with a number of people. It was at this point that a photograph was taken by Darryl Waswo (the Waswo

photograph) showing a partially obscured Mr Watson wearing a blue denim Country Road shirt.

[14] The Crown called a number of witnesses relating to purported interactions with Mr Watson at Furneaux Lodge. A theme emerged of a lone man, who the Crown said was Mr Watson, being obnoxious and inappropriate during interactions between about 10.00 pm and 4.00 am.

[15] One such important interaction concerned a confrontation with Oliver Perkins and his friend, Chris Bisman, which was witnessed by a number of others (the Perkins incident). Mr Watson acknowledged being involved in the Perkins incident when spoken to by the police.

[16] Some time after 2.00 am on 1 January, Mr Watson took a Naiad driven by Donald Anderson back to *Blade*. Mr Watson boarded *Mina Cornelia* and woke up some of the occupants who told him to leave. He then went onto *Bianco*. He told the police that, after his efforts to rouse others proved unsuccessful, he cooked a meal and went to sleep.

[17] The Crown's eventual position at trial was that Mr Watson returned to Furneaux Lodge — by means unknown — after he was unsuccessful rousing those on *Mina Cornelia* and *Bianco* (the two-trip theory). The Crown case was that the Perkins incident happened after Mr Watson's first trip back to *Blade* and following his return to shore. The defence case was that Mr Watson did not return to Furneaux Lodge and the Perkins incident occurred before Mr Watson's trip back to *Blade* with Mr Anderson.

Blade's movements on 1 January 1998 and Mr Watson's alleged efforts to destroy incriminating evidence

[18] When spoken to by the police in early January 1998, Mr Watson said he had left the Endeavour Inlet around 6.30 to 7.00 am on New Year's Day and sailed to Erie Bay, arriving around 9.00 to 10.00 am.

[19] A Crown witness said that *Blade* was not in the Inlet when he awoke at 5.30 am on 1 January 1998. Several other witnesses said they saw a boat they identified as *Blade* in other parts of the Sounds, the Tory Channel and the Cook Strait at various times on 1 January 1998.

[20] That Mr Watson arrived at Erie Bay around 9:30 to 10.00 am on New Year's Day was initially supported by a Mr L but he subsequently said he was mistaken and Mr Watson arrived at around 5.00 pm.[3]

[21] Mr Watson spent 2 January aboard *Blade* painting the cabin a dark blue colour, changing it from its previous shade of red. Mr L saw Mr Watson departing Erie Bay at about 8.30 to 9.00 am the following day.

[22] On 12 January 1998, *Blade* was lifted from the water and subsequently forensically examined. The local boat club president, Ian Michel, gave evidence that *Blade'*s hull had been wiped in places and, in his opinion, this was unusual.

[23] Fingerprinting officers gave evidence that a number of surfaces, including cassette tape cases, had been wiped clean. The cover to one of the squabs in a set was missing and a hole had been cut into it. The edges of the hole were singed. Mr Watson's former partner gave evidence that the squab was not damaged when she had been on *Blade* in November 1997. At trial, the thoroughness of the cleaning was challenged, given the remaining presence of fingerprints and blood.

[24] Police did not locate the shirt that Mr Watson was wearing on New Year's Eve.

[25] The Crown called evidence that the main hatch into the cabin of *Blade* had multiple scratch marks on the underside. Experiments indicated that the scratches were consistent with an adult-sized fingernail. However, some of the scratch marks were located on the side parameters or the very bottom of the hatch, which were areas not accessible when the hatch was closed.

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[3] We anonymise Mr L's name to ensure this judgment complies with suppression orders made at trial. We take the same approach for witnesses Mr E, Mrs E, Mr EM, Ms H, Mr J, Mr K, Mr M and Mr N.

The two hairs

[26] DNA analysis of two blonde hairs found on a blanket from *Blade* showed a strong connection with Olivia. The provenance of the two hairs was challenged at trial on the basis they could have been transferred onto the blanket by other means or the two hairs had become mixed up with hairs seized from Olivia's bedroom for comparison purposes.

The "Three Es'" evidence

[27] The jury heard from three witnesses about comments Mr Watson had allegedly made to them at various times in 1997 expressing serious animosity towards women and talking about killing people.

The prisoners' evidence

[28] Two men gave evidence that Mr Watson had confessed to them whilst he was a remand prisoner at Addington Prison.

[29] The defence mounted a strong challenge to the reliability of this evidence, suggesting for example that one of the witnesses was incentivised by the police to give this evidence.

The defence evidence at trial

[30] The defence called 26 witnesses at trial. As well as the witnesses claiming they had seen a ketch, the defence also called several witnesses to support the claim that Mr Watson's cleaning of *Blade* was in response to sailing through a storm rather than to remove forensic material as had been suggested by the Crown.

MR WATSON'S APPEALS AND APPLICATIONS

The 2000 appeal

[31] Mr Watson's appeal to this Court against conviction and sentence was dismissed on 8 May 2000.[4]

[32] The conviction appeal involved challenges based on:

(a) the admissibility of the evidence from the "Three Es";

(b) the way the trial Judge warned the jury in respect of identification, including in respect of Mr Wallace's purported identification of Mr Watson as the man in the Naiad (which was challenged on the grounds Mr Wallace had not actually made a visual identification of Mr Watson);

(c) the interruption of the defence's opening address;

(d) the two-trip theory;

(e) the Judge's summing up in respect of the Three Es' evidence, the two-trip theory, identification issues and a claim of general imbalance and unfairness; and

(f) jury vetting.

[33] This Court concluded there had been no wrong decision in law and no miscarriage of justice under any of the separate grounds of appeal, separately or cumulatively.[5] It noted that, absent trial error or the availability of fresh evidence, leading to a miscarriage of justice, it was accepted by counsel for Mr Watson that, on the totality of the evidence, findings of guilty were open to the jury.[6]

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4 2000 appeal, above 2, at [61].
5 At [56].
6 At [56].

[34] The appeal also included a claim of fresh evidence following a report concerning accidental contamination of DNA samples at an ESR laboratory in two unrelated cases.[7] ESR (Institute of Environmental Science and Research Ltd) is a Crown Research Institute whose functions include the provision of independent forensic testing and advice. The police had instructed ESR in respect of the recovery and forensic examination of hairs found on *Blade*. This Court held that the circumstances of the two cases had no common features with that of Mr Watson's case and there was no new evidence that would tend to throw doubt on the accuracy or reliability of the DNA testing results in Mr Watson's case.[8]

[35] In November 2003, the Privy Council declined to grant special leave to Mr Watson to appeal against his convictions.[9]

[36] In 2008, Mr Watson applied to the Governor-General for the exercise of the Royal Prerogative of Mercy in respect of his murder convictions.[10] The application was declined in July 2013.[11]

The IPCA Report

[37] In June 2007, Keith Hunter, author of a book entitled *Trial by Trickery*, wrote a letter of complaint to Deputy Police Commissioner Rob Pope levelling a number of allegations against him in respect of the manner in which he discharged his responsibilities as the officer in charge of the investigation into Olivia and Ben's disappearance. The complaint was forwarded to the Independent Police Conduct Authority (IPCA), whose role it was to examine and make findings about the adequacy and integrity of the police investigation.[12]

[38] In its report dated 17 May 2010 (the IPCA Report), the IPCA described the police investigation into the disappearance and murders of Ben and Olivia (Operation

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7 At [52]–[54].
8 At [54].
9 The Reference, above n 1, at cl 3(6).
10 At cl 4(1).
11 At cl 4(2).
12 In accordance with the requirements of the Police Complaints Authority Act 1988, ss 14(3) and 15. Soon after Mr Hunter laid his complaint, the Act was amended, its short title was changed to the Independent Police Conduct Authority Act 1988 and the authority was renamed from the Police Complaints Authority to the Independent Police Conduct Authority.

Tam) as one of the largest police files compiled in New Zealand's criminal history. Approximately 1,650 people who were in the Marlborough Sounds at the time had to be traced and contacted. More than 100 vessels were identified and traced.

[39] The IPCA considered 10 heads of complaint raised by Mr Hunter. While the appeal before us centred on identification evidence and hair analysis, there is no escaping the need to consider the wider allegations. As such, and to assist in the understanding of the level of scrutiny that has attached to this case, we set out the IPCA's summary of the heads of complaint and its findings in Appendix B.

[40] The IPCA's findings can be briefly summarised:

(a) *Photograph identification:* The IPCA found the construction of the montages, how they were presented to witnesses and the showing of a single photograph to Guy Wallace were all highly undesirable practices, particularly given the critical importance of suspect identification in this case, and fell far short of best practice.

(b) *The mystery ketch:* The IPCA found there was no evidence on which to conclude that the police deliberately ignored relevant evidence about vessels or vessel sightings. On the contrary, it was apparent that police went to considerable lengths to identify, locate and eliminate all vessels in the vicinity of Furneaux Lodge on the night Ben and Olivia disappeared and their actions seemed eminently reasonable in this regard.

(c) *Tunnel vision:* The IPCA found that, while there were some deficiencies in the inquiry, a close examination satisfied the IPCA that on the whole Operation Tam was conducted reasonably and rationally, with its leaders remaining open-minded throughout.

(d) *False rumours:* The IPCA found no basis for the allegation police created and circulated false rumours about Scott Watson. What was apparent was that a number of the so-called "rumours" were circulated

by the press themselves or by others, contrary to the urgings of police. In other instances, the information circulated was either true or was based on beliefs that were not unreasonably held by police. The provision of a "suspect profile" of Mr Watson to a group of civilians by a member of the investigation team was, however, highly undesirable.

(e) *The strategic lie:* The IPCA found no evidence of misconduct in police dealings with the media during Operation Tam. It considered Detective Inspector Pope's (as he was then) actions and his public comments entirely consistent with the view that he was extremely concerned by media speculation and identification of Mr Watson and that he sought to avoid any statements that might compromise the investigation or prejudice any subsequent trial.

(f) *False information in sworn affidavit:* The IPCA found no evidence that Detective Inspector Pope, or any other officer, intended to mislead the Court or swore an affidavit knowing any part of it was inaccurate. No misconduct or neglect of duty by police was found.

(g) *Secret Witnesses:* The IPCA found no evidence that police acted unlawfully or improperly in their interaction with either secret witness prior to, during, or after they gave evidence at the trial.

(h) *Coercion of witness:* The IPCA found no evidence to support allegations of coercion of a particular witness and was satisfied police acted professionally and appropriately in all respects in their dealings with him.

(i) Blade *duration test:* The IPCA found police had no obligation to test the duration of a voyage by *Blade* from Cook Strait to Erie Bay and it was highly unlikely any such reconstruction would have been admissible in evidence. This was because of the impossibility of replicating the wind conditions, tide and weather on New Year's Day 1998.

(j) *DNA contamination:* The IPCA found no evidence police deliberately contaminated the evidence by placing Olivia's hairs on the "tiger blanket" found on *Blade*, either while the blanket and sample hairs were within the custody of police or once the exhibits had been sent to the laboratory. Nor was there any evidence of accidental contamination or "secondary transfer" of this evidence.

[41] The IPCA Report concluded:[13]

> 186. The circumstances of the investigation made eye witness identification extremely difficult, yet vital. There is a vast amount of research indicating that eye witness identification is fraught with difficulty and in Operation Tam these difficulties were magnified by the circumstances of the disappearance (at night, and after people had consumed alcohol), and by the atmosphere of rumour and almost unprecedented and intense media speculation surrounding the investigation.
>
> 187. In these difficult circumstances, some actions of Police fell short of best practice, and at their most serious, had the potential to influence witnesses. I have noted where this was the case. It is alleged these failings amount to a deliberate and systematic attempt to skew the evidence towards a predetermined outcome; and that this approach was endorsed by laboratory scientists (by planting evidence), the trial Judge and the Crown prosecutors at Scott Watson's trial and the three appellate Judges who heard Scott Watson's appeal.
>
> 188. An alternative explanation is that, in a major investigation conducted under intense pressure in a very difficult environment and involving a large number of Police officers, mistakes were made, and that these were compounded by the actions of others, in particular the media and members of the community who openly discussed the investigation with each other and with reporters. The evidence supports this interpretation.
>
> 189. I record that many of the issues raised, including as to photograph identification, DNA samples, Police handling of witnesses, prejudicial media coverage, the identity of the 'mystery man', the existence of the ketch, and scenarios for disposal of the bodies, were available to Scott Watson's defence team to raise at trial and on appeal. The conduct of the trial and appeal are not matters within the Authority's jurisdiction.

Mr Watson's second application for the exercise of the Royal Prerogative of Mercy

[42] On 20 November 2017, Mr Watson made a second application to the Governor-General for the exercise of the Royal Prerogative of Mercy in respect of his

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13 Footnotes omitted.

murder convictions.[14] The Governor-General sought the advice of the Minister of Justice, who appointed a King's Counsel (who is also a retired High Court Judge) to advise on the application.[15] The result was that the Governor-General, acting under s 406(1)(a) of the Crimes Act 1961, referred to this Court the question of the convictions of Mr Watson for murder.

THE REFERENCE

[43] The Reference, a full copy of which is set out in Appendix A, is solely concerned with the evidence about the recovery and forensic examination of the two hairs found on a blanket on *Blade*. The Reference recorded the evidence that:[16]

> (a) two head hairs recovered from the blanket were examined by way of high-powered microscopic comparison, and were subjected to 5 types of DNA testing, conducted by the ESR in New Zealand and by forensic scientists in Australia and the United Kingdom; and
>
> (b) the results of those tests tended to support the proposition that 2 of the hairs found on the blanket were from the head of Olivia Hope.

[44] The Reference notes that the defence at trial cross-examined the Crown witnesses who gave evidence about these matters but did not call any forensic evidence of its own.[17]

Reason for the Reference

[45] Mr Watson maintained that two reports, dated 18 September 2017 and 19 March 2018, by forensic scientist Sean Doyle, provided new expert opinion evidence concerning the reliability of the forensic evidence at trial regarding the hairs recovered from *Blade* that were said to belong to Olivia. In particular, it was submitted that the report raised questions concerning:[18]

> (a) ESR's adherence to relevant quality standards relating to the collection, handling, and forensic examination of those hairs and other bodily material; and

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14 The Reference, above n 1, at cl 5(1).
15 At cl 5(2)–(3).
16 At cl 2(5).
17 At cl 2(6).
18 At cl 5(5).

(b) the reliability of the results obtained from the DNA testing of the hairs conducted in New Zealand, Australia, and the United Kingdom; and

(c) the fairness and accuracy of the evidence given at trial about the DNA testing and the results obtained from it.

[46] This resulted in the conclusion that evidence had become available since Mr Watson's trial and appeal that "may raise doubts about the reliability of an important aspect of the prosecution case," namely the forensic evidence concerning the two head hairs.[19] The Reference to this Court is for the purposes of:[20]

(a) considering evidence about the matters raised in Mr Doyle's reports;

(b) considering whether any of the evidence given at Mr Watson's trial should be reconsidered in light of the evidence about those matters; and

(c) determining, in light of that consideration, whether a miscarriage of justice may have occurred.

[47] In 2022, Mr Watson particularised the ground of appeal relating to the hair evidence as follows:

> 6 The appellant contends that a miscarriage of justice ensued because the Hair Evidence that was heard by the jury was inadmissible because:
>
> (a) The way in which the ESR on 7 March 1998, in the same laboratory, dealt with both reference samples of Ms Hope's hair, and evidence hair samples taken from the blanket seized from Mr Watson's yacht, meant that there might have been contamination. In other words, the Hairs might have been reference samples seized from the home of Ms Hope, and therefore not evidence hairs that had been present on the blanket. This meant that the Hair Evidence was inadmissible because it was not relevant, as it did not have a tendency to prove something of consequence to the determination of the trial. It was not relevant because the Crown could not prove a connection between the Hairs and the fact it sought to prove (that Ms Hope had been on the *Blade*). The authenticity of the Hairs could not be resolved. As such, it was not reasonably open to the jury to make the finding that the Hairs had been on Mr Watson's yacht, which was the finding required to establish relevance. This was not a jury issue.

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19 At cl 6(1).
20 At cl 6(2).

(b) In the alternative, the Hair Evidence, if relevant, was inadmissible because the risk of unfair prejudice it carried outweighed its probative value, because it provided an unsafe foundation for fact-finding.

[48] Mr Watson further contended there is fresh, credible and cogent evidence concerning the strength of the DNA results in respect of the hairs and the possibility the hairs were present on *Blade* due to transference (rather than because Olivia herself was on *Blade*). There was said to be a reasonable possibility of more favourable verdicts being reached had that evidence been before the jury. Mr Watson also suggested a miscarriage of justice occurred due to the way the Judge directed the jury on the hair evidence.

[49] The appeal before us was approached slightly differently, although still raising these same issues. We have addressed the arguments as put to us at the appeal hearing.

THE VISUAL IDENTIFICATION GROUND

[50] As set out above, the reason for the Reference related solely to the two hairs found on a blanket from *Blade*. This Court subsequently considered whether the Reference circumscribed the grounds of appeal.[21] Mr Watson sought to contend that the trial Judge erred in admitting the evidence that Mr Wallace identified Mr Watson from Montage B. The trial Judge had ruled prior to the trial that the Montage B identification evidence was admissible.[22] That ruling was not challenged at the 2000 appeal. This Court decided that a reference under the prerogative requires the Court to reconsider the conviction and, subject to a ground not being frivolous or vexatious, or an abuse of process, the reference is general in nature.[23] The proposed identification ground was therefore to be considered at the appeal.

[51] Mr Watson has particularised the ground of appeal as follows:

10 The entire basis for the Crown case was that the appellant had returned to *Blade* with the victims on the water taxi being driven by Guy Wallace early in the morning of 1 January 1998. Mr Wallace identified Mr Watson via a photographic montage. Photograph 3 in the montage depicts Mr Watson. As this Court recognised in its 2000

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21 *Watson v R* [2022] NZCA 204, [2022] 3 NZLR 1 [grounds of appeal judgment].
22 *R v Watson* HC Wellington T2693/98, 13 May 1999 [Montage B admissibility ruling] at [8]–[10].
23 Grounds of appeal judgment, above n 21, at [58].

judgment, it is beyond question that the Crown's case against Mr Watson depended substantially on the correctness of Mr Wallace's identification. Notwithstanding that Mr Wallace at trial resiled from the assertion that Mr Watson was the man who he transported along with Ms Hope and Mr Smart, he maintained that the person shown in photograph 3 was the man in the water-taxi. The Crown placed significant emphasis on this fact in its closing address to the jury.

11 A miscarriage of justice ensued because the jury heard that Mr Wallace identified Mr Watson using a montage. It was inadmissible because the procedure adopted to obtain the evidence did not produce a reliable identification by Mr Wallace.

12 There is fresh, credible and cogent evidence, which it is in the interests of justice to admit, that addresses the flaws in the procedure used by police to obtain visual identification evidence from Mr Wallace.

THE COURT'S TASK

[52] The Reference was made under s 406(1)(a) of the Crimes Act. That was repealed before the Reference was made but remains the provision applicable to this appeal.[24] It relevantly provided:

> **406 Prerogative of mercy**
>
> (1) Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he or she thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
>
> (a) refer the question of the conviction or sentence to the Court of Appeal or, where the person's right of appeal against conviction under section 229 of the Criminal Procedure Act 2011 was to the District Court or the High Court, to the High Court, and the question so referred shall then be heard and determined by the court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; …

[53] The Court's task is to consider the convictions as if this were an appeal against conviction.

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[24] Section 406 was repealed by s 54 of the Criminal Cases Review Commission Act 2019 on 1 July 2020, but the application by Mr Watson was received by the Governor-General before then, so s 406 of the Crimes Act applies: Criminal Cases Review Commission Act, sch 1 cl 3(1)–(2).

[54] The Court may reconsider grounds which have already been determined if significant new evidence has come to light.[25] The fundamental inquiry is whether, taken individually or collectively, the grounds of appeal demonstrate that there has been a miscarriage of justice that requires the convictions to be set aside.[26] If we are satisfied that there was an error at the trial that may have affected the result, we must then consider the proviso to s 385 of the Crimes Act to decide whether or not the convictions are nonetheless safe. Although s 385 has been repealed, it still applies to this proceeding.[27] It provided:

> (1) … the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
>
> …
>
> (c) that on any ground there was a miscarriage of justice; …
>
> …
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[55] The leading authorities under s 385 establish that:

(a) A miscarriage of justice is an error which may have affected the result. Errors or irregularities which plainly could not have done so are to be disregarded.[28]

(b) Errors cannot be saved by the proviso where they are so fundamental as to cause the trial to lose its character as a trial according to law.[29]

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25 *R v Ellis* [2000] 1 NZLR 513 (CA) [*Ellis* (CA)] at [13]. The Supreme Court made no comment on this approach: *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 [*Ellis* (SC substantive judgment)] at [91].

26 *Ellis* (CA), above n 25, at [18].

27 Section 385(1) was replaced from 1 July 2013 by s 232 of the Criminal Procedure Act 2011. The proceedings against Mr Watson commenced before this date, so the appeal provisions of the Crimes Act apply: Criminal Procedure Act, s 397.

28 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]–[31].

29 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 [*Lundy* (SC)] at [25]–[26].

Such a trial is unfair within the meaning of s 25(a) of the New Zealand Bill of Rights Act 1990.[30]

(c) The threshold for fundamental error is high because the proviso must be permitted to do the work for which it was designed.[31]

(d) The appellate court may take the jury's verdict into account, to the extent it is possible to say whether the error affected the verdict and provided the court recognises that it must reach its own decision.[32] In doing so the appellate court must take into account any disadvantage it faces when assessing the honesty and reliability of witnesses based solely on the transcript of their oral evidence.[33]

(e) Before it may apply the proviso, the appellate court must itself be satisfied of the defendant's guilt to the criminal standard, beyond reasonable doubt.[34]

[56] Whether any wrongly admitted evidence has made the trial unfair depends on an assessment of its significance in the context of the trial.[35] The Supreme Court in *Lundy* described an "incurable error" threshold and held that:[36]

> [42] The authorities establish that when considering the significance of inadmissible evidence in the context of the trial, an appellate court may inquire into whether the evidence went to an issue on which the verdict turned, how strong was the Crown case otherwise, how cogent or prejudicial was the evidence and whether it was met by defence evidence, what impact the inadmissible evidence had on the conduct of the defence case, how counsel handled the evidence, and whether the trial judge's directions mitigated or cured the irregularity. As explained above, it may be possible to take into account what the actual jury did with the evidence, if that is ascertainable.

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30 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78]; *R v Matenga*, above n 28, at [31]; and *Lundy* (SC), above n 29, at [27].

31 At [28], citing *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [37] per Lord Hutton, Lord Carswell and Sir Swinton Thomas and [54] per Lord Rodger and Sir Andrew Leggatt; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [36] per Elias CJ and Glazebrook J.

32 *Lundy* (SC), above n 29, at [29].

33 *R v Matenga*, above n 28, at [32]; and *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300 at [40]–[41] as cited in *R v Haig* (2006) 22 CRNZ 814 (CA) at [59] per William Young P and Chambers J.

34 *R v Matenga*, above n 28, at [31]; *Lundy* (SC), above n 29, at [30]–[35]; and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [57].

35 *Lundy v R* [2018] NZCA 410 [*Lundy* (CA)] at [376]; *Lundy* (SC), above n 29, at [38]–[39].

36 Footnotes omitted.

The admission of new evidence

[57] In some cases, the answer to the question whether there has been a miscarriage of justice may be informed by evidence that is new, in the sense that the jury did not hear it. To that end, this Court may receive new evidence as a matter of discretion, where it is necessary or expedient to do so.[37] Although this Court has refrained from setting any exclusive rule which should be applied to determine the admissibility of "fresh" evidence, the touchstone is the "interests of justice".[38]

[58] That Mr Watson's case comes before this Court as a reference does not alter the rules of admissibility.[39] But we accept, as Mr Watson points out, that this Court has held that the admissibility criteria are generally less rigorously applied in cases which come as referrals.[40] This is because, when dealing with a reference, the court recognises that it may be necessary to admit the evidence to decide the case on its true merits.[41]

[59] In considering whether it is in the interests of justice to admit the "fresh" evidence, the court must balance competing policies. On the one hand, the public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation.[42] It is not, therefore, sufficient for an appellant to point to evidence which may have been helpful to the defence case, or which the jury might have thought material, but which was absent at trial.[43] But, on the other hand, the court cannot overlook the fact that

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37 Crimes Act, s 389; and *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [14].

38 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 [*Lundy* (PC)] at [116], quoting *R v Crime Appeal (CA60/88)* (1988) 3 CRNZ 512 (CA) at 513. See also *Ang v R* [2024] NZCA 378 at [14]; *Pickering v R* [2012] NZCA 311, [2012] 3 NZLR 498 at [183]–[184]; *R v Chapman* (1991) 7 CRNZ 486 (CA) at 488; *R v Arnold* [1985] 1 NZLR 193 (CA) at 196; and *R v Baker* [1976] 1 NZLR 419 (CA) at 420.

39 *Redman v R* [2013] NZCA 672 at [23].

40 At [25], quoting *R v Haig* (2006) 22 CRNZ 814 (CA) at [53], and *Ellis* (CA), above n 25, at [18]; *The Queen v Morgan* [1963] NZLR 593 (CA) at 596; *R v Dick* [1973] 2 NZLR 669 (CA) at 670; *Collie v R* [1997] 3 NZLR 653 (CA) at 657. See also *R v Sparkes* (1956) 40 Cr App R 83 (CA) at 91–92 for a discussion of the competing policies in reference cases.

41 *Ellis* (CA), above n 25, at [19].

42 *R v Bain* [2004] 1 NZLR 638 (CA) [*Bain* (CA)] at [22].

43 *Loffley v R* [2013] NZCA 579 at [59]; *H v R* [2017] NZCA 415 at [23]; and *D (CA95/2014) v R* [2015] NZCA 171 at [22]. This was also an argument unsuccessfully raised by the appellant in *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [81]–[83] per Gault, Keith and Blanchard JJ.

sometimes, for whatever reason, significant evidence is not called when it might have been.[44]

[60] In *Lundy v R*, Lord Kerr, writing for the Privy Council, conveniently summarised the principles governing the admission of fresh evidence:[45]

> [120] … the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[61] His Lordship explained that the requirement that evidence be "fresh" can be of less critical importance in cases involving scientific evidence.[46] In a prosecution case depending "exclusively or principally" on scientific evidence, the Court is unlikely to exclude new expert evidence solely on the basis that it lacks freshness if it presents a "significant challenge" to the trial evidence.[47] Cogency is central.

[62] The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.[48] However, where the evidence is not "fresh", the cogency requirement is more exacting, and the evidence must be sufficiently cogent to obviate

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44 *Bain* (CA), above n 42, at [22].

45 *Lundy* (PC), above n 38. See also *Sinclair v R* [2024] NZCA 534 at [30]; *Kriel v R* [2024] NZCA 45 at [100]; *Swainbank v R* [2021] NZCA 93 at [35]; *Naseeb v R* [2021] NZCA 324, (2021) 30 CRNZ 166 at [26]; and *Parangi v R* [2018] NZCA 46 at [17].

46 *Lundy* (PC), above n 38, at [121].

47 At [122].

48 *Bain* (CA), above n 42, at [22]; *Dowie v R* [2024] NZCA 526 at [24], [31] and [35]; and *R v S (CA113/06)* CA113/06, 17 November 2006 at [9]. See also *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [40] and [48] where evidence that was clearly not fresh was admitted due to its credibility and cogency.

the need for freshness.[49] If the evidence was known and available at the trial, the court will be slow to accept it.[50] The evidence needs to point to a risk of miscarriage in order to merit admission.[51]

[63] However, even where trial counsel's conduct is reasonable, or the new evidence is not fresh, an appeal may nevertheless succeed.[52] In the end, we must focus on the outcome.[53] Where, in a case like Mr Watson's, the ground of appeal is that relevant evidence was not called, the effect of its absence cannot be ignored. The court will not apply the admissibility criteria with rigidity where there is reason to think that doing so might lead to injustice, or the appearance of injustice.[54] Each case has to be decided on its merits.[55]

Structure of the judgment

[64] In Part I, we address the Reference and the hair evidence. In Part II, we address the visual identification ground of appeal. In Part III, we address the overall case against Mr Watson.

PART I — THE TWO HAIRS

[65] We begin with a brief overview of relevant events.

What happened?

[66] On 10 January 1998, Detective Rolton visited the Hope family home to collect samples of Olivia's hair (reference hairs) which were placed in a plastic bag with the exhibit number ST05. ST05 was then sent to ESR.

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49 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [46] per William Young J dissenting. William Young J noted at n 11 that if the cogency requirement were not more exacting in cases involving evidence that is not fresh, then the requirement for freshness may as well be abandoned. The majority considered the evidence was fresh: at [33] per Elias CJ, Blanchard, Tipping and McGrath JJ.

50 *Kingi v R* CA122/05, 10 August 2005 at [68].

51 *Sami v R* [2019] NZCA 340, (2019) 29 CRNZ 252 at [51]; and *Morgan v R* [2019] NZCA 565 at [15].

52 *R v Sungsuwan*, above n 43, at [70] per Gault, Keith and Blanchard JJ.

53 At [7] per Elias CJ, and [69] per Gault, Keith and Blanchard JJ.

54 *Collie v R*, above n 40, at 657.

55 At 657; and *R v Sparkes*, above n 40, at 92.

[67] On 13 January, a forensic examination of *Blade* commenced. On 14 January, Detective Sergeant Landreth located a synthetic blanket with a tiger pattern on it (the tiger blanket) on a berth in the cabin of *Blade*. It was seized that day and given the police reference number of YA69.

[68] ESR's Auckland Forensic Service Centre Laboratory received the tiger blanket on 16 January and, on 19 January, forensic scientist Penelope Costello supervised the collection of trace evidence, including hairs, from the tiger blanket, placing the hairs into two self-sealing plastic bags.

[69] On 22 January, ESR forensic scientist Susan Vintiner undertook an initial examination of the hairs from the tiger blanket (questioned hairs) for the purposes of locating hairs with roots suitable for nuclear DNA (nDNA) testing. Eleven hairs were selected from the two self-sealing plastic bags and placed into individual snap-seal plastic bags labelled YA69/1–11.

[70] On 27 January, Ms Vintiner received ST05 as well as reference hair samples from Ben, Mr Watson's sister Sandy Watson, who had been on *Blade*, and Sandy Watson's two daughters. She undertook a preliminary visual examination of them but did not remove them from their sealed bag.

[71] On 7 March 1998, Ms Vintiner examined the reference hair samples from Ben, Sandy Watson and her children, and Olivia (ST05). She removed seven hairs from ST05 by making incisions through the plastic surface of the bag, removing hairs using fine tweezers and placing them into a new smaller plastic bag (sub-sample ST05 bag).

[72] Ms Vintiner then examined nine other hair samples recovered from *Blade* and the 11 questioned hairs selected on 22 January (YA69/1–11), comparing YA69/1–11 to ST05.

[73] Ms Vintiner then undertook an examination of the remaining questioned hairs from the two self-sealing bags. She located two blonde head hairs and six brown hairs with roots suitable for DNA testing and placed them into individual snap-seal bags, the blonde hairs being labelled YA69/12 and YA69/13 (Hairs 12 and 13).

[74] On 17 March 1998, Ms Vintiner conducted triplex analysis system (CTT) nDNA testing on the roots of Hairs 12 and 13. An nDNA profile was obtained for Hair 13 but not Hair 12. The nDNA profile obtained corresponded with that of Olivia. Ms Vintiner also used an analysis system called SGM (Second Generation Multiplex), but this did not return a result for either Hair 12 or 13.

[75] Rudolf Weigner of the Division of Analytical Laboratories, Sydney, undertook Polymarker analysis of Hair 13 at an additional five sites on the DNA. The DNA profile again corresponded with that of Olivia.

[76] Ms Vintiner had requested a second reference sample for Olivia (ST10) which she examined on 2 May 1998. A comparison with sub-sample ST05 supported the assumption the hairs had originated from the same person.

[77] On 2 June 1998, Dr Silvana Tridico, Forensic Science South Australia, and Ms Vintiner examined reference samples from Ben, Sandy and her children, ST05 and ST10, in addition to Hairs 12 and 13. They concluded Hairs 12 and 13 could have come from the same person but not from Ben or Sandy Watson. Sandy's children's head hair was paler and not excluded at this step. Olivia also could not be excluded. The following day, the scientists examined Hairs 12 and 13, and reference hairs from Olivia and Sandy Watson's children, concluding Hairs 12 and 13 could be from the same person and could be from Olivia but could not be from Sandy Watson's children.

[78] It was then decided to subject the hairs to another testing method, mitochondrial DNA (mtDNA) testing. Hairs 12 and 13, together with three other hairs, were sent to the United Kingdom Forensics Science Service (FSS) for mtDNA testing.

[79] Dr Gillian Tully conducted a screening process in the London office. In relation to Hair 12, the DNA extracted from the first hair extract tested matched the DNA profile of Olivia and her maternal relatives. For Hair 13, a mixed profile was obtained. Both Hairs were sent to Birmingham for further testing.

[80] Mr John Bark, an FSS forensic scientist based in Birmingham, then undertook the detailed mtDNA testing. He found that the mtDNA sequence from Hair 12

matched that of Olivia's mother and was different from that of Sandy Watson. That meant there was "a correspondence" between Hair 12 and the mtDNA of Olivia. The results for Hair 13 were "partial" or mixed and Mr Bark determined that DNA from at least two individuals was present. He concluded that Olivia could not be excluded as a contributor to the mtDNA of Hair 13.

[81] The results of the testing on Hairs 12 and 13 can be summarised as follows:

Analyst	Test	Locations		Sample	
				YA69/12	YA69/13
Vintiner (ESR)	CTT	3		No result	+ve
	SGM	5		–	No result
Weigner (Sydney)	Polymarker (extract only no blank)	5		–	+ve
Tully (FSS London)	mtDNA #1	13	Extract 1	+ve	Mixed
			Extract 2	No result	No result
Bark (FSS Birmingham)	mtDNA #2	780	Extract 1	+ve	Partial/Mixed
			Extract 2	+ve	Partial/Mixed

[82] On 11 June 1998, all of the hairs on the tiger blanket were counted. There were approximately 390 hairs: 132 body or pubic hairs, 220 brown head hairs, 16 animal hairs, 17 red-brown to orange head hairs and five blonde to light yellow-blonde head hairs (including Hairs 12 and 13). The remaining blonde hairs were within the colour range of Sandy Watson's children.

[83] On 28 July 1999, ESR received a request from Mr Watson's trial lawyers to make certain samples available for the defence to view. This involved retrieving the samples from secure storage, removing them from their brown paper storage envelopes, and repackaging them into new envelopes which were then labelled and sealed.

Approach

[84] We begin by addressing the various criticisms raised in the Doyle reports and the evidence called at the appeal before returning to the questions raised in the Reference. Given the nature of the criticisms, this section is necessarily detailed and technical.

Evidence at the appeal

[85] The following witnesses provided affidavit evidence in relation to the challenge to the Hair evidence and, with the exception of Caroline Crawford and Sarah Thirkell,[56] attended the hearing and were cross-examined. All those who gave expert evidence were eminently qualified to do so.

[86] For Mr Watson:

(a) Sean Doyle, Consultant Forensic Scientist;

(b) Peter Gunn, Honorary Associate Professor (retired) Forensic Biology, University of Technology Sydney;

(c) Caroline Crawford, Consultant Forensic Scientist;

(d) Paige McElhinney, Consultant Forensic Scientist; and

(e) Sarah Thirkell, Consultant Forensic Scientist.

[87] For the Crown:

(a) Anna Petricevich, Forensic Quality Manager employed at ESR;

(b) James Robertson, Professor Emeritus at the University of Canberra in the Faculty of Science and Technology;

(c) Susan Vintiner, Forensic Scientist employed at ESR;

(d) Mitchell Holland, Research Professor of Biochemistry and Molecular Biology, Forensic Science Programme, Pennsylvania State University; and

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[56] The Crown maintained the evidence of Ms Crawford and Ms Thirkell was inadmissible, a matter we address below at [427]–[436].

(e) Detective Richard Rolton, New Zealand Police.

Trial counsel evidence

[88] Nicolette Levy KC was junior defence counsel at the 1999 trial, assisting senior counsel Bruce Davidson (now a District Court Judge) and Michael Antunovic.[57] To avoid confusion between Judge Davidson and the Hon Paul Davison KC (now a retired High Court Judge), who appeared for the Crown at trial, we refer to Judge Davidson as "trial counsel" and Mr Davison as "the Crown prosecutor".

[89] At Mr Watson's request, Ms Levy provided an affidavit for the purposes of this appeal. Ms Levy said that she and trial counsel were responsible for instructing the experts who assisted with Mr Watson's case. Ms Levy said that she prepared her affidavit "in consultation with … [trial counsel], and he concurs with its contents". She has not spoken to Mr Antunovic because he has retired and was unavailable to assist.

[90] Ms Levy did not have access to the full trial file, as the notes trial counsel took of his dealings with Mr Watson were missing, as were the reports prepared by the experts instructed by Mr Watson (other than some of those of a Dr Guerson). This meant the content of her affidavit was based almost exclusively on her memory of the trial, corroborated by the partial records that do exist.

The experts instructed on Mr Watson's behalf for the trial

[91] Four experts assisted Mr Watson in preparation for, and at, the trial: Tony Gummer, Brian Scrimshaw, Dr Guerson and Jane Taupin. To familiarise themselves with the layout of ESR's Auckland laboratory, trial counsel, Ms Levy and (perhaps) Dr Guerson, conducted a scene visit in advance of the trial. Mr Scrimshaw also travelled to the United Kingdom to observe the testing of the two Hairs by one of the Crown experts.

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[57] Ms Levy was also the person who discovered the cut in ST05, just prior to Ms Vintiner's evidence in chief. She said she clearly remembered lifting the bag out of the box, and discovering the cut in ST05 because it was so unexpected, and its potential relevance was obvious.

[92] Ms Levy recounted that, in an email dated 16 August 2021, from Mr Watson's trial lawyers to his appeal lawyers, they (the trial lawyers) wrote that:

> … the instructions provided to the DNA experts ([Mr] Scrimshaw and [Dr] Guerson) were to review the ESR reports and associated material in order to assist in cross examination; the topics generally are similar to those which have emerged in the Doyle reports and the Reference including evidence collection, and contamination; critique of the analysis methods and results; and strength of those results against then known databases.

[93] Ms Levy went on to say that Dr Guerson and Mr Scrimshaw attended the trial, listened to the Crown's experts, and assisted trial counsel in preparing to cross-examine those experts, including on the topic of ESR lab contamination. But each of the experts advised that they could not advance the defence case beyond what had been achieved in cross-examination. That, according to Ms Levy, was why no expert witnesses were called on Mr Watson's behalf.

[94] However, Ms Levy said she did not recall receiving advice from Dr Guerson, or anyone else, about whether there were lab quality standards ESR applied (or should have applied) when the reference and questioned hairs were handled by Ms Vintiner on 7 March 1998. She did not recall any discussion of SWGMAT (Scientific Working Group on Materials Analysis) guidelines (referred to in the evidence on appeal), or its requirements for either or both of spatial and temporal separation in the examination of the questioned and reference hairs.

ESR's quality management system

[95] As discussed, the Reference was occasioned as a result of two reports from forensic scientist, Sean Doyle. Evidence addressing the issues raised by Mr Doyle was then obtained by Mr Watson and the Crown. Mr Doyle produced a third report, which summarised his former conclusions and altered them as he considered appropriate in light of the further evidence. By the time of the third report, Mr Doyle had access to some of the ESR case files and had received copies of several documents relevant to ESR's quality management system, both in 1998 and at the time of his report in 2022.

[96] This section of the judgment concerns Mr Doyle's criticism, primarily in his first report, of ESR's overall quality management system. Mr Doyle concluded:

> 110. In my opinion, the weaknesses identified in the quality management system employed by ESR in the late 1990s are sufficient to call into question the quality and therefore the reliability of the hair comparison and DNA results reported. The degree of unreliability would be determined by an assessment of the quality management system employed by ESR at the time and an assessment of the methods and procedures employed; against the requirements specified by more recent quality standards.

[97] Mr Doyle's criticisms related to ESR's competence as an organisation, the competence of the individual forensic scientists involved in the case (particularly Ms Vintiner, the principal ESR witness) and the validity of the forensic techniques used. Mr Doyle explained that quality management has developed considerably over the past decade or so. He said his task was to look at the records made at the time and assess whether what was recorded conformed to good practice at the time. However, he acknowledged that, even with substandard processes, it is possible for a scientist to carry out a flawless examination.

[98] Mr Doyle levelled more specific criticisms in respect of the various aspects of testing undertaken by Ms Vintiner, which we address in more detail below.

Accreditation

[99] In 1998, ESR held American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) accreditation in trace evidence. Ms Petricevich explained that the ASCLD/LAB programme was a widely used forensic accreditation programme at that time.

[100] Mr Doyle conceded that ESR held that accreditation but took issue with it, saying it "lacked the essential [third-party] and independent attestation of technical competence". He explained that, by contrast, accreditation against ISO/IEC 17025 (the relevant international standard for a "testing laboratory" which applies today) is an independent and third-party assurance.

[101] However, as Mr Gunn pointed out, ISO/IEC 17025 was not published until 1999, so failure to meet the standard in 1998 was unsurprising. In 1998, ISO/IEC 17025 had been published as a draft international standard only.

General compliance with quality standards

[102] Ms Petricevich's evidence was that ESR's hair examination protocol in 1998 met the then-current international standards. In summary:

(a) The protocol of examining a questioned hair in the same location but at a different time from the reference hair was compliant with the SWGMAT Evidence Committee's Trace Evidence Recovery Guidelines, which were prepared in early 1998 but published in 1999.

(b) ESR's procedures for general sealing of items of evidence in 1998 aligned with the then-current 1997 ASCLD/LAB Evidence Control requirements. This was supported by ESR's ASCLD/LAB accreditation in 1998. Further, there have not been significant changes to ESR's sealing procedures since 1998, yet ESR now holds accreditation to the modern standard of ISO/IEC 17025.

(c) ESR's general guidelines on the storage of samples, record keeping and procedures to avoid sample confusion and contamination were contained in the ESR Forensic Business Unit Quality Manual 1996, which was in use in 1998. There have not been substantive changes to ESR's guidelines on the storage of samples and record keeping since 1998. Given ESR currently holds accreditation in forensic testing to ISO/IEC 17025, ESR's current guidelines meet international best practice.

[103] Professor Robertson confirmed that ESR met the relevant standards in 1998. ESR had a quality system in place and held ASCLD/LAB accreditation. As ESR was accredited, it had been assessed as compliant with its quality management system at the time of its accreditation inspection.

[104] Ms Crawford was asked on behalf of Mr Watson to comment on ESR's procedures in place in 1998 for examinations of hair and DNA, whether those procedures met international guidance at the time and how far they differ from guidelines for best practice now. Ms Crawford was not required by the Crown for cross-examination. The Crown contended her affidavit evidence was inadmissible as it was neither fresh nor cogent,[58] an argument we address below.[59]

[105] Ms Crawford described her review as a reasonably high-level. Although in some areas she was unable to find evidence of adherence to the relevant standard or guideline, she said this did not necessarily mean that the laboratory was non-conforming in that area. She was also unaware of what procedures might have been in place but which had not been disclosed. In Ms Crawford's opinion, there were several aspects of the 1998 work which did not appear to meet fully today's and/or the 1998 standards, although she accepted that further information might provide evidence to the contrary.[60]

[106] Ms Crawford said that the implications of any apparent non-conformance had to be considered in the specific circumstances of the case. Non-conformances occur in all forensic laboratories which is why continuous improvement systems are so important.

Labelling

[107] Mr Doyle described what he considered to be major shortcomings with ESR's exhibit labels, including the same identifiers being used for different items, different descriptions being used for the same item and the use of more than one label for the same item. He criticised the lack of a clear and unambiguous record of item movement and the person who had control of items.

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58 *Watson v R* [2023] NZCA 552 at [2].

59 See below at [427]–[436].

60 Those aspects are: assessment of competency and proficiency of personnel; packaging and sealing of items; unique identification of samples; detailed note taking; anti-contamination procedures including separation of items from different locations; due diligence in relation to externally provided services; independent checking of critical findings; setting of case strategies; adherence to a code of conduct; information included within the reports; and assessment of the evidence within a Bayesian framework.

[108] Mr Doyle noted that ISO/IEC 17025, both in 1999 and now, requires items to be unambiguously identified, which he takes to mean having a "unique" identifier so that no two items have the same identifier. The 1997 ASCLD/LAB Evidence Control guidelines, which were current in 1998, also required a unique identifier. However, he acknowledged that the 1997 guidelines "unhelpfully [add] that this might be the case numbers which, as I understand it, would mean … every item of evidence in a particular case having the same identifier".

[109] In her evidence at the trial, Ms Vintiner explained the various ESR protocols for keeping samples separate. She was asked about the labelling of blood samples YA69/1–4 and the labelling of hair YA69/1–13. Because she was unaware of the numbering system used for the blood by another scientist, Ms Vintiner had attributed the same numbers to the hairs. She rejected the proposition this could have caused any confusion.

[110] Professor Robertson agreed with Mr Doyle that unique identifiers reduce the risk of substitution or mix-up. He said, however, that there did not appear to have been any actual confusion between the blood and hair samples that could have affected the results obtained.

[111] Mr Doyle noted Ms Vintiner's evidence that in 1998, ESR's practice was for sub-samples to retain the identifier of the parent sample. So, the tiger blanket was given the identifier YA69 and the hairs recovered from it sub-numbers, eg YA69/12 and 13 (Hairs 12 and 13). Mr Doyle accepted this was consistent with ESR's standard operating procedure (SOP), both in 1996 and in 2022, as described by Ms Vintiner. Nevertheless, he considered it increased the risk of a sample mix-up.

[112] Relatedly, and in response to Mr Doyle's criticism, Ms Vintiner acknowledged, as she did at the trial, that she mislabelled the ST05 sub-sample bag as ST08. However, she said the error had no impact on her examination because the sub-sample bag was also labelled "O Hope Bedroom" and no item ST08 was ever received at ESR.

[113] Mr Gunn considered ESR's labelling of items did not meet the standards acceptable at the time but whether any such deficiencies affected the ultimate interpretation of the results of Hairs 12 and 13 "cannot be determined".

Storage and sealing

[114] Professor Robertson was satisfied that the items received by ESR were appropriately packaged and sealed, meeting the standard expected in 1998 and complying with the requirements documented in ESR's Quality Manual 1996.

[115] Ms Vintiner addressed Mr Doyle's claim that the original ST05 bag was not properly sealed because she had made incisions in it. She explained that she put the bag in a sealed paper outer container in accordance with ESR's Quality Manual 1996. She said this aligned with the 1997 ASCLD/LAB Evidence Control requirements for sealing and storage of an item and with the SWGMAT Trace Evidence Recovery Guidelines.

[116] Professor Robertson considered that not sealing the bag itself after making a cut in it to remove hairs may not have aligned with the SWGMAT Trace Evidence Recovery Guidelines but:

> 72. Ms Vintiner believes that placing the plastic bag back into an envelope provided protection against the cross transfer of hairs between items. In my view the approach used by Ms Vintiner met the relevant ESR quality requirements for 1998. Overall, although I would not have made cuts in an evidence bag to recover hairs, this is not outside the legitimate personal choice for an examiner. In my view, due to the size of the cuts to ST-05, it is highly unlikely that hairs would have fallen out of the bag and have been a potential source for cross transfer between items.

Record-keeping and Ms Vintiner's use of personal judgement in extracting hairs from ST05

[117] Mr Doyle's real criticism of Ms Vintiner appeared to be that her evidence at trial and before us was not necessarily borne out by her records. Mr Doyle said that, in his 24 years as a quality auditor and 12 years of defence review, he had "never encountered such poor record keeping".

[118] Mr Doyle observed that there was no record of the procedure described by Ms Vintiner to remove hairs from ST05 and the procedure was not documented in ESR's SOP which did not refer to the use of personal preference. He regarded Ms Vintiner's selection of a procedure according to her personal preference as suggesting "a system not fully under control". He would expect any accrediting body to insist that, where there were options, they would be written into the SOP but they were not. Mr Doyle therefore considered that what Ms Vintiner did lacked the support of accreditation.

[119] As to what he would have expected at the time, Mr Doyle acknowledged that the world was a very different place in 1998. However, because Ms Vintiner was exercising personal judgement and ESR had a hair examination SOP which made no mention of the sub-sampling technique she used, it was surprising to him that, even in 1998, there was not a detailed record of what she did.

[120] Before us, Ms Vintiner accepted there were no written records of the procedure she followed that day, saying it was not typically done. She said she could say what she would have done that day because it was a method she used fairly frequently, if not all the time, in her hair examinations. Ms Vintiner said her approach was a matter of deliberate professional judgement in accordance with accepted standards. She referred to the 1985 Preliminary Report of the Committee on Forensic Hair Comparison:

> The procedure used by the hair examiner should incorporate the general considerations discussed in this report, proper evidence handling and the correct utilisation of proper equipment. As long as these considerations are kept in mind, the committee believes that a considerable amount of leeway should be allowed in choice of procedure to satisfy individual preferences.

[121] Professor Robertson described Ms Vintiner's notes as "not the best notes I have ever seen" but, in respect of Mr Doyle's evidence that Ms Vintiner's failure to document the hair removal procedure suggested a system not fully under control, commented:

> I've assessed that process against the hair guidelines that were in existence at that time or being finalised at that time and according to those guidelines which ESR say they relied upon in terms of their SOPs, then she was complying and the option was available to her to take that approach.

Ms Vintiner's part-time role

[122] Mr Doyle criticised the fact Ms Vintiner performed a number of different roles in 1998, including DNA analyst, hair examiner, body fluids examiner and crime scene examiner. He considered that called into question the sufficiency of her competence as a hair examiner, although accepted that somebody performing a role part-time could do it very well.

[123] On the basis of the evidence at trial, Mr Doyle had thought that Ms Vintiner needed Dr Tridico's assistance in carrying out the hair comparisons. Before us, he accepted he was now better informed and understood Dr Tridico's role was as a peer reviewer.

[124] Paige McElhinney had no concerns as to Ms Vintiner's expertise in performing the hair comparisons and considered the fact Ms Vintiner undertook other duties was unlikely to have affected her ability to undertake that role. Professor Robertson considered Mr Doyle's criticism to be speculation without any basis in fact.

Sharman report

[125] Mr Doyle linked his criticisms of Ms Vintiner with the "Sharman report", suggesting that ESR's lack of SOPs and the evidence personal preference was used to select methods "may indicate a lax culture in conforming to the normal standards of practice in forensic science in the late 1990s".

[126] The Sharman report was prepared by Lionel Sharman and dated 7 February 1999. It concerned DNA anomalies which affected two cases unrelated to that of Mr Watson, as referred to at the 2000 appeal. Following a ministerial inquiry, the final report was published on 30 November 1999.

[127] The anomalies were the presence of a DNA profile at two scenes matching that of a person "N". It was proved that N was not at either crime scene. The final report concluded on the balance of probabilities that there had been accidental contamination of the DNA extracted from the scene samples at the ESR laboratory in Auckland.

Trial evidence

[128] The Sharman report, but not the final report, was available at the time of Mr Watson's trial and Ms Vintiner was cross-examined on the anomalies. The jury was made aware of the ongoing nature of the investigation and inquiry.

The 2000 appeal

[129] The 2000 appeal included a claim the final report was fresh evidence which would have been of assistance to Mr Watson.[61] This Court considered the final report added little of significance to what was known at the time of trial. There was nothing to suggest that contamination such as occurred in relation to N might have occurred in Mr Watson's case. There was no new evidence which would tend to throw doubt on the accuracy or reliability of the DNA testing results as they were placed before the jury.[62]

Appeal evidence

[130] Mr Doyle contended that the fact the root cause of the incident was not identified demonstrated a weakness in ESR's quality management system at the time.

[131] In her affidavit, Ms Vintiner confirmed that a review was undertaken to rule out a similar contamination issue having affected Mr Watson's case. Ms Vintiner collated the CTT profiling results from all of the case samples and reference DNA samples processed at ESR between 1 January 1998, prior to the contamination incident involving N, and 7 March 1998, the date of the DNA extraction for Hairs 12 and 13. None of those case samples or reference samples shared the same CTT profile as Olivia.

Our assessment

[132] We are satisfied ESR held appropriate accreditation. ESR's accreditation allays any concern about ESR's general practices and procedures and responds to the suggestion those created the prospect of unreliable results.

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61 2000 appeal, above n 2, at [54].
62 At [54].

[133] We are also satisfied that ESR generally adhered to quality standards required at the time. Any possible non-adherence has not been shown to undermine the reliability of the hair evidence in any real way.

[134] The labelling deficiencies were exposed to the jury at trial but there is nothing to suggest they had any real impact on the reliability of the hair evidence. The issue of the storage and sealing of the hairs is addressed in the section on contamination.

[135] While better quality and more detailed record keeping would have been preferable, we note ESR's case file was some 987 pages. The evidence does not suggest the records were below the (highly variable) standards of the time. The option Ms Vintiner selected to remove hairs from ST05 was one available to her.

[136] Ms Vintiner's part-time role as a hair examiner was not a problem. She was qualified for the different roles she undertook.

[137] The Sharman report was known about at trial. There is no real change in the available information between trial, first appeal and now this appeal except that Ms Vintiner's audit confirmed the samples in this case did not become mixed with those in any other case.

Hair Comparison

Mr Doyle's concerns

[138] Mr Doyle was concerned that Ms Vintiner's evidence at trial may have led the jury to attach greater weight to the hair comparison evidence than was warranted. In his opinion, the hair examination and comparison added little weight to evidence in support of the source of Hairs 12 and 13 being Olivia. He quoted ESR's 1996 SOP:

> Although hairs are one of the most commonly found types of trace evidence currently available techniques for hair identification seldom produce strong evidence. It is usually impossible to say with any certainty that a hair would or could have come from any particular individual.
>
> The main difficulty with hair identification is that the visible and microscopic features of the hair from any one individual may vary enormously. The range of features in a person's hair usually has considerable overlap with the range in other people. A secondary problem is the difficulty getting adequate

> reference samples. Many of the samples supplied are clearly inadequate and the analyst usually cannot guarantee that even the full samples are actually representative of [the] complete range of the individual's hair.

[139] Mr Doyle explained that the latest 2022 SOP echoes those caveats and makes it clear that the purpose of hair comparison is to exclude an individual as the source of a hair.

[140] Mr Doyle criticised Ms Vintiner for characterising the reference hairs before the questioned hairs because in his opinion doing so in that order entailed the risk of cognitive bias. He accepted that the risk cognitive bias might result in unreliable evidence did not begin to be recognised in forensic science until the early 2000s. He said, if Ms Vintiner had followed good practice and characterised the questioned hairs first (perhaps by just looking for blonde coloured hair) and Hairs 12 and 13 were in fact present among the questioned hairs, then the source of those two hairs would be known with greater certainty.

[141] Mr Doyle's opinion was that, given the likelihood of false inclusions and false exclusions, "the hair examination and comparison evidence is so weak that it lacks probative value and should be excluded". At its strongest, that evidence meant it can be said that Olivia could be included as a possible source of the Hairs 12 and 13 but those Hairs could also have originated from others whose known hair sample encompassed the range of macroscopic and microscopic characteristics observed in the questioned hair.

Trial evidence

7 March 1998

[142] On 7 March 1998, Ms Vintiner examined various reference hair samples, including Olivia's from ST05, as well as reference samples from Ben, Sandy Watson and her two children. This was conducted using a low-power microscope. The purpose was to determine in more detail the general appearance and colour of the hair in the samples. She concluded Olivia's hair was generally blonde to light brown (with a light red or golden hue in some) and Ben's was light brown to dark brown.

Sandy Watson's head hairs were generally red brown in colour and her children's blonde, tending to colourless.

[143] After she had examined all the reference hair samples and decontaminated the work area, Ms Vintiner examined the hair samples recovered from *Blade* to look for any hairs which may have been within the range of characteristics observed in the reference samples for Olivia and Ben. This involved the 11 hairs previously selected from YA69 on 22 January and another examination of the remaining hairs from the two YA69 bags. It was on the second screen of the hairs from the two YA69 bags that Hairs 12 and 13 were located.

Re-examination of hairs from tiger blanket on 2 May 1998 following receipt of the second reference sample for Olivia (ST10)

[144] On 16 April 1998, ESR received ST10, containing hair samples recovered by police from Olivia's clothing. This was to provide Ms Vintiner with a larger sample so she could better assess the range of characteristics of Olivia's head hair.

[145] Ms Vintiner examined ST10 on 2 May 1998. She removed seven blonde hairs best representing the range of characteristics in the sample and placed them into a new small snap-seal plastic bag also labelled ST10 (sub-sample ST10 bag). Those hairs were then compared with the seven head hairs in the sub-sample of ST05, first by the unaided eye and then using a low-power microscope. Having regard to length, coarseness, waviness, colour and hue, Ms Vintiner was satisfied that the hairs in both samples supported the assumption that the sub-samples of ST05 and ST10 originated from the same person (Olivia). Ms Vintiner's subsequent examinations were premised on that assumption.

[146] She then undertook a re-examination of the hairs from the tiger blanket to ensure she had not inadvertently excluded a hair that could have originated from Olivia. No further blonde hairs within the range of the reference hair samples were found.

Comparison of ST05 and ST10 hairs with Hairs 12 and 13 on 2–3 June 1998

[147] On 2 June 1998, Dr Tridico from the Forensic Science South Australia laboratory and Ms Vintiner each undertook unaided eye and low-power microscopy examinations of the ST05 and ST10 sub-samples, reference hair samples from Ben, Sandy Watson and her children, and Hairs 12 and 13. Dr Tridico did so first while Ms Vintiner was not present. They then reversed roles.

[148] They concluded:

(a) Hairs 12 and 13 could have originated from the same person.

(b) Ben and Sandy Watson could not be the source of Hairs 12 and 13 as their hair was too dark.

(c) Neither Sandy Watson's children nor Olivia could be excluded as the source of Hairs 12 and 13.

[149] On 3 June 1998, Dr Tridico and Ms Vintiner then conducted an examination using high-power microscopy. They examined hairs from the ST05 and ST10 sub-samples, selected reference hairs from Sandy Watson's children, and Hairs 12 and 13. Again, Dr Tridico did so first, in Ms Vintiner's absence, before the two reversed roles.

[150] This time, they concluded:

(a) Hairs 12 and 13 could have originated from the same person.

(b) Hairs 12 and 13 could not have originated from Sandy Watson's children.

(c) Olivia could not be excluded as the source of Hairs 12 and 13.

[151] Each questioned hair which could not be excluded (that is, every hair with displayed characteristics within the range of the reference hairs) was independently

reviewed by Dr Tridico as a second examiner. This included Hairs 12 and 13. This was in accordance with ESR practice at the time.

Appeal evidence

Examination of reference hairs before questioned hairs

[152] Ms Vintiner's evidence was that examining questioned hairs before reference hairs was a recommendation and not mandatory. Many hair examination publications accept it is reasonable to study reference hairs first in order to undertake a targeted approach with the screening of questioned hairs.[63] She considered a targeted searching approach was preferable, given the large number of hairs recovered from the tiger blanket.

[153] Both Ms McElhinney and Professor Robertson considered that ideally questioned hairs should be examined first before looking at known hair samples if there are a very small number of questioned hairs. Ms McElhinney agreed that, given there were almost 400 hairs recovered from the tiger blanket, it was acceptable to look at the reference hairs first.

[154] Professor Robertson noted that a decision was made to focus on the possible presence of head hairs that may have come from Olivia based on the differences in appearance between the reference hairs presumed to be from Olivia and the questioned hairs. He noted the additional complication that it was not possible to take known hair samples from Olivia and Ben as they have not been located.

[155] The hair comparisons carried out on 2 and 3 June 1998 were undertaken after some of the DNA analysis. Ms McElhinney said it is now known that this sort of information can affect an individual's interpretation because of bias, unintentional or otherwise. Professor Robertson explained that forensic science is now more aware of the potential for cognitive bias than it was in 1998.

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63 Including recent guidance from the Forensic Science Regulator of the United Kingdom: Forensic Science Regulator *Cognitive Bias Effects Relevant to Forensic Science Examinations* (FSR-G-217, Issue 2, 22 September 2020) at [10.1.2(b)].

Examination of the reference and questioned hairs side-by-side

[156] Ms McElhinney was satisfied the processes used by Ms Vintiner in 1998 appeared to comply with the SWGMAT Guidelines for Forensic Human Hair Identification and Comparison. That is so even though those guidelines, discussed at length by Mr Doyle, were not released until 1999.

Small sample of Olivia's reference hairs examined using high-power microscopy

[157] Ms Vintiner mounted only three to five of the reference hairs assumed to be from Olivia for the high-power microscopy work, which in Professor Robertson's opinion was a low number. That meant some of Olivia's hair variation may not have been identified by Ms Vintiner and therefore she may have wrongly excluded hairs on the tiger blanket that also came from Olivia. However, Professor Robertson accepted that Ms Vintiner probably did recover all of the very light-coloured hairs in the sample recovered from the tiger blanket.

Inconsistency in measurements of the length of Hair 12

[158] On 7 March 1998, Ms Vintiner measured Hair 12 as approximately 15 centimetres long while the hair remained in its snap-seal bag. During the mounting of the hair in preparation for microscopy, Dr Tridico measured it as 18 centimetres. Ms Vintiner and Ms McElhinney agreed that any inconsistency in the measurement of Hair 12 may be explained by the difficulty in measuring a hair whilst inside a plastic bag.

Expertise and the need for a blind peer review

[159] Ms McElhinney had no concerns with Ms Vintiner's expertise in hair comparisons. As to Dr Tridico's involvement, Ms McElhinney agreed that it was not only common for people to peer review each other's work but best practice.

Purpose of hair comparisons

[160] Ms McElhinney noted Ms Vintiner's statement that, based on microscopic analysis and comparison, Hairs 12 and 13 could have originated from Olivia, and that

it was very unlikely they originated from Sandy Watson, Sandy Watson's children, or Hannah Fox.[64] Ms McElhinney accepted that the description of Hairs 12 and 13 is different from the description of the reference hairs from Amelia Hope.

[161] Ms McElhinney's opinion was that, if a questioned hair and a reference hair have sufficient features in common and no dissimilar features, the report should say, "[t]he hair could have originated from Person X, *or any other individual with hair of the same general appearance*".[65]

[162] Ms McElhinney agreed with Ms Vintiner's statement that:

> It is possible to conclude from a microscopic examination of a questioned hair and reference hair samples that a hair is more likely to have originated from one individual than another. On the basis of a hair examination alone, though, it is not possible to completely exclude the possibility that the hair in question originated from another person who displays the same type of hair characteristics.

[163] Ms Vintiner confirmed that microscopic comparisons were used not as a means of identification but rather as a screening tool to select hairs for DNA testing. She said hair comparison is a useful tool for excluding particular people and that hair examinations and DNA testing can be regarded as complementing each other. She said all available testing methods were employed to determine whether or not Olivia could be excluded from being the source of Hairs 12 and/or 13 — microscopic examinations, nDNA testing of the hair roots and mtDNA analysis of the hair shafts.

[164] Professor Robertson was satisfied Ms Vintiner was not drawing any conclusion that hairs with similar colouring were Olivia's but was instead carrying out a triaging process to identify hairs from the tiger blanket that might be suitable for further examination. And at no time did Ms Vintiner claim that microscopic examination allowed her to draw a conclusion about the uniqueness or individualisation of the questioned hairs which were later the subject of DNA testing.

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64 An outline of Hannah Fox's interactions with a man at the Furneaux Lodge's Main Bar is included below at [823](c)(x).

65 Emphasis in original.

[165] Professor Robertson "totally disagree[d]" with Mr Doyle that the hair comparison evidence should be given little or no weight. However, he agreed that it was accepted in 1998, and even more so today, that you cannot say a particular hair came from a particular individual based on hair comparison alone.

Our assessment

[166] We are satisfied Ms Vintiner had sufficient expertise to carry out the hair comparisons and that the peer reviews were appropriate and indeed best practice.

[167] There is no issue with the fact reference hairs were examined before questioned hairs, in the context of the large number of questioned hairs. Nor is there an issue with conducting a side-by-side comparison.

[168] The fact there was a small reference sample size and there might have been more hairs on the tiger blanket within the range of Olivia's hair suitable for testing does not assist the appellant's case. The focus must be on the hairs that were found and were tested.

[169] Despite the fact the risk of cognitive bias did not begin to be recognised until the early 2000s, we acknowledge its risk in the present case given that Ms Vintiner was aware of some of the DNA testing results at the time the hair comparisons were conducted.

[170] However, the DNA testing results also mean we find the discussion on the hair comparison evidence somewhat irrelevant. The hair comparisons could not have had an impact on the nDNA and mtDNA testing of Hairs 12 and 13. The criticisms of the way in which the hair comparisons were carried out do not identify an error which could have resulted in a miscarriage of justice.

[171] The real concern is ensuring undue weight was not placed on this evidence, given the limited purpose of hair comparison evidence. We have no concerns with Ms Vintiner's evidence on this topic. She did not overstate the conclusion from the hair comparisons. In closing, the Crown prosecutor suggested that the hair comparison was one of five scientific processes each leading to the conclusion Hairs 12 and 13

were Olivia's. That did somewhat overstate the evidence and it would have been better to have said the hair comparisons were a "step" in the process. He had earlier outlined Ms Vintiner's conclusion from the hair comparisons that Olivia could have been the source of Hairs 12 and 13 and she could not exclude the possibility of another individual with the same hair colour. He went on to discuss the DNA testing, "the first test that was done". So, while the Crown prosecutor's comment was undesirable, it was not a significant issue.

nDNA evidence

[172] Nuclear DNA (nDNA) analysis targets variation in the genome of different individuals. In this case, Ms Vintiner analysed samples using the triplex analysis system (CTT), which involves analysing the short tandem repeats (STRs) present at three locations on the DNA as well as testing the sex of the donor. A CTT profile was obtained from Hair 13 which corresponded to Olivia's profile taken from her Guthrie Card (blood from a heel prick taken at birth). This was compared with the results of testing of Olivia's parents which confirmed that the heel prick had been taken from Olivia. No DNA was extracted from the root of Hair 12.

[173] Ms Vintiner carried out further DNA tests (CTT and SGM) but was unable to obtain any results. She sent the DNA extract from the root of Hair 13, Olivia's Guthrie Card sample and a reference blood stain from Sandy Watson to Australia for Polymarker testing, a procedure which was not available in New Zealand at the time. On 6 May, Ms Vintiner received the result of the Australian Polymarker test of Hair 13 carried out by a Mr Weigner. The DNA profile corresponded with that of Olivia in the five locations tested.

[174] The statistics used by ESR in the interpretation of the DNA results (then and now) are described as likelihood ratios (LRs). These are calculated to assess the likelihood of the DNA result if the DNA originated from the individual in question rather than if the DNA originated from another individual selected at random from the New Zealand population. Sometimes, a different comparator is used — for example, an individual selected at random from the New Zealand European population.

Criticisms of the nDNA evidence

[175] Mr Doyle did not contest the nDNA results but was concerned about their interpretation. He accepted that, absent contamination or transference, the trial evidence was accurate that the nDNA testing of Hair 13 provided very strong support for Olivia being the source of Hair 13.

[176] Mr Doyle raised two issues regarding the nDNA results. First, that Mr Weigner's failure to test the reagent blank prepared by Ms Vintiner (explained at [178] below) was a deficiency in the testing procedure and therefore weakened the overall strength of the nDNA evidence. Secondly, while he accepted that the LRs Ms Vintiner gave in evidence reflected the results available, he noted that the number of loci tested in 1998 was low (CTT three, SGM five and Polymarker five) compared to the number tested today, 15 or more. He said that, if one of the non-tested loci differed, then a "no match" would result and that possibility should be taken into account by the fact-finder when weighing the evidence.

[177] Dr Gunn agreed with Ms Vintiner as to the CTT typing of Hair 13 and that it matched the DNA profile of Olivia from her reference blood sample. He also agreed that the CTT result was the strongest evidence linking Hair 13 to Olivia. In his affidavit, Dr Gunn said:

> 9.3. The CTT result from sample YA 69/13 is indistinguishable from that of the DNA sequence of Olivia HOPE's reference sample. Ms. Vintiner's estimate that this profile is approximately 440 times more likely if the hair is Olivia HOPE's than if it is from a randomly chosen New Zealand Caucasian, is conservative.
>
> 9.4. The Polymarker result from sample YA69/13 indicates that this result is approximately 55 times more likely if coming from Olivia HOPE than if coming from a randomly chosen New Zealand Caucasian. However the absence of a proper negative control sample being processed in parallel to the questioned sample compromises the value of this result.

Reagent blank

Trial evidence

[178] Ms Vintiner was cross-examined at trial about the reagent blank, which contains a sample of all the chemicals used to extract DNA from the samples undergoing testing. The reagent blank itself should not contain any DNA in it because no sample undergoing testing is added to it. Testing the reagent blank in tandem with the extracted DNA will indicate if there is any general contamination within the batch.

[179] When Ms Vintiner sent the extracted DNA from Hair 13 to Mr Weigner, she did not also send her reagent blank. She was satisfied there was no general contamination occurring in her extracted DNA because the reagent blank gave a clear result in the CTT test.

[180] Ms Vintiner agreed therefore that Mr Weigner's results did not include a check for contamination of her reagent blank at the additional DNA locations that Polymarker testing analyses. It was put to her that, if Mr Weigner had been asked to examine the reagent blank and found indications of contamination, all the results could be meaningless. Ms Vintiner acknowledged that possibility, saying that Mr Weigner would need to comment on that himself. She said it did not mean that her results were invalid. Ms Vintiner said her reagent blank was clear for the three tests she conducted so she was satisfied that the DNA she extracted originated from the hair root that was placed in the sample tube — the root of Hair 13. She said routinely a reagent blank which is clear in one test is also clear in subsequent tests. And a reagent blank usually accompanied a sample but not always.

[181] In re-examination, Ms Vintiner clarified that the reagent blank was used up completely in her SGM profiling attempts which produced no results, meaning she had none to send Mr Weigner.

[182] Mr Weigner confirmed he did not see the reagent blank Ms Vintiner used during the process of obtaining the DNA extract from Hair 13. Mr Weigner explained that, in carrying out Polymarker tests, he used an extraction blank which monitors the reagents added to a sample, being a slightly different control from the reagent blank

used by Ms Vintiner. He also used what was described as a positive control, meaning he used both positive and negative controls in the analysis he carried out.

[183] Trial counsel submitted to the jury in closing that Mr Weigner was not asked by ESR to test the control sample, which was a necessary prerequisite to determining if contamination had occurred, saying:

> You have a control sample to see if there is contamination. If there is contamination in the control sample, end of test. It doesn't mean anything. Maybe you try and do it again. So how can it be that you can rely on a result in Australia when the scientist is not asked to check the control sample? How can that be? What if he had looked at the control sample, this reagent blank they call them, and found contamination. Found contamination that [had] not been detected in New Zealand. What would that mean? It would mean that his result in New Zealand, that his result in Australia rather, could not be relied upon. And it then might start to cast some doubt on the result that had been obtained earlier in New Zealand. So this strengthening evidence as the Crown would have you believe it makes this probability different is weak, tenuous.

Appeal evidence

[184] In her affidavit for the appeal, Ms Vintiner addressed Mr Doyle's opinion (shared by Dr Gunn) that the fact Mr Weigner did not receive the reagent blank which was co-prepared with the DNA of Hair 13 was a deficiency. Ms Vintiner confirmed she had created a reagent blank in accordance with the Technical Working Group on DNA Analysis Methods guidelines (1995) during the DNA extraction process for Hairs 12 and 13. She then tested the reagent blank to demonstrate that the reagents used in the extraction process were free of any DNA. She did not send the reagent blank to Mr Weigner because it was consumed in the SGM testing and no sample remained for any further testing. She assumed Mr Weigner would have created and tested his own negative control.

[185] While Dr Gunn regarded the fact Mr Weigner did not receive the reagent blank as a deficiency in the testing procedure, he otherwise had no reason to doubt the accuracy of the tests. He considered it unlikely that the reagent blank would have contained any contaminating Polymarker DNA. Dr Gunn confirmed that the absence of the negative control for the Polymarker test did not invalidate the result in respect of Hair 13.

[186] Dr Gunn referred to the possibility that questioned hairs had been confused with reference hairs, discussed in detail below. Subject to that proviso, Dr Gunn had no difficulty with the testing, or the conclusion that the nDNA testing of Hair 13 provided very strong support for the conclusion that it was Olivia's hair.

[187] Professor Holland said the fact Mr Weigner could not test the reagent blank when he performed the Polymarker analysis did not invalidate the result. While it is preferable to run a reagent blank control with each amplification, the Polymarker results were not weakened by its omission, nor was this a deficiency in the testing procedure.

Likelihood ratio

Trial evidence

[188] Ms Vintiner was cross-examined about her interpretation of the DNA results she calculated by reference to a New Zealand Caucasian database drawn from 206 people. She calculated an LR of 449, meaning it was 449 times more likely Hair 13 came from Olivia than any female chosen at random within the New Zealand European population.

[189] Ms Vintiner was then asked about her evidence that, incorporating Mr Weigner's results, it was 28,000 times more likely Hair 13 was Olivia's hair than any fair headed female chosen at random, given there was no statistical information in the database about hair colour.

Appeal evidence

[190] In her appeal affidavit, Ms Vintiner said Mr Doyle was incorrect to say that only seven of the 12 loci available for testing were analysed for Hair 13. Ms Vintiner said that 12 DNA sites were tested, though only eight sites yielded results. The results obtained at all eight sites corresponded to Olivia's reference DNA profile. She noted that there was always a possibility that the result obtained from the next locus tested may exclude a person from contributing to the DNA but, as the number of loci tested

increases, the chance of a match occurring by chance decreases. She said any comment about results that were not obtained was speculation.

[191] Ms Vintiner has now calculated the LR for the CTT nDNA results obtained from Hair 13 as 527 for the general New Zealand population at that time. This means it is about 500 times more likely the DNA originated from Olivia rather than someone chosen at random from the general New Zealand population. This equates to strong support for the proposition that the DNA recovered from Hair 13 originated from Olivia.

[192] Ms Vintiner also discussed the calculation in her notes for a combined CTT and Polymarker LR value of 24,779, which was lower than the 28,000 figure indicated at trial. She explained that the 28,000 figure represented a stratified LR that adjusted for the proportion of each of the major ethnic groups that make up the New Zealand population. The LR of 28,000 was determined from the nDNA profiling results alone, which do not take into account the hair colour or sex of a person. That is so even though, at trial, she stated the alternative hypothesis associated with the LR was that the DNA evidence "originated from another unrelated fair haired female chosen at random from the general NZ population".

[193] Dr Gunn described Ms Vintiner's calculations of the LR for the CTT nDNA results (approximately 440 times more likely if the hair was Olivia's than if it were from a randomly chosen New Zealand Caucasian) as conservative. Dr Gunn agreed with Ms Vintiner's calculation of 1 in 24,779 (although noted the small difference in the evidence she gave — 1 in 28,000). He said the calculation was in accordance with the applicable standards in 1998/99.

[194] Professor Holland performed his own statistical analysis. The result was an LR larger than the value reported by Ms Vintiner: at least 41,000 versus at least 28,000. He said that was within the expected levels of variation given the different databases used. This points to a conservative value having been provided by Ms Vintiner at trial.

[195] Professor Holland agreed that Ms Vintiner and Mr Weigner's combined DNA results for the root of the Hair 13 supports the conclusion that the hair could have

originated from Olivia. Ms Vintiner's evidence that the DNA evidence "very strongly" supported the proposition that Hair 13 originated from Olivia was supported in the literature. Professor Holland considered the use of a numerical value along with a verbal probability phrase provided the jury with greater clarity when assessing the weight of the evidence.

Other issues

[196] Having summarised the evidence on Mr Doyle's two primary criticisms regarding the nDNA testing, we briefly turn to other issues with the nDNA testing raised in the evidence for the appeal.

Contamination

Trial evidence

[197] At trial, Ms Vintiner was cross-examined about the fact her nDNA test returned a match for Hair 13, whereas the United Kingdom mtDNA testing returned a mixed profile, meaning at least two possible contributors or sources of the DNA. Ms Vintiner explained that the nDNA results she obtained from the root of the hair showed no evidence of being formed by more than one contributor. She was asked whether the fact another test showed a mixed profile for the shaft of the same hair meant it was possible that it was always a mixed profile. She responded that it was possible the contaminant was only present in part of the hair and her results, supported by the Polymarker results, detected only one individual's DNA in the root. She interpreted the mtDNA results as indicating that possibly a body fluid had fixed firmly to the shaft and survived the washing procedures. She agreed she could not completely exclude the possibility that Hair 13 had been contaminated in the laboratory.

Appeal evidence

[198] In her appeal affidavit, Ms Vintiner discussed Dr Gunn's suggestion that packaging of multiple hairs in one sample bag may potentially have severely compromised the quality of the DNA results obtained from the tested hairs. Ms Vintiner disagreed, saying that, as hairs, like DNA, can transfer between items and

whilst on the same item, packaging hairs individually does not overcome prior DNA transfer events which may have occurred.

[199] Ms Vintiner's opinion was that the DNA results obtained from the CTT and Polymarker testing of the root of Hair 13 most likely originated from the DNA recovered from the hair root itself and not from a trace of extraneous DNA adhering to the surface of the root. She gave two reasons for her opinion. First, she noted the comparative lack of sensitivity of the nDNA tests at the time in comparison to the sensitive DNA testing methods required to detect trace DNA such as mtDNA testing. Dr Gunn agreed that this means any transfer of DNA from packaged items was unlikely to have compromised the nDNA results. Secondly, Ms Vintiner explained the roots of the hairs were washed to remove any extraneous DNA prior to the DNA on the root or adhering tissue being extracted for nDNA testing.

[200] Ms Vintiner pointed out that the papers Dr Gunn referenced are studies investigating the transfer of DNA between items or between people and items, eg cigarette butts. She said these studies have limited relevance to this case as it is her understanding that hairs from different items were not packaged together.

[201] Professor Holland said Dr Gunn's concerns were relevant to evidence containing biological fluids but far less relevant when considering hair evidence. He said that the surface of a hair is cleaned prior to the testing process, significantly reducing the concerns associated with transfer.

Lack of duplication

Appeal evidence

[202] Ms Vintiner responded to Mr Doyle's complaint about the lack of duplicate testing for her nDNA results by saying there was no requirement, nor is there now, for standard nDNA results to be duplicated before reporting. She explained that at the time, the nDNA tests were not as sensitive as the mtDNA testing where duplicate testing was routinely undertaken.

[203] Then at the appeal hearing, Ms Vintiner said she did in fact duplicate the nDNA test for Hair 13 and "found the repeat testing results sheet in the back of my case file, so it did get duplicated and I apologise I overlooked that". She said it is not usual to duplicate nDNA results so she did not consider it needed to be conveyed to the jury. She said the duplication she did do was on the amplified product of the DNA, not the DNA extract, and it gave the same result. In any event, none of the other experts suggested that Ms Vintiner failing to duplicate her results invalidated the nDNA results for Hair 13.

Amelia as the source of Hairs 12 and 13

[204] Ms Vintiner said that, importantly, Amelia was excluded as being a possible source of Hairs 12 and 13 because her dark to red-brown head hair was a distinctly different colour from the blonde Hairs 12 and 13. Furthermore, Amelia's reference DNA profile was different from Olivia's reference DNA profile and therefore different from the CTT profile determined for Hair 13. On the basis of the DNA results, Amelia could not have been the source of Hair 13.

[205] Dr Gunn and Ms McElhinney agreed that the CTT DNA profiles from reference samples submitted to the lab led to the conclusion that Amelia Hope could be excluded as the origin of Hair 13.

Hydrogen peroxide treatment

[206] As to the potential impact of hydrogen peroxide, Ms Vintiner noted that neither Hair 12 nor 13 were observed to have any distinct colour changes. In any event, she would not expect treatment of the hair shafts with hydrogen peroxide to cause DNA degradation in the hair root (which is embedded below the surface of the scalp) to the extent that no nDNA results would be obtained.

[207] Dr Gunn also disagreed with Mr Doyle's suggestion that hydrogen peroxide treatment might have deleterious effects on the DNA analysis. The hydrogen peroxide treatment of Olivia's hair occurred in June/July 1997 (five to six months before her disappearance). Dr Gunn concluded there was no lasting impact of hydrogen peroxide on the DNA in this matter.

[208] Professor Robertson's evidence was that the treatment of hairs with hydrogen peroxide would have had no effect on nDNA testing, as the DNA is contained in or on the hair root and attached cells such as sheath cells. Even if the hairs had been treated, it would not have reached into the hair follicle.

Our assessment

[209] Ms Vintiner had tested the reagent blank as part of her testing and it showed no contamination was present. The fact the reagent blank was used up and she was unable to send any to Mr Weigner did not invalidate the results he obtained using a different test. In any event, Mr Weigner used a different type of control.

[210] Ms Vintiner's LR was conservative. We consider it would have been preferable for Ms Vintiner to have avoided reference to "fair-haired" and "female" members of the New Zealand population chosen at random when reporting her LR, given her calculations did not utilise sex or hair colour information. But this is of no concern because she immediately clarified that neither hair colour nor sex were in fact included when calculating the LR.[66]

[211] Given the expert evidence, we regard the suggestions of any issues concerning contamination, lack of duplication, discounting Amelia as the source of Hairs 12 and 13 and the impact of hair colouring as of no moment.

[212] The nDNA profile result for Hair 13 provided very strong support for Olivia being the source of Hair 13.

Mitochondrial DNA analysis

[213] Mitochondria are a cell component generally found to be maternally inherited.[67] There are thousands of mitochondria present in a cell and as a hair shaft

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66 Additionally, no evidence has been put before us to suggest that the likelihood ratio is lower when the comparator is a randomly selected fair-haired and female member of the New Zealand population rather than a random member of the New Zealand population more generally. Indeed, it is possible that the likelihood ratio is actually higher for fair-haired and female members of the New Zealand population. We note that at trial, Ms Vintiner reported that the likelihood ratio was slightly higher for European New Zealanders (30,000) than New Zealanders of all ethnicities (28,000), even though Olivia was herself of European origin.

67 Although cases of possible paternal inheritance are noted in the scientific literature.

grows, although the nDNA may become degraded, mitochondria remain and it is these which are targeted in mtDNA testing.

[214] As the mtDNA is shared between individuals (particularly those known to be maternally related but unrelated individuals may also share results by chance) mtDNA analysis is not individualising. The results obtained from mtDNA analysis are not comparable to the results obtained from standard nDNA analysis because the techniques target different regions of the DNA.

[215] The issue in respect of the evidence on the mtDNA testing of the two Hairs was one of the two Mr Chisnall called "bad science".[68] He framed it as follows:

> Whether there are errors in the way that the Crown's forensic expert witness presented the results of the DNA testing. … Mr Bark … overstated the probative value of the result when he said it provided "strong support" for the proposition that YA69/12 came from Ms Hope rather than someone selected at random from the general population. This hinges on the fact that mtDNA is shared with *all* maternal relatives and is therefore far less discriminating than other forms of DNA testing. … Also, an issue arises about the way in which Mr Bark dealt with the inconclusive result he secured for the other hair.

Evidence at trial

Dr Tully's evidence

[216] Dr Tully first analysed the reference blood samples from Olivia's mother, Janice Hope, Sandy Watson and Olivia's Guthrie Card to ensure that the mtDNA of Olivia was different from that of Sandy Watson. Olivia's mtDNA profile was the same as Janice Hope's but different from Sandy Watson's, so Dr Tully considered mtDNA analysis of Hairs 12 and 13 worthwhile.

[217] Dr Tully performed the first stage mtDNA analysis, which she described as a screen, to see if further analysis (carried out by Mr Bark) was required. This involved looking at a very small part of the mtDNA — the parts of the mtDNA that are most likely to differ between individuals.

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[68] The other alleged bad science issue is the transference issue.

[218] There were no roots on Hairs 12 and 13 as they had been consumed in the nDNA testing process. The mtDNA analysis therefore involved testing the hair shaft only.

[219] On Dr Tully's first extraction, she obtained a profile from Hair 12 which matched that of Olivia and her mother. From Hair 13, Dr Tully obtained a profile consisting of mtDNA from more than one person, meaning it was "a mixed profile". That did not eliminate Olivia as being a contributor.

[220] Dr Tully repeated the process with a second section of both Hairs but was unable to obtain a result from either Hair on the second analysis. Dr Tully explained that did not invalidate the results from the first extraction but the results from the first extraction had to be treated with caution because her normal procedure would be to repeat the process to obtain the same results twice in order to confirm the mtDNA profile. However, there was nothing to say that the first results were invalid.

Mr Bark's evidence

[221] Mr Bark explained that each test is carried out twice, in that two pieces of any one hair sample are processed separately. Mr Bark had been told by Dr Tully that she had obtained a result from only one of her two extractions and was using a length of two to three centimetres. Mr Bark therefore used a longer length of six to seven centimetres to increase the chance of obtaining results.

[222] Knowing that Dr Tully had obtained a mixed result for Hair 13, Mr Bark attempted to clean the hair and, as a precaution, cleaned Hair 12 as well. Mr Bark confirmed that Dr Tully's tests had no real relevance to his tests because the tests were independent.

[223] Mr Bark obtained a result from both sections of Hair 12. Using blood samples from Olivia's mother and Sandy Watson, he found that the mtDNA sequence from Hair 12 matched the sequence of Janice Hope (and therefore, Olivia) but did not match the sequence of Sandy Watson.

[224] Mr Bark obtained a result, albeit not as complete as Hair 12, from both extracts of Hair 13. For approximately half the sequence, Mr Bark obtained a result from both extracts. For the other half of the sequence, only one extract yielded results. The sequence that was yielded from Hair 13 was from at least two individuals — it was a mixed result.

[225] Bases which Mr Bark would have expected to find in Olivia's mtDNA appeared in the mixed result for Hair 13, meaning Olivia could not be excluded as a contributor to that DNA. However, Mr Bark confirmed that his finding of a mixed profile in the mtDNA results for Hair 13 did not at all invalidate the nDNA result and all Mr Bark could say was that Olivia was not excluded as a contributor to the mtDNA from Hair 13.

[226] Mr Bark began his evidence by explaining that mtDNA is only passed on from the mother to the child so it has a maternal lineage and not a parental contribution. When he was asked to describe in detail the testing process he followed, he explained that Dr Tully had received blood samples from Olivia's mother, Janice, and from Olivia but, because Janice's was a more recent sample, it was easier to analyse. He explained that a scientist could use either the direct sample from an individual or a sample from say their mother or, if the individual is a woman, from one of her children, because she will pass the mtDNA onto her children. In cross-examination, Mr Bark repeated that mtDNA is maternally inherited, saying:

> Like my mother, myself, and my sister, if she had any children, her children, we would all share the same sequence.

[227] Mr Bark was cross-examined about the results for Hair 12. Two different types of control were used — reagent blanks and amplification blanks. He said he repeated the testing of the second extract after the reagent blank indicated contamination. The second time the reagent blank was clear but the amplification blank gave a contamination result. Mr Bark then repeated the tests again and both the reagent blank and amplification blank were clear. He did not accept that he had ignored the contamination or that it had affected the result. He explained that the test is extremely sensitive and considerable precautions are taken. Mr Bark agreed that the contamination would have invalidated the test if it matched the sequence obtained

from Hair 12 itself, given it would not be possible to know whether Hair 12's result had come from the contamination or from the hair itself. He confirmed that the contamination detected did not match the sequence obtained from Hair 12 itself.

[228] Mr Bark told the jury that the databases at the time of trial were relatively small so, instead of discussing numerical frequency when gauging the strength of how common a particular sequence was, a verbal scale was used. Mr Bark's own database involved 163 individuals and the sequence on Hair 12 did not occur in his database. He used an United States Army database of 132 individuals and again he found no matches. He then conducted a literature review made up of sequences of many different ethnic groups conducted by different researchers totalling 1,235 sequences and again found no matches. Because the sequence was not seen in approximately 1,500 samples, he suggested there was strong support for the proposition that Hair 12 came from "Olivia Hope rather than someone at random from the population".

[229] Mr Bark was not aware of any "pure" New Zealand database. His database was of 163 British Caucasian white-skinned Europeans. He was challenged about the extent to which he had personally checked the database details and confirmed that the accuracy of the database was dependent upon the people in the database having their mtDNA accurately sequenced and recorded in the database. Mr Bark explained that the databases were small because the data was being accumulated but coming in very slowly.

[230] Mr Bark asserted that the particular sequence was uncommon because it was uncommon against the three northern hemisphere databases Mr Bark had used. Mr Bark clarified he had used two Caucasian databases, the one from the United States Army having in his opinion similar characteristics to what he imagined New Zealand would have with a native population and an influx of Caucasians from different European types. Mr Bark admitted he did not know the New Zealand position because there was no New Zealand database. Mr Bark did not accept that invalidated his conclusion in any way.

Mr Doyle's concerns

Strength of the mtDNA evidence itself

[231] Mr Doyle considered that the mtDNA evidence relating to Hair 12 was irrelevant.

[232] Mr Doyle accepted there was nothing "suspicious" about the fact Hair 13 recorded a mixed mtDNA result because mtDNA testing is quite sensitive and prone to contamination. Indeed, Mr Doyle considered it was "highly likely" that the same hair as provided a positive nDNA match could provide a mixed mtDNA result, given the contamination issues with mtDNA testing at the time.

[233] Mr Doyle was taken through Mr Bark's trial evidence that his first control (reagent blank) test indicated contamination so he repeated the process. Mr Doyle said he had no reason to doubt that Mr Bark's approach was perfectly proper, albeit he was reluctant to concede that the contamination of the negative control of Hair 12 could be put to one side.

[234] Mr Doyle concluded:

> Given the strength of the nDNA evidence for YA69/13, the mtDNA evidence does not significantly strengthen the overall DNA evidence. Therefore, it remains my opinion that in supporting the contention that YA69/13 is that of Olivia HOPE, the mtDNA evidence is effectively redundant or irrelevant.

Criticisms of Mr Bark's evidence at trial

[235] Mr Doyle said that, based on Mr Bark's evidence at trial, Mr Bark was considering the proposition that *Olivia* was the sole source of the Hair 12 and not *Olivia "or a maternal relative"*. He therefore stood by his comments that Mr Bark was not justified in saying that the mtDNA results provided "strong support" for the proposition that Olivia was the sole source of the Hair 12 and "may have misled the court in doing so".

[236] Mr Doyle's essential point was that Mr Bark unfairly strengthened his opinion based on the mtDNA result by using the word "strong". He considered that it was

incumbent on Mr Bark to provide a figure on which to base his verbal equivalent but he did not do so.

[237] Mr Doyle also questioned the sufficiency of the databases used by Mr Bark, although conceded those issues were raised at trial. Mr Doyle said that Mr Bark needed to be assured of the quality of the data in the database and that the database was very small. He accepted that Mr Bark had been involved in developing many of the sequences in the database of 163 individuals. He also accepted that it was made clear at the trial that there would in time be expanded databases, as indeed there are today.

Appeal evidence

Dr Gunn's support for Mr Doyle's concerns

[238] Dr Gunn supported Mr Doyle's concerns. In his first affidavit, he summarised his position by saying:

> 9.5. The significance of the mitochondrial DNA results have been overstated by Mr. Bark, and cannot be supported. This is especially so if, as has been raised elsewhere, there is a possibility that the tested hair was that of a maternal [relative] (possibly a sister) of Olivia HOPE.

[239] In his reply affidavit, he added:

> 6.3. The use of verbal predicates (e.g. "strong" or "very strong") to describe the strength of the DNA evidence is potentially prejudicial (see paragraph 4.9 above), especially in relation to the mtDNA testing by Mr Bark.
>
> …
>
> 6.5. I note that neither Ms VINTINER nor Dr HOLLAND query my alternative estimates for the possible frequency of mtDNA profiles in Mr Bark's report (paragraph 7.15 of my report of 22 November 2022). I reiterate that I do not accept Mr Bark's conclusion that his results provide strong support for the prosecution hypothesis. On the contrary, I consider that they provide only very weak support for the hypothesis that the hair came from Olivia HOPE.

[240] After expressing some concerns about the "repeated contaminations that plagued Mr. Bark's attempts to repeat his analysis of [Hair 12]", Dr Gunn tentatively

accepted Mr Bark's results showing a match between the mtDNA sequences of Hair 12 and the blood sample of Janice Hope. However, he "disagree[d] strongly" with Mr Bark's choice of words in saying the results provided "strong support" for Olivia being the source of Hair 12. He considered the probative value of the evidence weak, noting Mr Bark did not present any statistical weight or analysis to justify his use of the words "strong support". He said, "[o]n the contrary, I find Mr. Bark's assertion to potentially be highly prejudicial to a defendant."

Lack of replication

[241] Dr Gunn said the absence of a result from a second extract was surprising and a deficiency. Professor Holland did not agree. He said that it was common and noted there are some laboratories that carry out mtDNA testing that require only one extraction. However, he agreed that it is desirable to carry out testing twice.

Was the maternal link of Hair 12 (as opposed to link to Olivia) made clear at trial?

[242] Dr Gunn was taken through the evidence at trial in respect of the explanations from Ms Vintiner, Dr Tully and Mr Bark that mtDNA was passed through the maternal line, for example Dr Tully:

> … mitochondrial DNA instead of being inherited from both your parents, is inherited only from your mother and this means that all siblings or brothers and sisters will have the same mitochondrial DNA and they will have the same mitochondrial DNA as their maternal aunts and maternal cousins[.] … As expected the mitochondrial DNA from Olivia Hope would be the same as from Janice Hope [(Olivia's mother)] as maternal relatives.

[243] Mr Bark's evidence confirmed that mtDNA is passed from the mother to the child. He said that Olivia "or her daughter" could be the source of Hair 12. He was also very clear that he sequenced *Janice* Hope's reference blood sample, taking the result to be the same as Olivia's mtDNA sequence.

[244] Professor Holland's evidence was that it would have been better to say that Olivia "and any of her maternal relatives" could have been the source of Hair 12. He said an expert should make it clear that it was not a positive identification and the match was to Olivia *and* any other maternal relatives.

Sufficiency of the databases used and the use of the "strong support" descriptor

[245] Dr Gunn continued to contest that the mtDNA testing of Hair 12 provided strong support for the origin of the hair being Olivia (or a maternal relative), maintaining it provided very limited support. The issue was the variation between laboratories worldwide as to how to express the verbal equivalence.

[246] Dr Gunn was asked about his own calculation that, for the combined published data, the population occurrence of the mtDNA sequence observed for both Hair 12 and Olivia might be as frequent as one person in 275. He was then referred to Professor Holland's calculations giving a range of between one in 513 and one in 1,531, resulting in Professor Holland's conclusion that the threshold of "support to strongly supports" was met for the proposition that Olivia or one of her maternal relatives was the source of Hair 12. Dr Gunn agreed that one in 275 and one in 531 are, in scientific terms, in similar ballparks.

[247] Dr Gunn agreed that, since Mr Bark's testing in 1998, the databases have increased "massively" in size and it was understood in 1998 that was going to happen. He also agreed that the databases used by Mr Bark were small but appropriate.

[248] Dr Gunn was referred to Professor Holland's comparison of the sequence with a more recent database, producing a likelihood of one in 5,704. Dr Gunn conceded that this provided far stronger support than the original results as reported by Mr Bark.

[249] A calculated statistic was not provided by Mr Bark, which was the practice at the time. However, Professor Holland said that, had he used the calculation of one observation in 1,531 individuals evaluated (ie including Olivia's mother's profile in the database),[69] a simple mathematical approach would suggest that one in 1,531 individuals may have the same mtDNA sequence as Hair 12.

[250] Professor Holland also discussed his use of an equation by which the maximum frequency of the mtDNA sequence associated with Hair 12 would have been

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[69] 1,530 unrelated individuals in the population (British Caucasians, North American Caucasians from the United States Army and various population groups of different ancestral origin reported in the literature used by Mr Bark).

estimated, at a 95 per cent confidence level, as 0.001956 — or, inversely, as one in 513 unrelated individuals in the population. This means that, if the population frequency of the sequence were one in 513, there would only be a 5 per cent chance of observing no matches against a random sample of 1,530 individuals from the population. If the population frequency were any higher, the chance of observing no matches would be less than 5 per cent. Using this estimate yielded a LR of 513, reflecting the ratio of two probabilities: the probability of observing the sequence if Hair 12 originated from Olivia or one of her maternal relatives, as against the probability of observing the sequence if Hair 12 originated from an unknown individual.

[251] Professor Holland then said, in relation to Mr Doyle's report, that the two values (one in 513 and one in 1,531) would meet the threshold of "support to strongly supports", respectively, the proposition that Olivia or one of her maternal relatives was the source of Hair 12. Therefore, Mr Bark's comments that the findings provided strong support for the proposition that Hair 12 originated from Olivia or a maternal relative were reliable.

[252] Professor Holland conducted further searches of an online database, the results of which supported the conclusion that the hair sequence of Hair 12 is uncommon in the general population. He obtained an LR estimate of 5,704, being more than three times the estimate of 1,531 he calculated using the datasets referenced by Mr Bark. At a 95 per cent confidence level, he obtained a conservative estimate of an LR of 2768, more than five times the estimate of 513 he calculated using the datasets referenced by Mr Bark. These values would meet the threshold of "strongly supports to very strongly supports" when considering the proposition that Olivia or one of her maternal relatives was the source of Hair 12.

[253] Professor Holland also conducted a search of the online databases in respect of the European population and the sequence was observed three times in 8,612 unrelated individuals of European ancestry. Using a 95 per cent confidence interval, he obtained estimates of between one in 982 and one in 13,919. Again, those values would meet the threshold of "supports to very strongly supports".

[254] Professor Holland said that assumptions at the time of trial were that the relative rarity of sequences in the population would increase as the search databases grew larger. While Mr Bark could have made these assumptions clearer in evidence, "given the strength of the mtDNA match between [Hair 12] and the sequence of Janice HOPE … , his verbal weight of 'strong support' was accurate".

[255] Professor Holland said mtDNA studies have shown that groups with similar mtDNA are observed within certain populations, saying mtDNA "can follow along ancestral lines like European groups, African, Asian, Latino, Hispanic".

[256] Professor Holland was challenged as to whether the databases he used included Oceania databases, or New Zealand or Australian databases more specifically. He confirmed there were some from Oceania but could not be more specific. When asked whether geographical factors are important, he explained that he would only be concerned if an individual came from an isolated population group with very little genetic drift or movement of DNA outside of their population group. Professor Holland was not aware of anything that reflected a potential for geographical and ancestral clustering of similar mtDNA profiles within New Zealand. He said, as long as there was free movement in New Zealand so there were not isolated pockets of individuals associated with the case who were part of an isolated population group, then the estimates were reasonable, even though they may not reflect exactly a New Zealand population.

[257] Professor Holland was asked about Mr Doyle's comment that:

> 108. The quality of the data populating the databases used may not have been assured. As such, evidence evaluations employing those databases may not be reliable.

[258] Professor Holland said he would agree with Mr Doyle that evidence evaluations may not be reliable *on the assumption* the quality of the data relied on is not assured. He was not aware of any issues with the quality of databases used by Mr Bark but had not looked into it. He went on to say that the biggest deficiency was the size of the databases. He said Mr Bark was reflecting the understanding that the databases were going to grow, as indeed they have.

[259] In respect of Mr Bark's conclusion that the mtDNA for Hair 12 provided "strong support" for Olivia as the source of the hair, Professor Holland's response was:

> … the question is whether or not at the time the statistic was at a point where strong support perhaps could have been used, however, again, with the understanding that the databases were going to get larger and the fact that this profile had not been seen and again the relatively small databases at the time, there was an assumption that this is strong support and when you look at it today, that was a correct assessment at the time. So in my opinion, it wasn't an erroneous statement because it has been found true. The question is whether it needed to be made at the time.

[260] Professor Holland was then asked about Mr Doyle's comment that:

> … in addition to the mtDNA evidence being weaker than Mr BARK suggests, an appropriate database and consideration of the alternative proposition that the mtDNA was that of a maternal relative would have further weakened his evidence probably to the point at which it becomes irrelevant.

[261] Professor Holland regarded the reference to "an appropriate database" as difficult to understand. He said the available databases were searched and at the time it was understood that the relative rarity of the profiles was going to increase significantly as the databases grew but it did not mean they were irrelevant "as long as that is stated effectively". Professor Holland's view was that the lack of a match against the available databases, combined with Mr Bark's understanding of where the databases were going to head and what that would mean, led Mr Bark to use the words "strong support".

Was the mtDNA evidence relevant?

[262] Professor Holland disagreed with Mr Doyle that, given that Olivia's mother, Olivia or Amelia could have been the source of the hair, the mtDNA evidence was irrelevant. He explained that would depend on whether Olivia's mother or sister had either been on Mr Watson's boat or, if secondary transfer were considered, in contact with someone who had been on the boat. He also pointed out that Hair 13 was not from Olivia's mother as her CTT profile did not match.

[263] Professor Holland said that Mr Doyle was wrong when he said that "the relative strength of th[e] nDNA evidence is such as to render the associated mtDNA evidence redundant", pointing out that, on the contrary, mtDNA sequencing is an

independent test. Hairs 12 and 13 were two separate pieces of evidence. Hair 12 produced mtDNA sequencing results and Hair 13 produced nDNA testing results. Therefore, he said, the mtDNA testing results were clearly relevant.

The Crown prosecutor's closing

[264] Professor Holland was then asked about the Crown prosecutor's closing to the jury:

> And then sending it on to Mr Bark where testing the two hairs himself and the full sequencing test found that he obtained a match between the mitochondrial DNA taken from hair 12 and that of Olivia Hope/Jan Hope reference and because he couldn't find that sequence anywhere in 1,500 reported sequences in the available databases, he concluded that the results indicated strong support for the hair being Olivia's.

[265] Professor Holland said he would have added "or her maternal relatives" to the statement, to make that limitation of the mtDNA evidence clearer.

Submissions

[266] Mr Chisnall submitted the evidence adduced on appeal reinforced that the challenges mounted in cross-examination at trial were not merely technical in nature. He contended that the evidence that disputed the way in which Mr Bark presented the mtDNA results for Hairs 12 and 13 was a new and significant evidential development that undermined the Crown case. In his submission, had the evidence been before the jury, a more favourable verdict was reasonably possible.

[267] In the Crown submission, this issue involved a direct contest between the experts: Mr Watson's experts opining that Mr Bark's statement of "strong support" overstated the mtDNA results whereas Professor Holland, a leading expert in mtDNA, confirmed Mr Bark's use of the term "strong support" to describe the strength of the mtDNA results obtained in relation to Hair 12 was accurate.

[268] Mr McCoubrey stressed that Dr Gunn agreed that he and Mr Bark were "in the same ballpark" in scientific terms available at the time. Mr Bark used broadly European databases and the test was in respect of a European woman. Trial counsel

cross-examined Mr Bark on the databases, both as to the size of them and the relevance of the data to the New Zealand population.

[269] The Crown pointed out that both Dr Tully and Mr Bark emphasised the maternal link, with Mr Bark saying "Olivia Hope or her daughter could be the source of this hair". He had earlier explained to the jury that mtDNA is passed on from mother to child, so that all maternal relatives share a mtDNA sequence. Mr Bark repeatedly made the point that he sequenced *Janice* Hope's reference blood sample and used the resulting mtDNA sequence as a proxy for Olivia's sequence.

Our assessment

[270] It is clear from the experts including Mr Doyle that the contamination issues are explained by the fact mtDNA testing was highly sensitive and contamination-prone in its early days. But the tests were repeated and the controls (the amplification blank and reagent blank) were clear. The contamination detected also did not match Olivia's mtDNA sequence or the result obtained from Hair 12. There is also no real issue as to lack of replication. We are satisfied there is nothing to suggest the results obtained were not accurate — the evidence was carefully tested via cross-examination at trial.

[271] The mtDNA analysis supported the proposition that Olivia was a potential contributor to the mixed mtDNA sequence obtained from the hair shaft of Hair 13. There was no dispute about this amongst the experts. We note that trial counsel made something of this point to the jury, suggesting that, because the mtDNA on Hair 13 was mixed, that undermined the nDNA result. That submission, while not correct scientifically, was not corrected and remained before the jury.

[272] The core conclusion that the mtDNA evidence provided strong support for the proposition that Hair 12 came from Olivia or a maternal relative appears reliable. We are satisfied the databases used were appropriate. Any limitations with the databases were explored at trial. Trial counsel challenged Mr Bark's use of small, overseas databases, saying in his closing address to the jury:

> Then, he tried to postulate, you might think, what the meaning of all this was from the various databases. There was one of 1500 Vietnam veterans or American war veterans or something, but he was unaware whether there was

> even such a database for mitochondrial DNA testing in New Zealand. He had no idea how common that profile might be in New Zealand.
>
> So, can I suggest to you, ladies and gentlemen, when you look at the results of this DNA analysis of these hairs, that they are unconvincing? They are unclear. They are unreliable. There's internal conflict. And it's not the kind of convincing, reliable, satisfactory evidence that you would want to take away with yourselves to a jury room and say, "I'm convinced that those two hairs belong to Olivia Hope. I'm absolutely convinced of that". Because in my submission, the evidence falls well short of demonstrating that kind of satisfaction.

[273] As we now know, the fact there was no New Zealand database was of no moment given Olivia was not part of an isolated population group, but this submission also remained before the jury.

[274] Professor Holland acknowledged Mr Bark could have been clearer about the assumptions underlying his conclusion of "strong support". He explained it was understood at the time of the trial that the strength of the mtDNA evidence would continue to improve as the databases increased in size, and that has proved to be the case. Having compared the mtDNA sequence against the databases available today, Professor Holland confirmed the statistical calculation for the mtDNA match between Hair 12 and Janice/Olivia Hope's mtDNA sequence is even stronger. In other words, a jury hearing this evidence today would properly be told Mr Bark's mtDNA results provide strong to very strong support that Hair 12 was from Olivia or one of her maternal relatives.

[275] We are satisfied that, even if Mr Bark did not make the point at every stage of his evidence, the jury was told by the two experts, Dr Tully and Mr Bark, of the maternal link in mtDNA testing, emphasised by Mr Bark's evidence of using Janice Hope's reference sample.

[276] Even if the jury were not told clearly enough that the probability relating to Hair 12 encompassed not only Olivia but her maternal relatives, this could not have resulted in a miscarriage of justice in the context of this case. It appears that the only one of Olivia's maternal relatives who could realistically have contributed the hair was her sister, Amelia, as Janice Hope, Olivia's mother, was not at Furneaux Lodge. However, neither the Crown nor the defence case included any scenario in which

Amelia was on *Blade*, meaning the possibility of transference of Amelia's hair would need to be considered. Amelia had been on the Naiad that dropped off Ben, Olivia and the lone man. If Amelia's hair was found on the tiger blanket, it would support an inference that Mr Watson was the lone man with her on the Naiad and her hair had transferred from her to Mr Watson to the tiger blanket.

[277] But crucially, the possibility Hair 12 was Amelia's can be ruled out because Amelia's dark to red-brown hair was a distinctly different colour to the blonde Hairs 12 and 13. Ms McElhinney agreed with Ms Vintiner's evidence on this.

[278] The mtDNA evidence was not redundant or irrelevant. It was a separate piece of evidence tending to suggest Olivia was on *Blade*. Overall, the fresh evidence on mtDNA supports the Crown evidence at trial and indeed strengthens it. In relation to mtDNA, this is not a bad science appeal.

Testing methodology

[279] Before we leave the topic of Hair testing, we need to address a general issue raised by Mr Chisnall as follows:

> Whether there were gaps in the testing methodology for both hairs that invalidated the results. This includes whether the jury heard inadmissible evidence from experts who had not validated their tests, which lent improper weight to the remaining testimony.

[280] In Mr Chisnall's submission, the Crown presented the Hair evidence as an impenetrable wall of science. However, two of its experts, Ms Vintiner and Dr Tully, did not validate, through duplication, their respective nDNA and mtDNA results, meaning their evidence did not meet the reliability threshold. Also, Dr Tully's testing identified a contamination concern. Further, Ms Vintiner's visual examination of the hairs was treated by the Crown as a form of identification evidence, notwithstanding that the experts agree it is simply a screening test.

[281] Referring to this Court's decision in *Lundy*,[70] Mr Chisnall said each scientist called by the Crown at trial was required to have duplicated his or her results. Those who failed to do so should not have given evidence.

[282] We do not read *Lundy* as requiring each scientist to duplicate their results for those results to be admissible. In *Lundy*, the issue was whether results produced by a bespoke and novel mRNA testing technique were inadmissible.[71] The results were adduced to respond to the suggestion central nervous system tissue found on Mr Lundy's shirt had an animal rather than human origin.[72] At the passage of *Lundy* Mr Chisnall cited, this Court rejected the submission that "the mRNA evidence could be strengthened by reference to other evidence called by the Crown", instead considering that "the admissibility of complex and novel scientific evidence must be assessed in its own terms".[73] The Court was concerned that focusing on other evidence "distracts from a proper consideration of the fundamental reliability of the science".[74]

[283] In Mr Watson's case, none of the expert evidence has cast any real doubt on the fundamental reliability of the scientific techniques used to analyse Hairs 12 and 13. The following passage of this Court's judgment in *Lundy* is apt:

> [242] The result should be that what is proffered as evidence is no longer theoretical in nature but can be shown by reference to a number of factors to have passed muster in the scientific community as something worthy of acceptance in a court of law. It is that kind of generalised support that enables courts to admit with confidence DNA evidence and the kinds of likelihood ratios which form part of it. The complications in the science have been resolved, the techniques broadly accepted and the probative value of their application agreed in the scientific community.

[284] Duplication of a particular scientist's test results in a particular case is an entirely different matter from the fundamental reliability of the scientific techniques used to generate those test results. Though duplication of each scientist's test results is desirable in principle, it will not always be possible or desirable in a given case due to the finite quantity of questioned material available for testing. It will only be a

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70 *Lundy* (CA), above n 35, at [246].
71 At [3].
72 At [62].
73 At [246].
74 At [246].

prerequisite to admissibility when the fundamental reliability of the testing technique is predicated on duplication.

[285] On the expert evidence before us, we do not consider the fundamental reliability of any of the scientific techniques used in the present case was predicated on duplication beyond what occurred. While Ms Vintiner did not disclose at trial that her nDNA testing of Hair 13 had been duplicated, in fact it was duplicated. Dr Tully's testing was intended to act merely as a "screening test" and was effectively superseded by Mr Bark's testing. As to Mr Weigner not testing Ms Vintiner's reagent blank, that issue was raised and adequately explained at trial. He also used different types of controls.

[286] The contamination of the negative controls in relation to Hair 12 when testing for mtDNA was dealt with at trial and confirmed by Professor Holland not to invalidate the results.

[287] Ms Vintiner confirmed to the jury that it was not possible to identify someone as the source of a hair from a microscopic examination of that hair. The jury was therefore aware at trial that the hair comparisons did not constitute an identification of Olivia. We have already commented on the Crown prosecutor's comment in closing in this regard.[75]

[288] We emphasise that Mr Watson had available to him experts who were able to advise for the purposes of cross-examination and closing. This is not a case where the scientific evidence used at trial has since been undermined and revealed to be unreliable. Indeed, the evidence given at trial has been confirmed as reliable by the experts who gave evidence at the appeal hearing. In summary:

(a) All of the experts who addressed the nDNA evidence before us accepted that the nDNA evidence provided very strong support for the proposition that Hair 13 belonged to Olivia.

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[75] See above at [171].

(b) Given the context of the other evidence at trial, none of the experts who addressed the mtDNA evidence cast serious doubt on Mr Bark's statement at trial that the mtDNA evidence provided "strong support" for the proposition that Hair 12 belonged to Olivia rather than someone at random from the population. It would have been preferable for Mr Bark to have qualified that statement with "or a maternal relative", but that omission was of no moment given the maternally inherited nature of mtDNA evidence was clear at trial and, in any event, Amelia's hair had a very different appearance from Hair 12.

(c) The two Hairs, each returning positive results from different DNA testing, constituted two separate pieces of probative circumstantial evidence. The nDNA result from Hair 13 was of higher probative value as its LR is higher and it relates to Olivia's nDNA profile, rather than the mtDNA profile that Olivia shared with her maternal relatives. But the nDNA result does not render irrelevant the less discriminating mtDNA evidence relating to Hair 12.

[289] We now turn to address the possibilities of transference and laboratory contamination.

The Hairs and the possibility of transference

[290] To recap, the general consensus of the experts appeared to be that the scientific results were sound.[76] Areas of possible non-compliance with standards or protocols were noted but, whilst not best practice, the consensus of those with expertise in their respective fields was that they did not affect the laboratory results that were obtained from Hairs 12 and 13. In particular, we did not understand any of Mr Watson's witnesses to be suggesting there was any issue of significance with the reliability of the nDNA results for Hair 13. For Ms McElhinney, the issues were about the potential for transference of the Hairs during, and after, the events on 1 January 1998, including as a result of the movements of police and ESR staff between different locations and how examinations were undertaken by key police and ESR personnel.

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[76] This was specifically conceded by Ms McElhinney.

[291] This issue was the second of the two Mr Chisnall called "bad science" and he framed it as follows:

> Whether a miscarriage of justice resulted because of the way in which the Crown addressed — in its evidence and submissions — the possibility that the two hairs, asserted by the Crown to have [been] taken from *Blade* and thus implying that Olivia was onboard on 1 January 1998, were in fact present as a result of secondary transference: either through casual, direct or indirect, social contact between [Mr Watson] and [Olivia], or during the subsequent scene examination of *Blade* by police and ESR.

[292] We address separately the two possibilities:

(a) Transference of the Hairs from Olivia to Mr Watson (directly or indirectly) during the events at Furneaux Lodge.

(b) Transference of the Hairs from the Hope family home to a police officer and from there to *Blade* during the scene examination.

The possibility of transference from Olivia to Mr Watson (directly or indirectly) during the events at Furneaux Lodge

Trial evidence

[293] The Crown prosecutor raised the possibility of transference in his opening address to the jury, saying:

> The Crown's case is that these head hairs are indeed Olivia Hope's. The inference to be drawn is that Olivia Hope must have been on this yacht in order for the hairs to have got onto the blanket. There may be the possibility that her hairs got there indirectly such as if she and Scott Watson had been together at some stage and her hair had been deposited onto his clothing and then from his clothing on to the blanket. But Scott Watson told the police that he had not seen [Olivia] or [Ben] that evening and had not had anything to do with them. So in the face of that, such an explanation for the hairs being on his boat would have to be considered unlikely.

[294] The issue was not then raised until the end of Ms Vintiner's cross-examination when she was asked about "transference". She affirmed that humans shed hair "naturally every day", sometimes in the order of 100 hairs per day. She explained that this can result in direct transfer of hair from the shedder to another, or secondary

transfer of hair from an object, or a recipient person, to another. This was the relevant exchange during cross-examination:[77]

> [Q:] And a larger number of hairs, that is a greater number of hairs, would be suggestive of direct contact?
>
> [Ms Vintiner:] Yes it is certainly far more supportive of that type of contact.
>
> [Q:] And the corollary of that is a lower number of hairs could be supportive of a secondary transfer?
>
> [Ms Vintiner:] A lower number of hairs makes it very difficult to comment as to which of the two is more likely, so a lower number of hairs would mean that a secondary transfer, which for the benefit of the Jury, means hairs that have been transferred from a person, usually from their clothing, to another object or person and then to the place where they are found.
>
> [Q:] Another circumstance that we have in this particular case which you may know about from your general knowledge, were the circumstances of the New Year's Eve party at Furneaux Lodge itself.
>
> [Ms Vintiner:] Yes I am aware.
>
> [Q:] … we have a situation where there were upwards of 1500 or possibly more people centralised at the Furneaux Lodge complex through the course of New Year's Eve, that is your understanding?
>
> [Ms Vintiner:] I'm not aware of the number of people there.
>
> [Q:] Within that complex there would it appears from the evidence that there was certainly a concentration of people at various stages in an outside garden bar and an inside lodge bar — *so you would agree that the Jury in this particular case would have to properly consider the possibility of secondary transfer of the hair from Olivia Hope, assuming the forensic results are correct, to Mr Watson and then carriage by him on his clothing to his sleeping berth on his boat*, they would have to consider that shouldn't they?
>
> [Ms Vintiner:] *They should consider that*.
>
> [Q:] And some of the issues that surround that are the length of time between various events taking place, the types of clothing that people were wearing, those kinds of issues like that?
>
> [Ms Vintiner:] Yes.

[295] Key was Ms Vintiner's acknowledgement that the jury "should consider" the possibility of the secondary transfer of Olivia's hair to Mr Watson and then the carriage of that hair, by him, on his clothing, to his sleeping berth on *Blade*.

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[77] Emphasis added.

[296] In re-examination, it was made clear that the term "secondary transfer" covers all subsequent transfers. There was some discussion about this, with Ms Vintiner saying that a woollen garment will hold onto hairs more readily than a smooth one. The Crown focused on standards of grooming:

> [Q:] … [Do] the standards of grooming of [a] person have any relevance … ?
>
> [Ms Vintiner:] A person who has a lot of head hair adhering to their clothing, are potentially a better source to pass those hairs on as opposed to a person you describe as having good grooming and good cleaning, may be more conscious of not having hair on their clothes which means that it's certainly a factor that needs to be considered as to how likely and how many hairs could be transferred between a clean well-groomed person as opposed to someone who is not.
>
> [Q:] So just dealing with a clean well-groomed person, are they more likely to have a lot of shed hairs on their clothes or less likely to have, I see you have got some study there?
>
> [Ms Vintiner:] It's difficult to make hard and fast rules because it is also very dependent on whether the person themselves, how much hair they lose daily as that can vary from person to person, but certainly a person who does not regularly clean or launder or simply brush off the hairs, you would expect that they possibly would have more hair on them.
>
> [Q:] And what about people who from one end of the spectrum might wash their hair regularly, brush it, tend to it regularly, and others who might pay less attention to that sort of standard, will that have a difference on the amount of hairs shed and hairs available for secondary transfer?
>
> [Ms Vintiner:] It would really depend on the actions after brushing, because brushing your hair regularly and not removing them from your clothes may actually increase the number of hairs present on your garments, there are lots of variables that need to be considered.
>
> …
>
> [Q:] The personal standard of hygiene and grooming, the higher that is, the less likely it is, is that right?
>
> [Ms Vintiner:] Yes.
>
> [Q:] The closer fitting the clothing, the less likely?
>
> [Ms Vintiner:] Yes.

[297] In summary, Ms Vintiner said it was difficult to make hard and fast rules because how much hair a person loses daily varies from person to person, depending on a number of variables.

Appeal evidence

[298] The terminology was clarified. The term "primary transfer" is hair from a person's head or their clothing coming into contact with either another person or object and leaving that hair behind, usually through contact. At trial, the term "secondary transfer" was used to mean a situation where a person's hair, for example on clothing, is transferred to an intermediary person or object and from there onto another person or object.

[299] The term "direct transfer" refers to where hair is taken directly from the head and transferred to another person or object, whereas "indirect transfer" can still be a primary transfer because the head hair could fall from the head onto the shoulder of the garment for example, and from there be transferred to another surface. Persistence, in turn, simply describes how long a hair may remain on an item until it is transferred or lost.

[300] Ms McElhinney's evidence was that, "[t]he mechanisms by which hairs may transfer and persist are critical to assessing the relevance of any results and it does not appear this was presented clearly at trial." Hairs can transfer directly from the individual and indirectly via an intermediary surface. As it may not be possible to determine how a hair was transferred, hairs are often not collected or examined when known social contact is alleged. However, given the circumstances of this case, Ms McElhinney agreed with the decision to collect and examine the hairs.

[301] Ms McElhinney explained that transfer and persistence of hairs could be affected by factors such as the length and nature of the hair, the features of the surfaces in contact (in particular, the nature of the receiving surface and the conditions to which the receiving surface is subjected), and the nature and duration of the contact. So then, in considering the persistence of hairs that may have been transferred to Mr Watson, directly or indirectly, his clothing required consideration. Ms McElhinney noted that he appeared to be wearing a blue denim shirt which from photographs appeared have a smooth surface. She said it was unlikely to retain hairs for a significant period of time unless a hair were caught in a button, for example. Depending on the nature of the jersey which he may have worn later in the evening, it may have retained hairs for

longer. Also relevant was whether any individuals who may have been on *Blade* had prior interaction with Olivia (there was no evidence of this), or whether Mr Watson had any interaction with Olivia or any of her associates prior to going on *Blade*. Ms McElhinney said there may be multiple transfer events in a social setting and this meant establishing a clear pathway was not necessarily possible.

[302] In summary (and there was no challenge to this), Ms McElhinney said it was not possible to determine how the two Hairs could have transferred to the tiger blanket on *Blade*.

[303] Professor Robertson's opinion was that it was not possible to say whether the Hairs were deposited by transfer between Olivia and/or her clothing directly to the tiger blanket or through a transfer to Mr Watson and/or his clothing, and then onto the tiger blanket. He said Mr Watson was clearly in close contact with a number of individuals and this was the type of close contact necessary for transfer in a casual contact situation. He agreed with Ms McElhinney that, in general, it may not be possible to determine how a hair was transferred, whether directly or indirectly. He considered that knowledge of the clothing worn by Olivia and Mr Watson, though relevant, did not really assist in making things any clearer. He went on:

> 156. It is reasonable that a jury should have considered the possibility that the hairs recovered from the blanket could have been deposited through these hairs having been picked up on to the clothing of Mr Watson without any direct or limited contact with Olivia Hope. It unknown to me whether there is evidence that there was the opportunity for Mr Watson and Olivia Hope to have been in close vicinity to each other where a transfer may have occurred.
>
> 157. It is possible that hairs could have been deposited onto another potential donor surface and then onto Mr Watson. It is not possible for me to assess the likelihood of this possibility in the absence of detailed information as to the movements of the two individuals, the clothing they were wearing at the time of their relevant movements, and the possibility for such a secondary transfer. Studies on secondary transfer generally show the likelihood of indirect transfer diminishes as the number of hairs increase. However, when dealing with a very small numbers of hairs, the studies do not give evidence of the likelihood of two hairs being subject to indirect secondary transfer as opposed to one.

[304] Professor Robertson said that hairs generally persist if they are trapped, rather than sitting on a surface, and that it really comes down to the nature of the fabric. If not trapped, something like 80 per cent are lost within a few hours.

[305] Ms McElhinney did not agree with Ms Vintiner's contention that secondary transfer was discussed "extensively" at trial, observing that the mechanism by which the Hairs could have been transferred was not discussed at all during Ms Vintiner's evidence in chief. She criticised Ms Vintiner for not raising this issue herself, saying it was her duty as an expert to do so. Ms McElhinney also questioned the Crown's re-examination of Ms Vintiner, which focused on Olivia's grooming and standard of hygiene, saying that a high level of grooming, for example frequent hair brushing, could actually result in more hairs on clothing. She pointed out that Olivia appeared to have her hair both up and down that night, and noted that this process may create loose hairs. Olivia also appeared to be wearing a dark coloured jersey at some point and, depending upon its nature and construction, it may retain hairs for a period of time.

[306] Ms McElhinney was concerned that Ms Vintiner's evidence to the effect that the jury should consider transference (which Ms McElhinney considered to be the correct answer) was changed in closing submissions to being a "mere possibility" or "highly unlikely", and that this suggested to her there was a misunderstanding of Ms Vintiner's evidence. We interpose to comment that, not only can this be considered the difference between submissions and evidence but also, it was a submission made in the context of the evidence *as a whole*.

[307] Ms McElhinney then referred us to an internal ESR memorandum dated 17 February 2016, which Ms Vintiner wrote to assist the ESR in responding to the release of a book about Mr Watson's case, and the potential criticisms of ESR's handling of the Hair evidence. In that memorandum, Ms Vintiner said:[78]

> Given the possibility of prior contact between Ms Hope and Mr Watson, together with our knowledge that a few hairs can transfer between and via people, and upholstery, for example … this finding [of the two hairs on the tiger blanket] does not necessarily mean that Ms Hope had direct contact with the blanket. That is, given the information provided in this case, *an alternative pathway that involved transfer from Ms Hope to Mr Watson in a social setting and then transfer from Mr Watson to the blanket could also be a reasonable explanation for the finding*.

[78] Emphasis added.

[308] In Ms McElhinney's opinion, it was that wording, "reasonable explanation", which should have been before the jury, as opposed to Ms Vintiner's concession in evidence that transference was a possibility. In cross-examination, Ms McElhinney accepted that it was for the scientists to raise the possibility and then for the jury to determine what to make of it in light of all the evidence at trial, including Mr Watson's case that he had not met or seen Olivia that night. She did, however, reiterate that, not being in direct contact, did not mean that indirect transfer was less likely.

[309] Ms Vintiner accepted that her brief of evidence did not discuss the topic of transfer and nor did the prosecutor ask her any questions on the topic in her evidence in chief at trial. However, she referred to the fact that her copy of a 1987 paper on the secondary transfer of scalp hair by Brian Gaudette and Anthony Tessarolo was in her case file, along with a 1982 paper relating to the transfer of textile fibres. She said the case file was disclosed to the defence so they were aware of it.

[310] Ms Vintiner addressed Ms McElhinney's suggestion that, if any of the hairs located on *Blade* could be "identified" as being from another partygoer at Furneaux Lodge who had not been on *Blade*, then this would have demonstrated that the Hairs could have been indirectly (or secondarily) transferred to *Blade*. Ms Vintiner explained this work was not undertaken at the time, nor would it have been feasible to do so. There were 1,618 people at Furneaux Lodge that night and it would have taken months, if not years, to complete that sort of analysis. Furthermore, reference hair samples were not taken from all the attendees at Furneaux Lodge.

[311] Ms Vintiner accepted that the presence of a large number of hairs, apparently from the same person, is more supportive of a primary transfer event, whereas the presence of a few hairs means it is very difficult to determine whether that presence is a result of primary or secondary transfer.

[312] Ms Vintiner was then asked about the difference in her evidence at trial, to the effect that the jury should consider "the possibility" of secondary transfer, and her December 2016 memorandum saying a secondary transfer was a "reasonable explanation" for the Hairs on the tiger blanket:

> [Ms Vintiner:] If I was giving this evidence now, because we do discuss activity levels in our statements, then I would have detailed these particular things that we are discussing now in my statement, it could've been more transparent, I accept that. We could've discussed it during my evidence in chief. I think what words I would use, "possible", "reasonable", I'm not sure.
>
> [Q:] Is that your way of saying that it's a reasonable possibility, transference, as an explanation for the presence of the hairs?
>
> [Ms Vintiner:] Yes, considering the situation, secondary transfer is a possibility.

[313] Professor Robertson said if there was evidence there had been a reasonable possibility of close contact between Olivia and Mr Watson, he would agree that an alternative pathway that involved transfer from Olivia to Mr Watson in a social setting and then transfer from Mr Watson to the tiger blanket could also be a reasonable explanation for the finding. He also agreed that the possibility of transference from Ms Hope to someone else and then to Mr Watson could not be excluded.

Submissions

[314] In Mr Chisnall's submission, Ms McElhinney's evidence emphasised why evidence of a small number of hairs located at a crime scene, in a context where social contact was a plausible explanation, should be treated with caution (in terms of admitting such evidence, and using it to explain what happened). There was, he contended, a sharp contrast between Ms McElhinney's evidence and Ms Vintiner's "anodyne concession" at trial. Ms McElhinney's evidence raised serious questions as to whether Ms Vintiner adequately conveyed that transference was not "preposterous" or "highly unlikely", as the Crown prosecutor had suggested.

[315] Mr McCoubrey acknowledged that a prosecutor would be wise to deal with the limitations of their expert's evidence during evidence in chief but said, as long as proper disclosure had taken place, there was no obligation to do so.[79] Ms Vintiner's case file was disclosed and the defence had experts available to it.

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[79] See also Criminal Procedure Act, s 113; and Evidence Act 2006, ss 89, 92 and 93.

Our assessment

[316] The issue is whether the evidence was before the jury. We are satisfied it was. Indeed, the Crown prosecutor raised the possibility at the very start of the trial in his opening address.

[317] Ms Vintiner told the jury that transference was a possibility. To ascribe probabilities to it, however, was not something that Ms Vintiner could do. Determining the likelihood of transference and whether it was a reasonable explanation for the presence of the Hairs on the tiger blanket would depend on the other evidence of what happened that night. As Professor Robertson explained, he was able to accept that transference was a "possibility" but he could not be sure whether it was a "reasonable" possibility without knowledge of precisely what contact may or may not have taken place.

[318] We have viewed the notes Dr Guersen, the defence expert, provided to the defence at Mr Watson's trial. He discussed both primary hair transfer, which he defined as transfer from a person directly to another person, place or object and secondary hair transfer, being the transfer of hair from someone else to a third person, place or object. He noted that secondary transfer can and does occur. He said that secondary transfers were most likely to pass only through one person and that the key factors included whether the person wore rough or textured clothing, whether horizontal surfaces such as a seat were involved, whether contact was with objects used by many people and the number of interpersonal physical contacts. The point is that this information was known to the defence at Mr Watson's trial and they had an expert available to advise them on it.

[319] The concerns around the Hair evidence do not relate to the science but instead relate to whether the possibility of transference was properly before the jury. There is no doubt it was. Whether transference was, as a matter of fact and having regard to all of the evidence, a reasonable explanation for the presence of Olivia's hairs on the tiger blanket was a matter for the jury to determine. At worst, there was not sufficient emphasis on behalf of Mr Watson on the various possibilities of secondary transfer during the cross-examination of Ms Vintiner. However, there is no doubt trial counsel

knew of this possibility given they received written advice on it from their own expert and he closed strongly to the jury on this topic, as we shortly discuss.

The possibility of transference of the Hairs from the Hope family home to a police officer and from there to *Blade* and the tiger blanket

[320] The appeal hearing and the new evidence on behalf of Mr Watson involved consideration of the recovery of the tiger blanket from *Blade*, with the suggestion that the procedures used could have resulted in transference of hairs from Olivia's home to the tiger blanket while it was still aboard *Blade*.

[321] Detective Richard Rolton was a member of the Criminal Investigation Branch (CIB) based at Blenheim Police Station in 1998. On 10 January 1998, he visited the Hope family home to collect hair samples from Olivia's bedroom. They were placed in a plastic bag and allocated sample number ST05.

[322] On 12 January 1998, *Blade* was seized by police from its mooring in Shakespeare Bay and sailed to Waikawa Bay where it was lifted from the water and transported to a secure hangar at Royal New Zealand Air Force Base Woodbourne in Blenheim, where a forensic examination commenced on 13 January 1998.

[323] Responsible for the seizure of *Blade* and oversight of the subsequent forensic examination was Detective Sergeant David Landreth.

[324] From 12 to 14 January 1998, Amanda Brennan and Peter Wilson of ESR (amongst others), assisted the police in the examination. Ms Brennan's work involved examining *Blade* at Waikawa Bay and, when *Blade* was at Woodbourne, she was responsible for examining its interior. Mr Wilson focused on the exterior.

[325] Detective Landreth observed Ms Brennan conduct her forensic examination. When Ms Brennan took possession of an item, he recorded it, she placed it in a bag, and he then handed it to Detective Paul Merrett, the police exhibits officer.

[326] The tiger blanket was found on the forward berth in the cabin of *Blade* on 14 January 1998.

The scene examination of the tiger blanket

Trial evidence

[327] Detectives Landreth, Merrett and Rolton all gave evidence at trial, as did Ms Brennan.

[328] Detective Landreth, when asked about the steps taken to prevent contamination to *Blade*, explained that:

> Firstly, [we] decided Detective Merrett would not go on the boat at any time, [as] he was to set up an exhibits receiving area in the hangar a short distance from the boat, [and] would rec[eive] all exhibits from me in that position. Anyone else going on the boat, and it was only those other people I mentioned, they wore complete paper overalls, rubber gloves, … paper caps and also paper overshoes.

[329] Detective Merrett also explained his role as exhibits officer, whilst Detective Rolton discussed some of the steps he took when visiting the Hope family home.

[330] Ms Brennan, during her brief evidence in chief, explained that, when examining *Blade*, she was equipped with protective clothing to prevent any cross-contamination. She further explained how, step-by-step, she collected hairs and fibres from seat coverings, the floor and various surfaces.

Appeal evidence

[331] Consultant forensic scientist Sarah Thirkell was instructed by Mr Watson to carry out a basic assessment and review of the scene work undertaken by ESR scientists of *Blade* in 1998, and specifically in relation to the tiger blanket. The Crown did not require her for cross-examination, submitting that her evidence was inadmissible. We have considered her evidence and address its admissibility below.[80]

[332] Ms Thirkell's affidavit noted that, at the time, there was "very little, if any, guidance" in place for the initial retrieval of evidence from a crime scene. She accepted that the current more stringent policies were not in place in 1998 but she reviewed the scene examinations to ascertain "if these had been done robustly and

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[80] See below at [432]–[436].

effectively", and to assess whether the examination was sufficient and would be deemed appropriate by today's standards. Ms Thirkell was not provided with ESR's SOPs for scene examination, as at 1998, but said she expected adherence to best practice.

[333] Ms Thirkell considered that the scene examination appeared to have been methodical but she would have expected clear photographs of the scene and greater depth to the notes. Ms Brennan's five pages of notes did not meet the United Kingdom Accreditation Service RG201 or ESR guidelines in place at the time, being brief and lacking detail. While there was extensive recording of the items, details of the order of recovery did not appear to have been fully documented. There was no record of when personal protective equipment was worn or removed, or whether it may have been worn in police vehicles or at the operation base, prior to, or during, the *Blade* examination. Ms Thirkell said these matters should be considered as mechanisms by which hairs could have been transferred to *Blade*.

[334] Professor Robertson's evidence was that the handling and storage of the tiger blanket was significant in that it was possible for hairs to have been displaced or lost during its search and recovery. He also considered that ESR's paperwork lacked sufficient detail.

[335] Ms McElhinney levelled similar criticism. She observed that the tiger blanket was in the front berth with a sheet, two pillows and possibly clothes which could have provided a means for hairs to be transferred to the tiger blanket. She also pointed out that the tiger blanket was not referred to by Detective Landreth until 14 January 1998, by which time there had been considerable examination of *Blade*, including fingerprint examination and the removal of a number of items.

[336] Ms McElhinney concluded that it was not possible to determine how the Hairs may have been transferred to *Blade*, and that both direct and indirect transfer should be considered. The presence of the Hairs on the tiger blanket, she said, may not reflect their initial position, and should not be used to imply that Olivia had direct contact with the tiger blanket, or was on the bed, when the Hairs were deposited.

[337] Referring to the fact Detective Rolton and Ms Maggie Leask (a police media officer) had visited the Hope family home, Ms McElhinney said it was not possible to exclude the possibility that police staff transferred the Hairs to *Blade* or the tiger blanket. It was possible, she said, that Detective Rolton could have transferred the Hairs to the vehicle in which he travelled, to the police station, or to the operation base.

[338] Detective Rolton discussed his visit to the Hope family home on 10 January 1998. He collected a large number of samples of hair from Olivia's bedroom. He wore gloves but no other protective gear. The hairs were placed in a plastic snap-seal bag, sealed with brown tape and then placed in an outer brown bag at the address. On return to the police operation base, he secured the hair samples in the exhibit store until they were passed to Detective Merrett on 15 January 1998. Detective Merrett then took the samples (ST05) to be secured in the exhibit store at the Blenheim Police Station. ST05 was couriered to ESR on 19 January 1998.

[339] Detective Rolton and Ms Leask were the only staff who visited the Hope family home from the beginning of the inquiry up to, and including, 14 January 1998 when the tiger blanket was secured.

[340] Detective Rolton never visited the base at Woodbourne where *Blade* was secured and there is no record Ms Leask or any other person from the inquiry, apart from those involved in the *Blade* examination, did so. None of the *Blade* examination team visited the Hope family home.

[341] All the members of the *Blade* examination team had arrived at Blenheim on 12 January 1998, two days after Detective Rolton collected the reference hairs from the Hope family home and placed them in secure storage. Between 12 and 14 January 1998, the only occasions on which the *Blade* examination team may have been in proximity to Detective Rolton would have been at the daily conferences attended by upward of 30 to 40 staff.

Receipt of the tiger blanket at ESR

Trial evidence

[342] Ms Penelope Costello of ESR gave evidence about the receipt of the tiger blanket at ESR on 16 January 1998. The blanket was packaged in a clean sack that was sealed. On 19 January, visible hairs were collected using tweezers and the tiger blanket surfaces were also tape-lifted, any hairs being collected with tweezers. The hairs were then placed into two separate self-sealing plastic bags.

[343] Ms Costello and her assistant wore protective clothing, such as a lab coat and gloves, when opening any items. And, as fibres were an issue, Ms Costello said that they would, before opening any items, perform "negative control" tape-lifts on their own lab coats, in case fibres were attached. Ms Costello and her assistant provided hair samples for elimination purposes.

Appeal evidence

[344] Ms Vintiner responded to the criticism that the collection of hairs from the tiger blanket should have been undertaken on *Blade* to determine where on the tiger blanket a specific hair was located. She said this would have been a "near impossible" task due to the space restrictions as well as the size of the tiger blanket. Rather than risk any hairs being lost (or, indeed, transferring from one place to another on the tiger blanket), it was decided the appropriate course was for the tiger blanket to be packaged for examination at the lab. Ms Vintiner said that this was a very typical decision in these sorts of circumstances.

[345] Ms McElhinney said that, as a result of the scene examination and the method of hair collection, it was not possible to determine where on the tiger blanket a specific hair may have been located. But she recognised the impracticability of examining, and individually categorising, each of the hairs, given the large numbers of hairs that were recovered (approximately 390).

[346] Ms McElhinney said the collection methods used by ESR to collect debris, hairs and fibres were the standard methods, and are those used today, as detailed in the

SWGMAT guidelines. Based on the information in the ESR file, Ms McElhinney said the possibility of contamination of the tiger blanket within the Auckland Service Centre laboratory itself was likely eliminated.

[347] Professor Robertson commented that Ms Costello's examination notes gave no indication of the location of the hairs or the number of hairs on the blanket, saying the lack of detail was plainly inadequate. However, he went on to say that any failure by Ms Costello to follow best practice could not have resulted in contamination of reference and questioned hairs or otherwise impacted on the integrity of the forensic evidence relating to the hairs.

The IPCA Report

[348] The IPCA Report considered the following complaint:

> **DNA Contamination** – (Pages 33 – 34) – It is alleged that possible contamination of evidence occurred either by hairs recovered from a 'Tiger' blanket seized from Scott Watson's boat, Blade, and identified as belonging to Olivia, having been 'planted'; or that poor Police practices resulted in accidental cross-contamination.

[349] The finding was then summarised as follows:

> **Finding**: I find no evidence that police deliberately contaminated the evidence by placing Olivia's hairs on the blanket, either while the blanket and sample hairs were within the custody of Police, or once the exhibits had been sent to the laboratory. Nor is there any evidence of accidental contamination or 'secondary transfer' of this evidence.

[350] The IPCA was satisfied as to the chain of custody for both of the hair samples, as well as the tiger blanket, and that they were held secure by police and laboratory analysts throughout the investigation. It found that there was no obligation for police to count the hairs taken from Olivia's home, noting that guidelines discouraged such a practice as it would increase the risk of contamination. The IPCA found no evidence that the police deliberately contaminated the evidence by placing Olivia's hairs on the tiger blanket.

Our assessment

[351] As we have recounted, the trial evidence given by Detective Landreth was that Ms Brennan and all of the others on *Blade* wore complete protective paper overalls, rubber gloves, paper headcaps and paper overshoes. Detective Landreth, Ms Brennan and Ms Costello were all questioned about the steps taken to avoid contamination of *Blade* and at the ESR laboratory.[81] Ms McElhinney accepted that officers searching a crime scene were likely to be aware of the risk of contamination.

[352] The only two people who attended the Hope family home were Detective Rolton and the media officer, Ms Leask. Detective Rolton never went to Woodbourne to take part in the examination of *Blade* and nor is there any record of Ms Leask having attended. That means the possibility for transference arose at the base where police gathered or through the use of police vehicles by different police officers. However, the *Blade* examination team did not arrive until two days after Detective Rolton's visit to the Hope family home.

[353] We accept the Crown's submission that the possibility of transference in those circumstances is "so speculative as to be random guesswork".

[354] But in any event, the steps taken to avoid any cross-contamination were explained to the jury and it was for the jury to assess whether it was a reasonable possibility, having regard to all the evidence.

The possibility that on 7 March 1998 the questioned hairs were contaminated by Hairs 12 and 13 which were reference hairs

[355] We turn to consider the evidence addressing the possibility the procedures used by the ESR on 7 March 1998 could have resulted in contamination of the questioned hairs by the reference hairs, meaning Hairs 12 and 13 were actually reference hairs, not questioned hairs from the tiger blanket. As Mr Doyle confirmed to us, the possibility of contamination in the lab was "front and centre" in his report.

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[81] As a reminder, Detective Landreth was responsible for the lifting and examination of *Blade*, Ms Brennan was the person who removed the tiger blanket from *Blade*, and Ms Costello was at ESR.

[356] The reference hairs had not been received by the Auckland Forensic Biology Lab by 22 January 1998 when the ESR first examined the questioned hairs. The first batch of reference hairs were received on 27 January. However, the reference hairs were not removed from their packaging on that day and nor were the questioned hairs examined on that day. And, on 7 March 1998, Hairs 12 and 13 were individually packaged and sealed.

[357] It follows that any potential contamination could not have occurred either before or after 7 March. This was accepted by Mr Watson's experts.[82]

[358] The issue of contamination was framed as follows:

> Whether there was a reasonable possibility that the way in which samples were handled by ESR in the laboratory on 7 March 1998 meant that the two hairs the Crown said were located on *Blade* (YA69/12 and 13 [Hairs 12 and 13]) were in fact reference hairs seized from Olivia Hope's home.

Trial evidence

[359] On 7 March 1998, Ms Vintiner undertook an examination of the reference hairs in ST05 under a low-power microscope. She removed seven blonde to light-brown coloured hairs from the ST05 bag by making a few very small incisions with a sharp scalpel blade through the plastic surface and removing them using a pair of fine tweezers. She placed them into a smaller snap-seal plastic bag. The original ST05 bag was then put aside. Ms Vintiner did not seal over the pin pricks in the original ST05 bag because she was satisfied the bag would be sealed by putting it into an envelope.

[360] Ms Vintiner said she tried to keep the holes as small as possible, saying it was very important at all times to be conscious of the possibility of contamination between a reference sample and a questioned hair sample if the utmost care were not taken.

[361] Ms Vintiner moved on to considering reference hair samples of Ben, Sandy Watson and her children. Given the hairs recovered from the tiger blanket were predominantly brown to dark-brown in colour and that there was reasonably good

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[82] Ms McElhinney accepted that contamination could not have occurred on 22 January 1998, and she also accepted that it could not have occurred after 7 March.

agreement in hair colour between Ben and Mr Watson, Ms Vintiner decided to concentrate on the reference sample from Olivia. She first satisfied herself that ST05 was a representative sample of Olivia's head hair, undertaking the process discussed at [142] above. Her conclusions were "firm[ed] up" by the hair comparisons she undertook in May and June 1998, discussed at [144]–[151] above.

[362] Ms Vintiner then prepared the area for examination of the questioned hairs to address the potential risk of contamination — replacing the old white bench paper with clean white bench paper, checking to make sure there were no hairs on her lab coat and changing her gloves. She went back to the original two snap-sealed bags that contained the hairs from the tiger blanket and slowly sifted through them for the purpose of locating blonde hairs that could be compared with Olivia's reference sample. She had not done this in January because she did not have reference hairs from Olivia at that stage. In January, she had been looking for hairs with roots whereas on 7 March she was looking for "correspondence" with Olivia's reference hairs. Given she was working through 400 hairs, she conducted the search twice and, on the second sift, located two blonde hairs as well as six brown hairs, all of which were then placed in separate sealed snap-seal bags. She compared the selected hairs with Olivia's reference samples under the stereo low-power microscope and considered they fell within her hair range.

[363] In cross-examination, Ms Vintiner explained the need for caution when dealing with the hairs and the risks involved:

> [Ms Vintiner:] With regards to the examinations of hair samples, if care is not taken in your actual examination procedure, then you could create a situation where a recovered hair sample is contaminated by a reference hair sample.
>
> …
>
> [Q:] So the risk is that in this particular case, for example, that hair recovered from Olivia's bedroom inadvertently gets mixed up with the hair recovered from the blanket?
>
> [Ms Vintiner:] Yes.
>
> [Q:] So all these various procedures and protocols that you talked about [were] put in place to guard against these such things happening?
>
> [Ms Vintiner:] Yes.

> [Q:] There is also another risk, isn't there, and that is the risk that can relate to the cross-contamination of the extracted DNA from various samples?
>
> [Ms Vintiner:] Yes there is.

[364] Ms Vintiner was cross-examined about the risk that a hair recovered from Olivia's bedroom was inadvertently mixed up with a hair recovered from the tiger blanket. She was taken in detail through the process of recovering hairs from ST05.

[365] Trial counsel then referred Ms Vintiner to an additional cut in the original ST05 bag, approximately one centimetre in length in the bottom right-hand corner. Ms Vintiner had not seen this previously but confirmed the cut could only have been made by herself. She conceded she was unable to exclude the possibility reference hairs may have contaminated the questioned hairs, agreeing that the jury should consider that one theory for the presence of Hairs 12 and 13 amongst the questioned hairs was that they escaped from the original ST05 bag during processing and handling. She could not completely exclude the possibility it may have happened during her examination but thought it unlikely.

[366] Two explanations were put to Ms Vintiner: either Hairs 12 and 13 were collected from the tiger blanket and remained in the bag through the process until 7 March, or they escaped from ST05 during the handling process and Ms Vintiner mistakenly assumed they came from the tiger blanket. Ms Vintiner acknowledged the latter explanation needed to be considered.

[367] It was also put to Ms Vintiner that the jury should have regard to the fact that, as a trained hair examiner, she looked at the contents of the questioned hairs on 22 January 1998, knowing she was looking for long blonde hairs. Ms Vintiner agreed, saying she was aware from television that Olivia had pale coloured hair.

[368] Ms Vintner was then asked, when considering the two possibilities mentioned at [366], whether the jury would be entitled to have regard to her examination of the contents of the bag on 22 January and the fact no blonde hairs were isolated by her on that date for any further work. Ms Vintiner responded that she was not surprised, as her examination of the sample on 22 January was "very minimal". She did not, on that date, undertake the sifting process which was carried out later. She tipped the

hairs onto filter paper and looked at them very briefly. And, of the 400 or so hairs she later established were present, she targeted the first 11 "decent" ones she saw and put the samples back into their bags.

Appeal evidence

Criticisms of Ms Vintiner for having reference and questioned hairs present and examined in the same room, on the same bench

[369] In his first report, Mr Doyle said Ms Vintiner's examination of the reference and questioned hairs in the same room, on the same bench, and on the same day (7 March 1998) was contrary to the applicable standards in the SWGMAT guidelines.

[370] Ms Vintiner understands the SWGMAT guidelines to require separation by time or location, or both. She therefore considered her examination accorded with the guidelines in that the questioned and reference hairs were examined at different time periods, with those periods separated by an interval which included decontamination.

[371] In his third report, Mr Doyle accepted Ms Vintiner's interpretation of the SWGMAT guidelines and that his was wrong. SWGMAT allowed for separation in either time or location.

[372] The SWGMAT guidelines are silent on the extent of the requisite "time" separation. Ms Crawford suggested that the three-hour separation was "poor practice" by current standards. While current standards might be of some interest, ESR procedures cannot be criticised by reference to standards which were not in place at the relevant time.

The possibility that Hairs 12 and 13 were reference hairs and not questioned hairs from the tiger blanket

[373] Mr Doyle raised the possibility that, in addition to those hairs removed with the tweezers, others may have been inadvertently removed from ST05. In this scenario, reference hairs remained, and were retained, unseen somewhere on the bench or on clothing (with Ms Vintiner's unchanged laboratory coat being a favoured candidate). He said he was not suggesting the scenario was likely, and indeed

concluded that contamination was unlikely. But it was possible and would explain why, Ms Vintiner knowing Olivia's hair was blonde, Hairs 12 and 13 were not identified during the initial examinations. Referring to the mtDNA testing of Hair 12, Mr Doyle said that, if Hair 12 is the hair of a maternal relative, such as Olivia's sister, Amelia, it would lend support to the proposition that Hair 12 was a contaminating reference hair from ST05.

Contamination risk from incisions in the original ST05 bag on 7 March 1998

[374] Ms Vintiner said the small incisions she made into ST05 to remove the seven hairs were only a few millimetres in length. She made the point that hairs naturally adhere to plastic due to static electrical charge and noted Ms McElhinney's agreement that hairs may not readily fall out because of this. Ms Vintiner did not believe her sampling strategy of making incisions in the original ST05 bag posed a risk of contamination.

[375] Ms Vintiner explained that the larger original ST05 bag was placed in a brown envelope and tamper sealed. The sub-sample ST05 bag containing the seven hairs was put to one side, away from the examination area.

[376] The reference hairs in ST05 were never counted. Nor had the questioned hairs taken from the tiger blanket on 19 January 1998 been counted as at that time. Ms Vintiner accepted that, if the reference hairs in ST05 and the questioned hairs had been counted before 7 March 1998, there would have been reassurance that Hairs 12 and 13 were not reference hairs.

Steps between examination of the reference hairs from ST05 and hairs recovered from the tiger blanket

[377] After Ms Vintiner put the snap-sealed ST05 bag to one side, she continued with her examination of three other reference samples.

[378] As she had explained to the jury, she then decontaminated her work area as she moved to examine the questioned hairs. She changed the white bench paper to new bench paper, visually checked her laboratory coat, and changed her gloves. She then

wiped down the bench area, as well as the utensils (such as the tweezers), with bleach and/or ethanol to remove any trace material which may have adhered to surfaces.

[379] Ms Vintiner said that, during the visual check of her lab coat, she was specifically looking for hairs and that any adhering hairs would have been removed with adhesive tape. She accepted it was difficult to see blonde hairs on a lab coat but said, in her opinion, her coat was protected from potential contamination by the method she used to remove and repackage the hairs from the original ST05 bag. This method, she said, meant there was no opportunity for blonde hairs to transfer to her lab coat from the original ST05 bag. She pointed out that she had not inserted her arm into the top of the opened bag.

[380] Ms Vintiner then examined nine other hair samples described as recovered from *Blade*, each sealed in a plastic bag.

Examination of the hairs from the tiger blanket

[381] Ms Vintiner then turned to the hairs recovered from the tiger blanket. Her written record confirms that at least three hours passed between the examination of the reference hairs in ST05 and the examination of the questioned hairs from the tiger blanket (which is when Hairs 12 and 13 were found).[83]

[382] Ms Vintiner first examined YA69/1 through to YA/11 (Hairs 1–11) by low-power microscopy, with all hairs still being contained in their individual snap-sealed bags. She compared each of these hairs to the reference hairs.

[383] Ms Vintiner then examined the remaining questioned hairs in the original two YA69 bags (taken from the tiger blanket) for the purpose of locating hairs sufficiently different from Sandy Watson's reference hair sample and those of her children, and which might have been within the range of characteristics observed in Olivia or Ben's reference hair samples. It was during the second screen that she located two blonde head hairs, one approximately 15 centimetres long, Hair 12, and the other approximately 25 centimetres long, Hair 13. She also located six brown hairs with

[83] Ms Vintiner has a written record of the time the examinations took and the estimate is what proportion of the total time would have passed.

roots that might have provided an nDNA profiling result. Each hair was put into an individual snap-sealed plastic bag.

Decontamination precautions

[384] Mr Doyle accepted Professor Robertson's opinion that it was clear Ms Vintiner and Ms Costello were aware of the need to take necessary precautions to minimise the potential for contamination. He made the point that standards were very different in 1998 and that full barrier clothing would be worn today. He also accepted that hairs are visible but noted Ms Vintiner often made the point that blonde hairs are difficult to see against a white background. He agreed that, as an experienced forensic scientist, Ms Vintiner was aware of that and alive to many of the issues he raised. Mr Doyle accepted that Ms Vintiner said she checked her lab coat for hairs but observed that "we're all prone to human error". He said that if Hairs 12 and 13 were in fact reference hairs then part of the explanation would have to be that she failed to see them.

[385] Ms Vintiner explained to us the technique she often used to avoid getting hairs on her lab coat:

(a) The original sample bag is placed flat on the clean, decontaminated work area. There is also the labelled sub-sample bag.

(b) The hairs in sample bag are then observed (remaining within the bag) and selected. To remove the selected hairs, small incisions are made to the left of each, with a sharp scalpel.

(c) The scalpel is then placed down, and the snap-seal on the sub-sample bag is opened and held to create a round/oval opening.

(d) With sleeves up, tweezers would then be inserted into the small incision in the sample bag, moving the hair from right to left, to get it out, and then into the sub-sample bag.[84]

(e) As hairs naturally adhere to plastic, the hair would cling to the side of the sub-sample bag when released from the tweezers.

(f) Having released the tweezers, she would check to ensure the hair had dropped.

[386] Ms Vintiner said, when the process was completed, the tweezers would be placed down, and the snap-seals on the bags would be closed.

Lab coat

[387] Ms Vintiner did not swap lab coats when she went from examining one set of hairs to the other. She was referred to an article titled "The persistence of human scalp hair on clothing fabrics" from 2002 published in *Forensic Science International*.[85] Its authors included Professor Robertson. The paper discussed an experiment testing persistence on a number of substances, including cotton, polycotton, cotton/acrylic, as well as polyester and wool, using hairs 15 centimetres long.[86]

[388] The abstract of the 2002 article reads:[87]

> The rate of loss of hairs from non-woollen fabrics during normal wear was found to follow an exponential decay curve. In contrast, the rate of loss from the woollen garments was quite linear, indicating a constant, even loss, and thus suggests that a different process is involved in the persistence of hairs on woollen garments from that on non-woollen garments. The speed at which hair was lost from fabrics decreased in the order polyester, cotton/acrylic, polycotton, cotton, smooth wool, rough wool, so that wool gives the best chance of recovering samples of hair.

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84 Ms Vintiner said that some scientists prefer to open the top of the bag and then put their arm in and pull the hairs out that way. In this case, she said that such an approach was a contaminating risk because there was a good chance hairs would attach to her sleeve. She said that, if she had used that method, then it would have been prudent to change her laboratory coat, given the greater risks.

85 J Dachs, IJ McNaught and J Robertson "The persistence of human scalp hair on clothing fabrics" (2003) 138 Forensic Sci Int 27.

86 At 29.

87 At 27.

[389] The test conducted in relation to polycotton related to lab coats found:[88]

> The results showed that hair persisted longest on the cotton t-shirt (maximum of around 5 h[ours]), then the polycotton laboratory coat (maximum 4 h[ours]) …

[390] Ms Vintiner, having been referred to various parts of the paper, noted that, after three hours, more than 90 per cent of hairs would have been lost from the lab coat and, at four hours, none were detected.

[391] Professor Robertson said changing a lab coat was not necessarily required. However, it would have been important, at least visually, to ensure there were no hairs left either on the examination bench or inadvertently transferred onto the lab coat. He said the SWGMAT guidelines allow considerable flexibility as to the examiner's preferred procedure, so long as it incorporates the general guidelines as to proper evidence handling and correct use of equipment.

[392] Professor Robertson assessed the risk of hairs coming out of the holes in the original ST05 bag as very minimal but said it would have been better to seal them. He said there was no doubt that standards in forensic evidence recovery and handling have become more onerous since 1998. But the evidence of Ms Vintiner suggested compliance with the SWGMAT guidelines. That, in turn, meant the likelihood of cross transfer should have been negligible. Although all of Ms Vintiner's examinations were conducted in the same examination room, and probably on the same table, this was not an unusual practice. And so, having referred to Ms Vintiner's affidavit evidence, Professor Robertson concluded that, provided she followed the procedures she described, the possibility of contamination was "very small".

[393] Ms McElhinney confirmed that hair examiners were always aware of contamination issues (Ms Vintiner had trained Ms McElhinney in hair examination). She agreed with Professor Robertson that, due to the small size of the cuts, it was highly unlikely that hairs would have fallen out of the bag and that the likelihood of cross transfer in the laboratory setting should have been negligible.

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88 At 33.

Contamination risk from unexplained slit in the original ST05 bag

[394] Ms Vintiner explained that her responses in cross-examination at the trial were made in a context where she was unaware of the unexplained cut in the original ST05 bag and was unable to exclude the possibility reference hairs may have contaminated the questioned hairs. Ms Vintiner has since determined, by reference to ESR records (specifically, the notes of Ms Costello), that the original ST05 bag was submitted to ESR in a sealed brown bag and that, on 19 January 1998, Ms Costello placed the original ST05 bag into a new sealed brown envelope, where it was stored until Ms Vintiner's examination. Ms Vintiner said that she or Ms Costello would have made a note had there been any damage to the original bag.

[395] However, before us, Ms Vintiner accepted that she could not say for certain that the cut was not present on 7 March and she could not exclude it as a possibility.

[396] Ms Vintiner said that, if the unexplained cut were a possible source of contamination, the cut would need to have been made before the reference hairs were placed into the ST05 sub-sample bag on 7 March 1998. After that point, the original ST05 bag was stored inside a sealed brown envelope and was not used for any comparison work. The original ST05 bag was stored in a sealed paper envelope before and after Ms Vintiner examined it.

[397] Having considered her precautions and processes, in Ms Vintiner's opinion it is extremely unlikely that Hairs 12 and 13 originated from the original ST05 sample bag of the reference hairs from Olivia's bedroom. If Hairs 12 and 13 were reference hairs, in order to have become mixed with the questioned hair samples, they would have had to: overcome the static charge of the inside of the original ST05 bag; travel unnoticed through a one centimetre cut in the original ST05 bag which had not been noted by two experienced examiners, noting Hairs 12 and 13 were approximately 15 and 25 centimetres long; and persist in the examination area during the examination of three further reference hair samples, the decontamination of the work area (including the changing of the bench paper), the examinations of nine other questioned hair samples from *Blade*, and the examination of the 11 hairs from YA69, before both Hairs travelled into the sample of the remaining hairs from YA69 when those hairs

were emptied onto filter paper. 23 samples in total were examined between ST05 and YA69.

[398] Ms Vintiner said, if the cut occurred at the ESR laboratory, then it most likely occurred when she was preparing the samples for defence counsel to examine, in mid-1999. She explained she would have removed the original ST05 bag from its brown storage envelope by cutting the brown paper envelope. That would explain why there was no record of anyone noticing the cut and referencing it in notes.

[399] In her report, Ms McElhinney referred to Ms Vintiner's concession at trial that Hairs 12 and 13 could have originated from the reference hairs from Olivia rather than the tiger blanket. Ms McElhinney observed that this concession was based on the cut to the packaging of ST05 being present, but unnoticed, on 7 March 1998. This could indicate, according to Ms McElhinney, that Ms Vintiner's examinations were inadequate, the cut was very difficult to notice or that it was made at a later date.

[400] Ms McElhinney was asked about Ms Vintiner's evidence as to why she does not consider contamination occurred on 7 March. Ms McElhinney agreed that, if Ms Vintiner's recollection was correct and the steps she said she took were accurate, then that would have minimised the possibility of contamination.

Submissions

[401] Mr Chisnall accepted that potential for contamination was "well-ventilated" at trial but submitted that the evidence available now provided an enhanced picture about the risk of contamination.

[402] In Mr McCoubrey's submission, there was no real (in the sense of realistic, or more than purely theoretical) possibility of contamination. The possibility was entirely speculative and against the weight of the expert evidence.

Our assessment

[403] Although Mr Watson contends Hairs 12 and 13 may have been reference hairs that escaped from the original ST05 plastic bag, we find the possibility of contamination on 7 March to be extremely unlikely:

(a) The method of extracting hairs from the original ST05 bag minimised the risk of hairs escaping by virtue of: the snap-seal not being opened, the tiny incisions made, the targeted removal of specific hairs by tweezers, the length of Hairs 12 and 13 (15 and 25 centimetres respectively) and that hairs naturally adhere to plastic via static electrical charge.[89]

(b) The method minimised the risk that any hairs adhered to Ms Vintiner's gloves or lab coat and she confirmed that a visual check showed no hairs had stuck to her.

(c) Upon removing the hairs, the original ST05 bag, with the remaining hairs, was sealed and placed in an outer envelope, and placed in storage. The snap-sealed ST05 sub-sample containing the seven blonde hairs was put to one side away from the main examination area before any questioned hairs were dealt with. This complied with the applicable ESR guidelines at the time,[90] the SWGMAT Guidelines[91] and the ASCLD/LAB Evidence Control Standards Criteria.[92]

(d) The process complied with the SWGMAT guidelines which provided that samples should be dealt with "in different locations, at different times, or both, to prevent contamination". Here, the examinations were

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89 The Crown also pointed out that Ms McElhinney, a witness for Mr Watson, agreed that hairs inside of a plastic bag, being subject to a static charge, might not readily fall out.

90 Which provided that "[t]he use of adhesive tapes on plastic bags may not be sufficient; such items should preferably be heat sealed *or sealed in paper outer containers*." (Emphasis added.)

91 Which provide that a primary container (here, the original plastic ST05 bag) may be secured within an envelope or paper bag. Professor Robertson said, even if that approach did not meet the SWGMAT guidelines to seal "open edges", he concluded the risk of hairs falling out of the small cuts in the ST05 bag and becoming a potential source of cross transfer was "highly unlikely".

92 Which classify an item as "properly sealed" if its contents cannot readily escape and if the container cannot be entered without obvious alteration.

conducted in the same location, but at different times, with the examinations being separated by decontamination procedures: decontamination of the workbench, including changing the bench paper and Ms Vintiner's visual check of her coat and gloves for hairs, as well as wiping down utensils. And, as Professor Robertson explained, there is not the same risk of contamination with visible trace evidence such as hairs as there is with trace evidence that is barely visible, or not visible at all (such as DNA).

(e) If Hairs 12 and 13 had escaped from the original ST05 bag, they would have had to persist in the examination area until the examination of the questioned hairs.

[404] Professor Robertson considered Ms Vintiner's evidence made it clear she was well aware of the need to take necessary precautions to minimise the potential for contamination. He concluded that, assuming she took the procedures she described to avoid contamination, "there was a negligible opportunity for hairs to have been inadvertently left on a work bench and available for potential cross transfer to other items".

[405] Contamination was a possibility as Ms Vintiner accepted before us, as she did at trial. But the short point is that it was a very unlikely possibility and, in any event, a possibility that is even better understood now than it was at trial.

[406] The additional cut in the ST05 bag caught Ms Vintiner by surprise at trial but the position has since been clarified. The evidence, in our view, suggests it is more likely than not the cut did not occur on 7 March, but rather much later when Ms Vintiner was preparing the samples for use by the defence. Viewed today, it is *less likely* than it was at trial that the cut in the bag had been made on 7 March and therefore less likely that any reference hairs escaped from ST05 and became combined with the questioned hairs. But the position before the jury was that Ms Vintiner could not exclude the possibility the cut was present on 7 March.

[407] As we have said, the only time contamination in the lab could have occurred was 7 March.[93] That possibility was before the jury and was of more concern then than it is now.

Relevance of ESR's examination of the questioned samples on 22 January 1998

[408] The questioned hair samples recovered from the tiger blanket were first examined by Ms Vintiner on 22 January 1998 when she screened the hairs for roots that might provide a DNA result. The hairs were contained in two small snap-seal plastic bags and the bulk of them was darkly coloured. It was later determined there was a total of around 400 hairs contained in the two bags, of which five were blonde.

[409] Due to the large number of hairs present in the two snap-seal bags, each bag was emptied, one bag at a time, onto clean white filter paper, and the contents were sifted through. Ms Vintiner emptied the first bag and selected one hair. And, after assistance from a technician, a total of 11 hairs (later determined to be brown and red-brown in colour) with roots suitable to attempt DNA testing were selected. They were placed in individual snap-seal plastic bags and labelled YA69/1 through to YA69/11.

[410] When she gave evidence before us, Ms Vintiner was challenged about the fact she did not see any blonde hairs on 22 January. She said she was not surprised, given the very short time she spent looking at the exhibit and that it was difficult to see blonde hairs when they are in a group of 400 brown hairs. She explained the purpose of the examination on 22 January 1998 was to detect the presence of hairs with intact roots that had a growth phase indicating they were worth attempting nDNA testing. While slightly surprised Ms Vintiner did not focus only on blonde hair on 22 January, Ms McElhinney did not view the examination conducted as technically "wrong", as its purpose was simply to find root hairs suitable for analysis.

[411] Ms Vintiner clarified that her technician, Karen Lee, was also involved. Ms Vintiner explained she started the search for hairs with roots and then Ms Lee took

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[93] See above at [357].

over. Ms Vintiner accepted that, at trial, she said she had done it but said that this was on the basis that "technicians [are regarded as an] extra pair of hands".

[412] At trial Ms Vintiner had confirmed she had in mind Olivia's hair colouring, but, when asked before us, she could not say for certain whether she told the technician that, saying she would have directed the technician to look for hairs with roots, as that was the purpose of conducting the examination. She was not sure whether she "emphasised" that Ms Lee should also have been looking for blonde hairs.

[413] Ms Vintiner confirmed there were no notes recorded by Ms Lee but pointed out that there were sample bags with Ms Lee's initials on them. She accepted, however, that she did not explain to the jury that there were two people conducting the examination.

[414] Professor Robertson agreed that work carried out by a technician should be recorded but observed that it is often only the reporting scientist who will give evidence and that they may not mention they had been supported.

Submissions

[415] Mr Chisnall submitted that a key component of the issue about possible contamination in the ESR lab on 7 March was that Hairs 12 and 13 were not seen on 22 January. He also suggested the fact Ms Vintiner used a lab technician that day placed a "completely different complexion" on matters and, in his submission, if that evidence had been before the jury (which would have meant calling the technician) it would have enabled the jury to reach a different conclusion, or at least for the defence to put to the jury that there were two sets of eyes looking. In his submission, that lent weight to the contamination point and was something only the jury could resolve.

[416] This issue was also relevant, in Mr Chisnall's submission, to one of the central issues in the case: ESR's poor record keeping and failure to comply with processes. There were no ESR notes to disclose that Ms Vintiner was assisted by a technician on 22 January and she did not say that she was assisted by a technician when conducting the examination that day. This, Mr Chisnall argued, meant a critical witness was missing, which in itself raised a fair trial issue. It was also relevant to Mr Watson's

right to offer an effective defence and his right to examine witnesses. The jury, he submitted, did not get the full picture of what happened.

[417] In Mr Chisnall's submission, these features made it more possible that Hairs 12 and 13 were not present on 22 January and, if they were not present, then that made it more possible contamination occurred on 7 March.

[418] For the Crown, Mr McCoubrey pointed out that it was known at trial that technicians were involved in the laboratory work. In the context of trial counsel's cross-examination of Ms Vintiner on the possibility that the DNA testing had resulted in contamination between the various hair samples, the following exchange took place:

> [Q:] And how many people are sort of involved in the process over that period, is it just exclusively one person or are there assistants?
>
> [Ms Vintiner:] There are a team of analysts which include scientists and technicians. Most of the work is undertaken by technicians. …
>
> [Q:] So as a general rule, a lot of the primary work, the laboratory work, is undertaken by a technician with a scientist providing assistance or interpreting the data and all that sort of stuff, is that how we should see it?
>
> [Ms Vintiner:] Yes, providing direction when required and interpreting the data.

[419] Ms Vintiner was also asked to approximate the number of people who were in the team of assistants and scientists. She responded:

> If I think in current day terms because the staffing situation has actually increased since a year ago — but we have five scientists who report case work, and I think about the same number of technicians.

Our assessment

[420] The first search of hairs recovered from the tiger blanket on 22 January involved a lab technician carrying out at least some of the work. Mr Chisnall sought to elevate this into a fair trial issue.

[421] We consider at a minimum it emphasises Ms Vintiner's less than ideal record keeping. It is not, however, evidence of bad science. We know there could not have

been any contamination of the questioned hairs by the reference hairs that day because the reference hairs had not been received by ESR by then.

[422] The presence of a technician arguably improves the Crown position from that at trial as it helps explain why no blonde hairs were selected on 22 January. That is because, whilst Ms Vintiner had in mind she was looking for blonde hairs, she was not certain she conveyed that to the technician, who was instructed to look for hairs with roots suitable for DNA analysis. And of course Ben, who had dark hair, was also missing. So it was not the case that only blonde hair was relevant. Also, as Ms Vintiner said at trial, as at 22 January she did not have any reference hairs to compare with the questioned hairs. It appears reasonably likely Ms Vintiner did not instruct the technician to be on the lookout for blonde hairs but simply instructed her to select hairs suitable for DNA testing.

[423] However, we accept it is possible that Ms Vintiner did instruct the technician to look for blonde hairs and that, if she had been a witness at the trial, the technician might have said she did not see any. That then would have added weight to the defence submissions at trial that no blonde hairs from the tiger blanket were selected because there were none, and they were only found on 7 March as a result of the questioned hairs having been contaminated by the reference hairs. That puts the omission of this evidence at trial at its highest.

[424] We do not consider this a fair trial issue. A technician is regarded as an extra pair of hands acting on directions. Ms Vintiner accepted before this Court that it would have been better had she said exactly who pulled which hair out of which bag. We do not know the extent of pre-trial disclosure in respect of the involvement of technicians. But it was not a secret that technicians were used. This was made clear at trial and the experts advising Mr Watson would also have known this. So it was perfectly possible for this to have been dealt with at trial. Appellate counsel were also aware of this, as Ms Vintiner referred to a technician being involved on 22 January in her affidavit for the appeal provided almost two years before the hearing.

[425] In closing the defence's case, Mr Watson's trial counsel emphasised to the jury that contamination was reasonably possible, referring to the fact Hairs 12 and 13 were not spotted in January 1998:

> … [Ms Vintiner] told you about the caution that would need to be taken and reasons for it. The risk is this, she told you: that inadvertently hairs from the reference sample get mixed up with the hairs from the blanket. The risk is this; and is this what happened in this particular case? Is it possible … that these hairs came out of that bag ST05, during the course of the earlier examination of it, attached themselves to Ms Vintiner's clothing, or were left on the table or something, and when YA69 was examined later in the day, there they were?
>
> Now, [Ms Vintiner] told you, ladies and gentlemen, this was something that you as a jury would need to think about. She accepted that. More than that, she told you that, in doing that, you were entitled to take into account the fact that she was an experienced hair examiner and hadn't seen these two hairs at the time of the earlier examination in January 1998. It is a matter entirely for you, because it's a matter of fact, but if there is a reasonable possibility that there was an inadvertent laboratory transfer of those two hairs from Olivia's reference samples ST05, from her bedroom, to hairs YA69 bag from the blanket, then really the hairs can be forgotten about. Because they got there, if you consider that to be a reasonable possibility, inadvertently in the laboratory.

[426] The jury was well appraised of the risks of lab contamination. The evidence extensively canvassed above shows the possibility of contamination of the questioned hairs by reference hairs on 7 March (the only time it could have occurred) was extremely unlikely. Although the involvement of a technician on 22 January was not highlighted at the trial, in the context of all the other evidence addressing the possibility of lab contamination, we regard the issue as being of marginal significance only.

Admissibility of new expert evidence relating to the Hair evidence

[427] Before we leave the evidence about the Hairs, we turn to address the admissibility of the evidence about it tendered for the purposes of the appeal (despite the fact we have extensively referred to the new evidence).

[428] Mr Chisnall submitted that it was plainly in the interests of justice to admit the evidence under the test in *Lundy*,[94] and having regard to the less rigorous approach

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94 *Lundy* (PC), above n 38, at [120].

generally taken in cases including the prerogative of mercy, as we discussed above.[95] He submitted the freshness criterion was met in respect of:

(a) The evidence of Ms McElhinney addressing transference. In particular, the evidence emphasised the cautious approach required in relation to evidence about the location of a small numbers of hairs when social contact was a plausible explanation for their presence at the crime scene. More fundamentally, it brought into sharp relief whether Ms Vintiner adequately conveyed to the jury that transference was a "reasonable explanation" for the finding of the hairs.

(b) The evidence from Mr Doyle and Dr Gunn which challenged Mr Bark's trial evidence and which "demonstrated" that the mtDNA result was redundant and the Crown therefore overstated its strength.

[429] The hair ground was the sole basis of the Reference.[96] Mr Doyle's two reports were expressly referred to in the Reference.[97] Nevertheless, Mr Doyle confirmed that, when he wrote them, he was unaware of the assistance Mr Watson had at trial and gave no consideration to what might be new or fresh.[98] Mr Doyle acknowledged he knew Mr Watson's trial lawyers had access to experts, although he was aware of one only, not the four of them. He could not, however, dispute that the topics addressed by those experts were generally similar to the topics that emerged in his own reports.

[430] Mr Chisnall conceded Ms Levy's affidavit established that Mr Watson's experienced trial counsel were thorough and careful in their preparation, and alive to most of the concerns dealt with in the evidence filed on appeal. Trial counsel secured expert advice which was deployed during cross-examination of the Crown's witnesses.

[431] Strictly speaking, the matters raised in Mr Doyle's reports, and indeed the other evidence tendered on behalf of Mr Watson (and on behalf of the Crown in reply) does

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95 Above at [58].
96 The Reference, above n 1, at cl 6.
97 At cl 5(4).
98 The Crown makes the point that the foundational evidence of Mr Doyle, on which the other expert evidence builds, was not originally prepared for the purposes of the appeal, and that this explains to a large extent why it is as broad as it is.

not satisfy the freshness criterion. It does not meet the heightened threshold discussed in *Lundy*, where the Board held that the finality principle must give way when an appellant presents credible and cogent scientific evidence that plausibly counteracts the Crown's case at trial, regardless of whether it is fresh.[99] As our detailed analysis makes clear, all the issues with the Hair evidence of any significance were raised at trial and subject to submission and analysis. While a strict application of the law on the admission of new evidence on appeal would suggest none of the appeal evidence relating to the Hair evidence is admissible, the context of the Reference and the reasons for it make our approach of considering that evidence in detail unavoidable.

Admissibility of Ms Crawford and Ms Thirkell's evidence

[432] However, we will comment specifically on the admissibility of Caroline Crawford and Sarah Thirkell's evidence given the Crown's submissions in that respect.

[433] Ms Crawford sought to inform the Court of "the arguably fallible aspects of Ms Vintiner's laboratory analysis" by comparison with various quality standards and guidelines. But she did not attempt to establish whether any non-conformity actually increased the risk of contamination in this particular case. It was therefore not substantially helpful because there was better evidence available on the actual risk of contamination in this case. Ms Vintiner's detailed account of the steps she took to avoid contamination and why, was critiqued by experts, including others called by Mr Watson.

[434] Ms Thirkell's evidence highlighted alleged "deficiencies" in Ms Brennan's documentation of the scene examination of *Blade*. The blanket had been in situ on *Blade* for a total of 14 days before Ms Brennan examined it. Ms Thirkell concluded there was a chance Hairs 12 and 13 had originated from another location on *Blade* and been redistributed to the tiger blanket during that period.

[435] As the Crown pointed out, Ms Thirkell's core conclusion did not assist. The crucial question for the jury was whether Olivia and Ben had been present on *Blade*. The presence of Hairs 12 and 13 *anywhere* on *Blade* tended to support a finding that

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99 *Lundy* (PC), above n 38, at [128].

they had been. The scene on *Blade* could not have been preserved from the time of the alleged crime given that *Blade* was seized on 12 January 1998, by which time Mr Watson had been living on it for nearly two weeks and had extensively cleaned and painted it.

[436] As the Crown submitted, this appeal is not an inquisition into the examination of *Blade*, the processes used by police and ESR, or the subsequent testing of the Hairs. The evidence of Caroline Crawford and Sarah Thirkell was undoubtedly relevant to the topic of best practice in scientific examinations. However, there was no reasonable possibility a more favourable verdict would have been reached had the evidence been before the jury. It was not relevant to whether or not a miscarriage of justice occurred. Not only was the evidence not fresh but it was not cogent and was therefore strictly speaking inadmissible.

The Judge's directions on the Hair evidence

[437] The final topic we must address in this Part I is the criticism of the Judge's directions to the jury on the Hair evidence. This issue was framed as follows:

> Whether the Judge's directions to the jury regarding the relevance of contamination and transference were adequate. It is contended that there [was] a series of interlinked errors. First, the Judge did not remind the jury of the Crown's concession that transference was "possible". Nor did the Judge correct the Crown's erroneous submission that the jury had to be sure that transference was "probable". Second, [the Judge] effectively told the jury that it could accept that the scientific evidence proved that the two hairs belonged to [Olivia] unless transference or contamination were "plausible". The Judge did not expand on what he meant by this term. Third, it is submitted this was an exceptional case in which the Judge was required to provide a direction that the Crown had to prove the provenance of the Hairs beyond a reasonable doubt.

[438] While the issue was so framed, counsel's submissions were more wide-ranging, involving allegations that the Crown prosecutor inverted the onus of proof, which was not corrected by the trial Judge, and raising other concerns with how the Crown prosecutor addressed the issue of transference. As the criticism begins with the Crown prosecutor's closing, we start there.

The prosecutor's closing and alleged fair trial issues

[439] Mr Chisnall criticised the Crown's closing for emphasising that Mr Watson had not called experts, a point which Mr Chisnall noted was linked to the assertion that there was no evidence of contamination in the laboratory. The prosecutor said:[100]

> … we have, in my submission to you, some scientists who were in every case [Ms] Vintiner, Mr Wagner, [Ms] Tully [and Mr] Bark, all patently careful thorough scientists with considerable experience and authority and they didn't overstate the position, they were straight up about it. And so there are five separate distinct scientific processes, each one of them leading to conclusion that those hairs are Olivia's. Now there hasn't really been any challenge to the science by the defence at all. They didn't call any evidence to contradict it. The cross examination of [Ms] Vintiner suggested there was some problem perhaps with a snip in the plastic bag containing the hairs. That was contained in another bag and there was no evidence of any contamination that's likely to have affected this. … And so it's the Crown submission to you that on any scientific and commonsense view of the matter you are driven to the conclusion that these two hairs on the blanket are Olivia's.

[440] Mr Chisnall submitted that this issue must be viewed through a fair trial lens. While Mr Watson's trial lawyers did not enter the arena unequipped to challenge key aspects of the Crown's expert evidence, the Crown prosecutor's emphasis on the absence of defence evidence undermined that approach, and largely made the concessions secured in cross-examination redundant. Mr Chisnall contended that the Crown prosecutor's submission that Mr Watson had failed to mount a challenge to the scientific evidence was not accurate, inverted the onus of proof, ignored the right to silence, was illogical, and did not reflect the careful cross-examination conducted by trial counsel.

[441] We do not consider the Crown prosecutor's submission was unfair in the ways alleged. The Crown prosecutor did not say there had been no challenge to the evidence but that there had not "really" been any challenge "to the science". We interpret the submission as being to the effect that the actual results were not challenged or contradicted by evidence. The Crown prosecutor was essentially submitting to the jury that, collectively, the science led to the conclusion Hairs 12 and 13 were Olivia's. The statement came in the course of a long closing, following a long trial, where the

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[100] While by no means determinative, we note that it does not appear that trial counsel raised any concerns about the closing with the Judge.

Crown prosecutor had just discussed all of the scientific processes. The submission did not amount to an inversion of the onus of proof or ignore the right to silence.

[442] Mr Chisnall suggested that, although the Judge touched on trial counsel's submissions on the DNA evidence, he lent weight to the Crown's submission when he told the jury that "[y]ou may think that in terms of analysis that there is little doubt (a matter for you), little doubt that they match the sample hairs of Olivia". (We return later to this observation.) And, said Mr Chisnall, the error was compounded by two later comments made by the Judge in the context of summarising the defence case. The first was that:[101]

> I have said to you that there was no doubt an opportunity for [the ESR] processes to be carefully analysed and followed and that all the documentation has been made available to the defence and [trial counsel] has conducted his cross-examination with the knowledge of the complete file in this case. *There does not appear to be any evidence raised to the contrary and I am not suggesting that there is any onus on the defence to do so. Its role is simply to point out those areas which may be susceptible to risk of mistake and this they have done*.

[443] This was an accurate statement. The Judge simply pointed out, as it was open to him to do, that no evidence had been called to contradict the Crown's scientific evidence. The Judge reminded the jury there was no onus on the defence to lead any evidence and that the role of the defence was to identify the risk of mistakes, which it did. The Judge had earlier instructed the jury that there was no onus on Mr Watson and that was the case despite his having called evidence.

[444] The second comment was in relation to evidence given by scientists, where the Judge said:

> These are technical matters and you may feel there is some difficulty in resisting the evidence they give, in the absence of any manifest error.

[445] We note, however, that, immediately afterwards, the Judge reminded the jury of mistakes Ms Vintiner admitted to making, and said "scientists do not decide these cases, you decide them". The Judge explained, "you do so with due regard to the

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101 Emphasis added.

integrity of the DNA testing and as you may think any reservations and qualifications that may have been established in cross-examination".

[446] These do not amount to fair trial issues.

Did the Crown at trial unfairly address the issue of transference?

[447] In opening, the Crown prosecutor had raised the possibility the Hairs were deposited on Mr Watson at some stage during the evening and transferred from his clothing to the tiger blanket. Then, in closing, he said there were two possible explanations for the presence of the Hairs on the tiger blanket — either Olivia had been aboard *Blade* or the Hairs had been transferred to *Blade*:[102]

> I suppose the next possibility is fibre or hair transfer by which Olivia came in contact with presumably Mr Watson sometime during the night and he ended up with hair from her head on his clothing so that when he went back to his boat he ended up shedding it off his clothing so it ended up on the blanket. Well just what are the implications of that? Two hairs of Olivia's, and we know that the two hairs aren't going to stick together, so were there more hairs? Logic would suggest that there would have to be more and every time there's a transfer, fewer and fewer get moved on to the next, the carrier. Or the next proposition might be that Olivia interacted with someone else and some hair from her head ends up on that person's clothing and then that person interacted with Mr Watson, and then it transferred on to his clothing, then he went on to the boat and it transferred on to the blanket. *Is it getting preposterous? If it's not preposterous it's getting pretty unlikely. In my submission to you, highly unlikely.*

[448] Before us, Ms Vintiner was asked whether she agreed that describing the possibility as "highly unlikely" was inconsistent with what she had said to the jury. She replied:

> It is known that every time a transfer event happens, the next transfer event is likely only going to occur for a few of the hairs, and then the next one, fewer and fewer. And it's been demonstrated that the more steps you have in the transfer pathway, the less likely it is to be an explanation.

[449] Ms Vintiner agreed that no one knew how many steps might have been involved. She said she did not give evidence at trial to the effect that it was highly unlikely but that a transfer from Olivia to Mr Watson to the tiger blanket should be considered.

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[102] Emphasis added.

[450] Professor Robertson accepted that two hairs could stick together and be indirectly transferred. He did not, therefore, agree with the Crown prosecutor's comments that, "we know that the two hairs aren't going to stick together". The Crown prosecutor made a mistake in so saying. But we do not consider it makes a material difference when the total picture is considered. There was no evidence about whether hairs could stick together and the jury were instructed to decide the case on the evidence.

[451] Overall, we do not consider there was anything unfair in this passage of the Crown prosecutor's closing address to the jury. As Ms Vintiner confirmed, the more steps in a transfer pathway, the less likely it is to be an explanation.

[452] Mr Chisnall's next issue was that, although the Crown acknowledged it could not exclude the possibility of transference, the prosecutor suggested Mr Watson was required to prove that transference was a *probable* explanation for the presence of the hairs. The Crown prosecutor said:[103]

> In theory, just looking at it by itself, you can play this little game, but when you look at it alongside the other evidence and say well, hang on, Olivia is seen getting into a boat with a man that looked like him, all of a sudden this idea of transfer from some innocuous contact starts to become even more remote. Now I suggest to you that the finding of those hairs on that tiger blanket are a telling factor against Mr Watson. And *I accept that the Crown cannot exclude the possibility that there was some indirect transfer, some indirect mechanism of transfer*, *but accepting that as a possibility does not mean the Crown accepts that it was probable,* in fact to the contrary, the Crown says that that is a *highly unlikely explanation* for the reasons I've just outlined to you. And if you get to the point of saying well those hairs didn't get there by some indirect means of transfer, they were there from Olivia's head, then Olivia was on his boat and the Wallace identification was right, and he must know what happened to her. And he must have killed her, that's what that all means.

[453] We do not accept that this passage suggested Mr Watson had to prove transference was probable. There was therefore no need for any correction by the Judge. The prosecutor was, in our view, properly acknowledging that transference was a possibility but reminding the jury to consider all of the evidence. As Mr McCoubrey suggested, the correct way for the Crown to approach notions of possibility was to acknowledge transference as a possibility, weigh the likelihood of

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[103] Emphasis added.

that possibility against all of the other evidence, and then make the submission that — having regard to all of that other evidence — there was a simple reason why Olivia's hairs were on the tiger blanket and it was not transference.

[454] Trial counsel began this section of his closing address to the jury as follows:[506]

> Can I suggest to you, ladies and gentlemen, that you take the following approach with these hairs? Number one: were the hairs on the blanket when the boat was seized? … If you're not satisfied that the hairs were on the blanket when it was seized, then you can ignore them. Have the Crown ruled out the possibility that there was an innocent laboratory transfer of those hairs?

[455] Trial counsel then posed the questions of "[h]ow did [the Hairs] get there? Was there a possibility of secondary transfer?" He continued:[104]

> You may recall that, when the Crown opened their case, they mentioned this, and when they closed their case, as part of their closing, they conceded that it was a possibility. You may well think that the concession however, made by Ms Vintiner, their own expert witness on this topic was stronger than the concession made by Crown counsel. She told you that the issue of innocent secondary transfer was one that you as a jury would need to consider, in this particular case, for a variety of reasons.
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> And they are obvious if you think about it. Furneaux Lodge: 1500, 1600 people congregating, as the evidence would seem to suggest, in two essential areas, the main bar and the garden bar. Crowded situation. Olivia Hope, with her hair up and down through the course of the evening. The average rate of shedding of human hair, as I recall the evidence, was about 80 or 100 hairs per day. *So, you may well consider that the concession by the Crown in their closing, and indeed the stronger concession by Ms Vintiner when she was asked about this topic is a telling factor indeed that the Crown cannot exclude the reasonable possibility that these hairs got there by innocent secondary transfer*. And, that's only assuming, ladies and gentlemen, you rule out an inadvertent laboratory transfer and are prepared to accept to a satisfactory standard that they are in fact her two hairs.
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> So as a circumstance ladies and gentlemen, can I suggest to you that these two hairs have no real value? It's not like what you may have thought when the case was opened to you. His boat, her hairs, that's the end of it. Not like that at all. How did those hairs get there? Laboratory, inadvertent transfer, secondary transfer? How convincing are those results?

[456] The defence therefore comprehensively addressed this issue with the jury. The jury was not left in any doubt, in our view, that Ms Vintiner and the Crown conceded transference (direct or indirect) was a possibility.

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104 Emphasis added.

The Judge's directions

[457] Mr Chisnall identified what he considered was the "critical direction":[105]

> Now members of the jury that is all I want to say about the DNA evidence. You may think that the two hairs that were examined: one went to the [United Kingdom], one went later to Australia. It is a matter that [trial counsel] has made some submissions on. *You may think that in terms of analysis that there is little doubt (a matter for you), little doubt that they match the sample hairs of Olivia ... But the focus of your enquiry will be, you may think, into the possible transference of hair, accidentally as we have heard how plausible you think that is. How much weight you put on that, is very much a matter for a jury to decide*. Then there is the other question that [trial counsel] put to Ms Vintiner that you would have to have regard to the possibility of some mix at the time that the re-examination of the two bags were concerned. *Now I do not express any view of that, it would be quite wrong for me to do so but I think you need to just look at that background. It would seem that if it had happened it would be contrary to all the steps that normally are taken to avoid this happening. But the examination seems to have been on the same day. That is a matter that you have to address because it is pivotal evidence. If those hairs were on the blanket and the blanket was on the boat and they did not come about accidentally then they have very strong probative force, do you not think?*

[458] Mr Chisnall submitted that the Judge entered the arena by referring to the strong probative force of the Hair evidence (if the Hairs were not on the tiger blanket accidentally), and by prefacing his direction by telling the jury that there was "little doubt" the Hairs "match the sample hairs of Olivia". Mr Chisnall submitted that this provided the Crown with a powerful and unfair advantage.

[459] He also suggested that, despite the Judge properly identifying contamination and transference as issues the jury would need to resolve, he provided the jury with no structure for how to undertake the assessment, and simply said that the jury was required to determine whether transference and contamination were "plausible". And, said Mr Chisnall, it was at the time of giving this "critical direction" that the Judge should have reminded the jury that the Crown conceded that transference was possible.

[460] The summing up needs to be considered overall. The jury had heard almost three months of evidence, multiple days of closing submissions and a summing up that appears to have lasted for the best part of a day. The passage quoted above was in an earlier passage of the summing up before the Judge's discussion of the Crown and

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[105] Emphasis added.

defence cases. The Judge summarised the defence case at the very last part of the summing up and on the topic of the Hairs said:

> Thirdly [trial counsel] says is the question of hairs. I have already referred to those and he in a wider attack on the DNA evidence, says that the statistical basis when you are dealing with the English tests, in any event do not appear to be of much relevance to the New Zealand scene. The New Zealand position for the one hair that was examined here and later sent to Australia shows 28,000 times more likely to be Olivia's hair than any other blonde coloured person, I think is the formula, and but perhaps not the same can be said about the other hair.
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> Of more concern, [trial counsel] may say, is the fact that on the 7th March there were the samples from Olivia's hair. That is her hair samples taken from her room or wherever, and also there was a further examination of YA69, when the two hairs were discovered. The cut in the bag he said, hair of some 10 inches, 8 inches long, cut in the bag might be an extraction. I think up to you. Not particularly scientific — the explanation if there was one, was to the effect that when one cut open the parcel, one of these bags that were inside may have been cut.
>
> But you will have regard to the matter that I mentioned and [trial counsel] mentioned, as to the contemporaneous examination of the samples, not at the same time in the exact sense but on the same day and have regard to the steps that are taken to ensure these transfers are not made. [Trial counsel] reminds you that only five blonde hairs out of the 400 were discovered and he says the risk, inadvertently, is that there has been some laboratory transfer as well as the possibility, I suppose, he says of transfer as a result of contact between the two.
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> I have said to you that there was no doubt an opportunity for these processes to be carefully analysed and followed and that all the documentation has been made available to the defence and [trial counsel] has conducted his cross-examination with the knowledge of the complete file in this case. There does not appear to be any evidence raised to the contrary and I am not suggesting that there is any onus on the defence to do so. Its role is simply to point out those areas which may be susceptible to risk of mistake and this they have done.
>
> Other criticisms that he makes, not criticisms so much, but just notes of caution. Caution about the control sample, how that was not available in some cases with the Australian testing and it was a concern. He spoke of the 12 or 13 positions in the 69/12 and I think the mitochondrial testing and that there just has to be some question-marks, some note of caution, some vigilance observed by you in considering the technical scientific and DNA evidence.
>
> Finally, and perhaps of most importance on this topic was the concession that Ms Vintiner herself quite properly made, and in the best traditions, that the issue of a mistake or mix-up or inadvertent exchange you would, as the jury, have to consider it and I direct you to consider it. You may reject it or you may think it is a doubt. If you entertain a reasonable doubt as to that then of course one of the planks of the prosecution case disappears.

> Scientists give evidence in this case but of course it is up to you whether you accept it. These are technical matters and you may feel there is some difficulty in resisting the evidence they give, in the absence of any manifest error. But [trial counsel] says, based just on the cross-examination makes the point that scientists are human. Ms Vintiner with all her experience, acknowledges mislabelling things, making assumptions about the hairs which in fact were not the hairs – they were blood samples from the blanket apparently but they carried a YA69/1–4 reference. A mistake. Could have been important. Was not important as it eventuates because all the samples were in fact of no incriminating significance but nonetheless an error. As I say to you scientists do not decide these cases, you decide them and you do so with due regard to the integrity of the DNA testing and as you may think any reservations and qualifications that may have been established in cross-examination.

[461] The Judge's comment "that there is little doubt (a matter for you), little doubt that [Hairs 12 and 13] matched the sample hairs of Olivia" was said in the context of the scientific testing of the Hairs. He then went on to suggest that the focus of the jury's considerations would be into possible transference and then lab contamination. We consider that was a fair way of directing the jury. But in any event, he did refer to the challenges to the expert evidence in the passage quoted immediately above. He did, as a judge is required to do, provide the jury with an overview of both the Crown and defence cases. For example, the Judge referred, on the one hand, to the Crown's argument that "it would seem that if [contamination] happened it would be contrary to all the steps that are normally taken to avoid this happening" and, on the other hand, the defence position that the "examination seems to have been on the same day" (thus raising the possibility of contamination).

[462] Further, it was accurate for the Judge to say that, if the Hairs "did not come about accidentally then they have very strong probative force".

[463] The Judge used the word "transfer" when discussing what we have characterised as lab contamination as well as when discussing the possibility of hair transfer but we do not consider the jury would have been confused by this and it reflected the language used at trial.

[464] The Judge correctly referred to Ms Vintiner's concession that the jury would have to consider the possibility of lab contamination. The Judge then suggested that, if the jury entertained a reasonable doubt as to that, then one of the planks of the Crown case disappeared. We consider this direction was favourable to Mr Watson given the

point we are about to come to: the provenance of Hairs 12 and 13 did not need to be proved beyond reasonable doubt. As to transference, the trial Judge told the jury that the focus of its inquiry would be into the "possible transference of hair". We consider that direction was adequate in the context of the evidence.

[465] When we stand back and consider the overall context, we are satisfied that the Judge's directions on the Hair evidence were satisfactory.

Was this a case where the provenance of Hairs 12 and 13 had to be proved beyond reasonable doubt?

[466] In Mr Chisnall's submission, the issues of contamination and transference each posed the question of whether the Hair evidence was relevant if there was a reasonable possibility there was an innocent explanation for the presence of Hairs 12 and 13 on *Blade*, or if they were never on board at all. He suggested it was not possible for the jury categorically to resolve three questions, whether Hairs 12 and 13: were transferred to *Blade* through social contact; were transferred onboard during the scene examination conducted by police and ESR; or were reference hairs and thus never aboard *Blade* at all, as a consequence of lab contamination on 7 March 1998. He submitted the provenance of the Hairs should have been proved beyond reasonable doubt and indeed he contended the Hair evidence was inadmissible.

Admissibility of the hair evidence

[467] Mr Chisnall stressed that proof of the chain of custody is integral to the enquiry regarding the provenance of evidence,[106] meaning this Court's gatekeeping role was enlivened, engaging relevance and whether the evidence's probative value was outweighed by its unfairly prejudicial effect.

[468] The Crown had to establish a connection between the Hairs and the fact it sought to prove with them, namely that Olivia was onboard *Blade*. Mr Chisnall here referred to the observations by the Supreme Court in *Bain* about an aspect of evidence in dispute in that case (a recording said to provide evidence of an admission):[107]

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106 Citing *Fane v R* [2018] NZCA 246 at [72].

107 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 [*Bain* (SC)] at [42] per Elias CJ and Blanchard J (citations omitted).

> Before it is admissible as having "a tendency to prove or disprove" [an admission by the appellant] … the connection or relationship of the recording to the fact sought to be proved (the admission) must be established. That connection or relationship is not a matter of assessing the probative weight of the evidence but of accepting its logical connection to the fact it is said to prove. In the case of real evidence such as a recording, that connection or relationship is usually established by facts as to authenticity and identity. … Authenticity and identity in respect of a voice recording said to be confessional commonly turns both on proof of the making of the recording and its subsequent custody (to negate tampering), in addition to proof that the voice recorded is the voice of the accused.

[469] This means, in Mr Chisnall's submission, the appropriate test is whether the evidence "is reasonably capable of supporting the … fact".[108] He submitted that relevance ended where speculation began,[109] and that a fair trial required that the jury not be invited to act on evidence which was irrelevant.[110] He contended the jury was not in a position to resolve the evidential dispute regarding Hairs 12 and 13. Establishing their provenance was not a jury question, as it necessitated reversion to speculation. Transference could neither be proved, nor disproved. That, in his submission, was the key point. And, it was also, he submitted, the key point with respect to contamination.

[470] Mr Chisnall submitted that, even if the Court were satisfied that the Hair evidence was relevant, its admission at trial posed a profound risk of unfair prejudice, given what is known about the reliance juries place on testimony from forensic experts and it was therefore inadmissible.

[471] Chain of custody issues apply only once the exhibit has been seized by the police. We have already canvassed the detailed procedures adopted by the police and ESR to preserve the tiger blanket and hair samples free of contamination. The fact of the possibilities of transference or contamination does not mean the evidence was inadmissible. We do not regard the circumstances as in any way analogous to that of the recording in *Bain*. We reject the submission that the admission of the Hair evidence involved any risk of unfair prejudice on the basis juries rely on expert

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108 At [43] per Elias CJ and Blanchard J, quoting *R v Thomas* [1970] VR 674 (VSC) at 679.

109 *Bain* (SC), above n 107, at [59] per Elias CJ and Blanchard J, citing *Hollingham v Head* (1858) 4 CBNS 388 at 391, 140 ER 1135 (Comm Pleas) at 1136.

110 *Bain* (SC), above n 107, at [58] per Elias CJ and Blanchard J.

evidence. In making the submission, Mr Chisnall was referring to a comment of McGrath J in *Bain* that:[111]

> Evidence will also be unfairly prejudicial if it is likely to mislead the jury; for example, if it appears far more persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence.

[472] That is not a fair reflection of the expert evidence given at Mr Watson's trial, as our extensive review of it reveals.

[473] The scientific results taken from Hairs 12 and 13 were sound. That left three possibilities: the Hairs were not recovered from *Blade* but were, in fact, reference hairs from ST05; the Hairs were on *Blade* by reason of transference (direct or indirect) from Olivia (or her home); or the Hairs were on *Blade* because Olivia was on *Blade*. Those possibilities were all before the jury. The Crown case was that it would be an extraordinary coincidence if the Hairs accidentally ended up on the tiger blanket and that the likelihood of that coincidence had to be assessed in light of all the other evidence pointing to Mr Watson.

[474] There is no doubt the Hair evidence was admissible. It was of high probative value and that value was not outweighed by the risk it would have an unfairly prejudicial effect.

Did the provenance of the Hairs need to be proved beyond reasonable doubt?

[475] Finally, Mr Chisnall referred to the Court's residual discretion requiring "disputed circumstances", as opposed to only the elements of the offence, to be proved to the criminal standard when there is an exceptional reason to do so. Given the Crown's reliance on the Hair evidence, Mr Chisnall submitted that the Hairs' provenance was a "disputed circumstance" of the kind enlivening the discretion.

[476] It is settled law that the Crown needs only to prove the elements of the offence beyond reasonable doubt and does not have to do so for individual facts in a

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[111] At [84] where McGrath J cited the Law Commission *Evidence Code and Commentary* (NZLC R55, 1999) vol 2 at [C59].

circumstantial case.[112] The facts from which the Crown seeks to draw inferences do not have to be severally proved beyond reasonable doubt.[113]

[477] The discretion referred to by Mr Chisnall was explained by this Court in *Milner v R* as follows:[114]

> [15] In the context of a case based on circumstantial evidence the principles set out in *Thomas v R* are still relevant. There may be evidence in a circumstantial case which, if relied on standing alone, would require the jury to speculate but which, when considered along with other evidence at trial, would give rise to no doubt at all. Evidence may of course be unsafe to rely on because it is of a character that can never gain in its value from the context.
>
> [16] Mr Glover for Ms Milner relies on a passage in the separate concurring judgment of Turner J in *Thomas*. Turner J said that there may be cases "in which without the affirmative proof of some collateral circumstance, not itself an essential ingredient of the crime charged, the Crown case must fail, for reasons special to the particular case". Turner J went on to say that in those cases:
>
> > … it will be necessary for that particular fact to be proved to the satisfaction of the jury beyond reasonable doubt; for if it is not so proved, ex hypothesi a reasonable doubt must remain on the whole case. But such cases are exceptional. This case is not one of them. An example, if one is needed, will be found in the facts of *R v Dehar* [1969] NZLR 763 [(CA)].

[478] In refusing leave to appeal in *Milner*, the Supreme Court said: [115]

> [8] The existence of a power to give a direction as to proof of a particular circumstance in a case where it is in the interests of justice to do so is not challenged. It is part of the inherent powers of the court to ensure that guilt is established by the Crown beyond reasonable doubt. Where a disputed circumstance is not an element of the offence charged however there must be some exceptional reason particular to the case to justify such a course, as Turner J in *Thomas* made clear. Such an exceptional reason would arise if in the absence of such proof of a particular fact, there must necessarily be a reasonable doubt about the verdict of guilty.

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112 *Thomas v The Queen* [1972] NZLR 34 (CA) at 38–39 per North P and Haslam J and 41 per Turner J; *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647; *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [67]; *Goodman v R* [2008] NZCA 384 at [5] and [12]–[13]; *Guo v R* [2009] NZCA 612 at [49]; *Watt v R* [2014] NZCA 459 at [13]; *McLaughlin* [2015] NZCA 339 at [34]; *Tihi v R* [2016] NZCA 211 at [23]; *Honk Barges Ltd v R* [2019] NZCA 157 at [80]; *Kuru v R* [2023] NZCA 150 at [89]; *Benbow v R* [2023] NZCA 344, (2023) 31 CRNZ 12 at [44]; and *Tamihere v R* [2024] NZCA 300 [*Tamihere* reference] at [58].

113 *Ngarino v R* [2011] NZCA 236 at [26]; and *Fane v R*, above n 106, at [49].

114 *Milner v R* [2014] NZCA 366 [*Milner* (CA)] (footnotes omitted), quoting *Thomas v The Queen*, above n 112, at 41.

115 *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412 [*Milner* (SC)].

[479] There will be exceptional cases where a disputed fact, which is not an element of the offence, is so significant in the context of the particular case that, unless it is proved beyond reasonable doubt, the Crown will have insufficient evidence to prove the charge. For example, in *Fitzgerald v R*, DNA evidence found at the crime scene appears to have been the only evidence upon which the prosecution relied to prove the conviction.[116] It was therefore necessary to prove beyond reasonable doubt the origins of the DNA evidence and to exclude the possibility of secondary transfer. As the prosecution failed to do so, the conviction was quashed.

[480] *McLaughlin v R*, is an example of a case dismissing the same argument as advanced by Mr Chisnall on broadly comparable facts.[117] There this Court said:[118]

> [34] This is not one of those rare cases where the Crown had to prove beyond reasonable doubt that Mr McLaughlin's DNA had been deposited under Jade's fingernails by direct transfer in order to secure a conviction. In *Milner v R* this Court affirmed the observations of Turner J in *Thomas v R* that, where a disputed circumstance is not an element of the offence charged, there must be some exceptional reason, particular to the case, to justify a direction that a particular fact must be proved beyond reasonable doubt. In the present case, the Crown relied on a substantial body of evidence to prove that Mr McLaughlin was the assailant. We canvass this evidence later in this judgment. In context, the DNA evidence was simply one strand of evidence the proof of which did not need to be established beyond reasonable doubt.

[481] In Mr Watson's case, the jury's task was to consider how likely the possibilities of transference or contamination were, in light of *all* the circumstantial evidence in the case which we discuss in Parts II and III of this judgment. In this regard, the Judge instructed the jury as follows:

> Circumstantial evidence, which I have been discussing in relation to the proof of the death of the person named in the indictment, and that the accused was the person who deliberately caused those deaths, is of course at the heart of the reasoning process which the Crown, and indeed the defence, urges upon you. The Crown arguing that the circumstantial evidence leads only to one conclusion, the defence suggesting that it leads to an opposite conclusion or at least leaves, at the very worst, to a reasonable doubt as to the Crown's conclusions. And so that you, in considering circumstantial evidence need to be told this. Circumstantial evidence going to the guilt of a person is this: one witness proves one thing, another proves another thing, another proves another thing and all those things prove to a conviction beyond reasonable

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116 *Fitzgerald v R* [2014] HCA 28, (2014) 311 ALR 158.

117 *McLaughlin v R* [2015] NZCA 339 (footnote omitted).

118 Citing *Milner* (CA), above n 114, at [14]–[16], *Milner* (SC), above n 115, at [7]–[9], and *Thomas v The Queen*, above n 112, at 41 per Turner J.

> doubt, but neither of them separately prove the guilt of the person but taken together, they do lead to the one inevitable conclusion. If that is the result of circumstantial evidence, it may be a very much safer conclusion you come to than if one witness goes into the witness box and says, "I saw this crime committed". Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a body or group or series of facts, undesigned, unexpected coincidences that as a reasonable person, you find your judgment is compelled but to one conclusion. If the circumstantial evidence falls short of that standard if it does not satisfy that test, if it leaves gaps then of course it is no use at all. So look at the evidence here. Look at all the surrounding circumstances and see whether you find such a body or group of facts which will lead you to the conclusion that the Crown invites you to do.

[482] The Crown was not required to prove beyond reasonable doubt how the Hairs got onto the tiger blanket or that there was no contamination of the questioned hairs in the ESR lab.

Answers to the questions posed by the Reference

[483] In conclusion, probative scientific evidence was led at trial, tested by senior trial counsel (advised by experts), appropriately commented upon by counsel in the closing addresses and appropriately directed on by the Judge in his summing up. We do not consider there is a reasonable possibility that more favourable verdicts would have been reached had the new evidence, as tested before us, been before the jury. In terms of the Hair evidence, this was a fair trial.

[484] As required by the Reference, we have considered the evidence raised in Mr Doyle's expert reports concerning the reliability of the forensic evidence at trial regarding the Hairs. In particular:

(a) Having considered the evidence:

(i) we have concluded ESR generally adhered to relevant quality standards relating to the collection, handling and forensic examination of the Hairs and are satisfied there is no material issue;

(ii) we have found the results obtained from the DNA testing of the Hairs conducted in New Zealand, Australia and the United Kingdom reliable; and

(iii) we are satisfied as to the fairness and accuracy of the evidence given at trial about the DNA testing and the results obtained from it.

(b) We conclude that none of the evidence given at Mr Watson's trial should be reconsidered in light of the evidence we have considered.

(c) We have determined, in light of our consideration, that a miscarriage of justice did not occur in respect of the Hair evidence.

PART II — THE IDENTIFICATION EVIDENCE

The challenge to Mr Wallace's identification of Mr Watson

[485] We now turn to the identification evidence. For convenience we set out again the challenge as framed by Mr Watson:[119]

> 10 The entire basis of the Crown case was that the appellant had returned to *Blade* with the victims on the water taxi being driven by Guy Wallace early in the morning of 1 January 1998. Mr Wallace identified Mr Watson via a photographic montage. Photograph 3 in the montage depicts Mr Watson. As this Court recognised in its 2000 judgment, it is beyond question that the Crown's case against Mr Watson dependent substantially on the correctness of Mr Wallace's identification. Notwithstanding that Mr Wallace at trial resiled from the assertion that Mr Watson was the man who he transported along with Ms Hope and Mr Smart, he maintained that the person shown in photograph 3 was the man in the water-taxi. The Crown placed significant emphasis on this fact in its closing address to the jury.
>
> 11 A miscarriage of justice ensued because the jury heard that Mr Wallace identified Mr Watson using a montage. It was inadmissible because the procedure adopted to obtain the evidence did not produce a reliable identification by Mr Wallace.

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[119] See above at [51].

[486] The question for us is whether the evidence of Mr Wallace's identification of Mr Watson from Montage B was admissible and, if not, was the decision to admit it an error that could have affected the outcome of the trial? Relevant to this is the question of whether Mr Wallace had previously been shown a single photograph of Mr Watson and another montage, Montage A, and, if so, the impact of that on Mr Wallace's identification of Mr Watson from Montage B.

Setting the scene

[487] To set the scene, we have included photographs and sketches relevant to the identification issue:

The single photograph (taken 19 January 1990):

Montage A (Mr Watson is photograph number 6, taken 8 January 1998):

Montage B (Mr Watson is photograph number 3, taken 12 January 1998):

Alternative photograph of Mr Watson not used in Montage B (taken 12 January 1998):

Compusketch produced with input from Mr Wallace on 9 January 1998:

Compusketch produced with input from Roz McNeilly and Chey Phipps on 9 January 1998:

The *Mina Cornelia* photograph taken just prior to Mr Watson going ashore on New Year's Eve (blurring added):

The Waswo photograph taken just after Mr Watson's arrival onshore. Mr Watson is partially obscured by the woman dressed in red (blurring added and labels removed):

[488] We begin this section by reviewing the evidence Guy Wallace gave at trial, as well as relevant aspects of the statements he gave to the police at various times during the investigation and his evidence at the depositions hearing.

Guy Wallace's trial evidence

Overview

[489] Mr Wallace gave his trial evidence over two days, some 18 months after Olivia and Ben's disappearance. He told the jury he had lived in Picton on and off for around six to eight years prior to moving to Australia. He returned to New Zealand in late-1997, planning to stay for several months. He had been working at Furneaux Lodge for a matter of weeks before New Year's Eve, employed to do bar work and maintenance.

[490] The Main Bar where Mr Wallace was working started to get busy between 8.00 and 9.00 pm on New Year's Eve. Mr Wallace paid particular attention to a man who arrived around that time. He described the man as a bit scruffy, noting that most

people "make an attempt to … tidy themselves up a bit and look fairly respectable" on New Year's Eve. He estimated the man was about 32, with dark hair which was "a wee bit wavy, just unkempt … just above the shoulder I suppose". He further described the hair as covering the neck, just down to the tops of the ears. He appeared to be unshaven, "less than a week, a few days" worth.

[491] When asked if there was any aspect of the man's appearance that caught his attention, Mr Wallace said the man's eyes did not appear to be "very trustworthy". The man had dark brown eyes, "pretty slanty really, not like a fully opened person, just more of a closed aspect, but not closed".[120] He estimated the man's height at five feet and eight or nine inches. Mr Wallace was "pretty vague" on what the man was wearing, describing it as jeans and sneakers, but was unsure about his top half.

[492] The man introduced himself by name and said he was from Picton but Mr Wallace did not recognise him. Mr Wallace can remember turning to whoever was working on the bar with him and asking if they recognised "this guy from Picton".

[493] The man was drinking beer and spirits which he thought was bourbon but could not be 100 per cent sure. He remembered him because he paid in cash, but the bank notes were crunched up, so Mr Wallace had to straighten them out to put them in the till.

[494] The man did not appear to be with anyone else. Mr Wallace also saw him in the Garden Bar. Before midnight, Mr Wallace had to intervene to settle down the beginnings of a fight in the Main Bar. The man was in the vicinity.

[495] Mr Wallace called last drinks at 2.25 am but his boss overruled him. Mr Wallace went outside and, some time later, began to collect rubbish near the Garden Bar.

[496] Mr Wallace came across a young couple who were looking for a water taxi to the Solitude jetty and he said he would take them to the nearby Doctors jetty. As they

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[120] After it commenced deliberations, the jury asked to hear a part of Mr Wallace's evidence again. The eyes of the man feature in those particular passages.

were walking to the jetty, he came across the same man from the bar. When they reached the jetty, there were several other people waiting for a ride: a young female and a young male (who wanted to go to *Tamarack*), maybe another male, and the man he had seen earlier.

[497] Mr Wallace sat in the stern on the port side to operate the outboard motor. Ahead on the port side were the young couple he was taking to Solitude and on the starboard side were the people wanting to go to *Tamarack* and, beside them, the lone man. Once at *Tamarack*, the young girl and her male companion disembarked and a male and a female got on. As the female got on, the lone man patted the seat next to him and said, "better sit over here". The man "sort of raised his eyebrows as if mmm, very nice young lady". The young woman, who by trial Mr Wallace knew was Olivia, asked about accommodation and Mr Wallace told her that Furneaux Lodge was full. That was when the lone man said, "I have accommodation aboard my boat, you can come" (gesturing to Olivia) "but he can't" (gesturing to the man who was with her).

[498] Mr Wallace then headed towards the lone man's boat. Mr Wallace said, from the position of standing on the end of the jetty looking out to sea, the drop-off destination for the lone man's boat was to the left.

[499] Mr Wallace recalled approaching a "great big [boat] like a Markline,[121] what I would call a gin palace launch that was tied up behind this big ketch". It appeared to be closed down for the night. The lone man said that his boat was moored up next to it. There were anywhere from three to five boats, including the lone man's one.

[500] The three people then got off. Mr Wallace asked the pair whether they were sure they were "okay with this". They replied "yeah no worries fine".

[501] Mr Wallace's description of the boat as a ketch is discussed in more detail below.[122]

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121 Markline is a New Zealand boat builder known for producing a range of typically fiberglass cruisers and launches.

122 Below at [848].

The lone man

Compusketch

[502] On 9 January 1998, Mr Wallace spent about an hour involved in the compilation of a compusketch (a drawing created using a computer) with the assistance of Senior Constable Gary Tibbotts.

[503] Mr Wallace did not feel the artist could get the style he wanted. At Mr Wallace's direction, someone used a pencil to draw on hair and touch up the facial hair because "the background on the face appeared to be too dark and I wanted to make the stubble stand out a wee bit more". He said the stubble was "prominent". In cross-examination, he agreed it was how he recollected the appearance of the man at the bar, albeit 8 or 9 days after New Year's Eve.

Montage B

[504] Mr Wallace said he selected number 3 (Mr Watson) when police showed him the compilation of photographs of seven men and Mr Watson (Montage B) in April 1998. However, Mr Wallace said the person in the photograph had "shorter hair, he doesn't appear to have quite so much stubble on his face". Mr Wallace was "pretty definite" photograph number 3 was the person he dropped off and the same person he served in the bar. The eyes seemed "similar".

[505] Under cross-examination, Mr Wallace said he was drawn to photograph number 3 on Montage B and also number 5. He agreed that it was the eyes of number 3 that struck him more than anything else because they were "almost half closed". Mr Wallace agreed that, for him to be "pretty sure", number 3 would need more facial hair and longer hair. Mr Wallace also said there was "no doubt at all" that the man he saw at the bar was the same man he took out on the Naiad with Ben and Olivia. He accepted he used the words "reasonably sure" when discussing whether the man said he was from Picton with the police.

[506] Mr Wallace expanded on that comment, saying the lone man had a couple of days' stubble on his face and an unkempt look. His clothing was a bit scruffy, he had

clearly not had a shave and his hair "looked like the I have just got up look". It was dark in colour and wavy coming down to the base of his neck with his hair more than likely coming down over his ears at the side. He thought the man wore a Levi's shirt with a red or orange label somewhere near the pocket.

[507] Mr Wallace was sure in his own mind that the man said he was from Picton because he remembered asking one of the other bar workers if they recognised him, but he conceded he used the phrasing "reasonably sure" in an earlier statement.

[508] Mr Wallace was asked then about being questioned by the television reporter, Julie Roberts, who showed him video footage of Mr Watson either entering or exiting the Blenheim Courthouse. He said:

> Well my first response to the video tape was that the quality of the video tape was very poor and the reporter Julie Roberts asked me for a yes or no answer and she asked me if this was the man from the Naiad and I said from that footage, I would have to say no.

[509] He was asked what it was about the appearance that was different and he replied "well the video footage I considered to be unclear for a definite yes or no answer".

[510] Mr Wallace was questioned about being shown the *Mina Cornelia* photograph at the depositions hearing (discussed below) and said, "well it doesn't appear that he has as much stubble as the man that you have been asking me about", and, "well in this photo the gentleman has his eyes closed and so, and that is a big thing about a person's face when you can see their eyes, quite [difficult] to say from this photo". Mr Wallace agreed in cross-examination that he had virtually ruled out Mr Watson as being the man on the Naiad based on the *Mina Cornelia* photograph. He agreed that one of things that struck him about the man in the *Mina Cornelia* photograph was that he did not appear to have any facial hair and his hair was too short, which would rule out the man in the *Mina Cornelia* photograph.

[511] In re-examination, the Crown prosecutor focused closely on Mr Wallace's selection of Mr Watson from Montage B:

[Q:] What did they ask you to do?

[Mr Wallace:] They said don't give us an answer, take your time, look at it, look at it again and then I will ask you if you recognise anybody in this montage.

[Q:] And did you take their advice and do as they suggested

[Mr Wallace:] Yes I did.

…

[Q:] What was it about the appearance of the man in photo 5 that initially had some resemblance to the man in the bar?

[Mr Wallace:] Um the shadowy unshaven look.

[Q:] So you have put that one, no 5 aside and you went back to no 3 did you?

[Mr Wallace:] Yes I did.

[Q:] And what did you conclude about no 3 in relation to your recollection of the man at the bar

[Mr Wallace:] Well overall he was just more similar to the man that I had seen in the bar that night.

…

[Q:] And what were you able to, how sure or how positive were you in the way that you expressed your recognition of that man in relation to the man in the bar.

[Mr Wallace:] Well very sure like the eyes, had a very mistrusting look.

Guy Wallace's depositions hearing evidence and statements to the police

[512] We now turn to relevant aspects of the various statements Mr Wallace made to the police, starting very early on in the police investigation, together with Mr Wallace's evidence at the depositions hearing. Both parties referred to this material and that approach has previously been taken by this Court in Governor-General's reference cases.[123]

[123] See *Tamihere* reference, above n 112, at [47]; and *Collie v R*, above n 40, at 658.

Statements on 3 January 1998

[513] The police job sheet 3 January 1998 recorded that Mr Wallace described the boat as "a timber ketch with round port holes … moored just starboard of the jetty". Looking at the map, it would have been next to the *Spirit of Marlborough*.

[514] Mr Wallace described the man whose boat Ben and Olivia boarded as follows:

> The guy on this ketch would have been about 32, about 5'9'' tall, wiry build. He was unshaven but didn't have a moustache. He had short dark wavy hair and smelled like a bottle of Bourbon.

[515] Mr Wallace said it would have been about 5.00 am because, after the drop-off, he went back to the bar and had a few drinks, and then the sun was coming up.

Statement on 5 January 1998

[516] Mr Wallace said he went to have a break about 4.00 to 4.20 am and was picking up rubbish. He saw a male and a female who wanted a ride to the Solitude jetty at The Pines. They were unable to get a ride so he offered to take them.

[517] When he got back to the jetty, there were four people wanting to go to *Tamarack*, which is where Olivia and Ben boarded. The lone man told Olivia to sit by him, Mr Wallace said in order to balance the boat. Olivia was asking for accommodation and the man said she could stay on his boat but, gesturing to Ben, he could not — it was said jokingly. He recalled there being a group of four or five boats rafted up at the location indicated by the man.

[518] From the jetty to *Tamarack* would have taken four to five minutes and from *Tamarack* to the ketch about the same time. He described the ketch.

[519] Mr Wallace described the man as follows:

> The guy that got on board with Olivia and Ben was a male, Caucasian, aged about 32 years. He was about 5'8" tall, wiry build. I think he may have had tattoos on his arms but I can't be sure. His hair was a brownie colour, wavy and medium length. He had about two days growth on his face. He was bourboned up, like his eyes weren't focussing.

> He was wearing a Levi shirt with short sleeves, 100 per cent cotton. It had a collar with a button-up front. I saw the Levi brand on it. It was a short sleeved shirt and the colour was between khaki and very pale green. He was wearing blue jeans and I think sandshoes.

[520] After he dropped them off, Mr Wallace returned to the jetty and did three more trips. He then pulled the tank and fuel line out and went back to the Lodge for a beer, which was when he noticed it getting light.

Statement on 6 January 1998

[521] Mr Wallace said the ketch was in a group of about five vessels and next to a big Markline, and the boats were all rafted up.

[522] He then said:

> I now recall the guy from the ketch drinking in the bar for most of the night, probably from about 8.00 or 9.00 pm onwards. He spent most of the time in the one area. This was on the right just as you walk into the bar through the main doors. He was actually drinking at the bar. This area is known as "Reg's Corner" …
>
> …
>
> When the guy from the ketch was drinking in the bar he was drinking double bourbons and coke. He would have paid cash when I served him. Furneaux only takes cheques from locals and any Eftpos that night was done through reception.
>
> When this guy was in the bar he appeared to be a bit of a loner. He would chat away to people that came up to the bar but there was no particular person that he appeared to be with. He seemed friendly enough, just pissed.

Police job sheet dated 8 January 1998

[523] Detective Sergeant Moore spoke to Mr Wallace, who said he and his family were being "hounded" by the media.

Statement on 9 January 1998

[524] Mr Wallace described first noticing the man at about 9.00 pm in the area of the Main Bar known as Reg's Corner. He was drinking bourbon. Mr Wallace served him on a number of occasions. He was drinking steadily but not heavily. He appeared to

be a fisherman or tradesman by the way he was dressed and his manner. He paid by screwed up notes.

[525] At 3.00 to 3.30 am Mr Wallace was picking up rubbish when a couple asked for a ride to the *Solitude* jetty. He then saw the man by the Hobie Cat.[124]

[526] Mr Wallace said of the man's boat:

> It would only have taken about one to two minutes to get [there] from the *Tamarack* which was on the right-hand side as you look from the jetty. It would have been in line with the Lodge in the second line of boats.
>
> The ketch the unknown male pointed to was about 20 - 30 metres to the left-hand side of the jetty in about the second or third row of boats.

[527] He described the ketch as rafted onto the port side of the Markline or a similar boat to the Markline and he believed there were three other boats rafted up too.

Video interview on 11 January 1998 with Detective Fitzgerald

[528] Detective Fitzgerald conducted a long video interview with Mr Wallace on 11 January 1998.

[529] Mr Wallace described the lone man as a bit scruffy, without a shave for a couple of days, hair all over the place and not dressed up. He was in the bar early on (between 8.00 and 9.00 pm), drinking bourbon and beer and was present right through the evening, or at least Mr Wallace remembered him being there a lot. At one stage, the lone man was in the vicinity of, if not involved in, a scuffle.

[530] Following an extended exchange with Mr Wallace as to whether the ketch described by Mr Wallace existed, the Detective was clearly impatient with Mr Wallace, saying "I wanna know the truth, there's no more mucking around today". He suggested Mr Wallace had been telling lies. Detective Fitzgerald put it to Mr Wallace that "[t]he mystery man you described to me, the mystery man you drew an identikit picture of … he doesn't exist either".

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[124] A Hobie Cat is a type of catamaran sailboat.

[531] Detective Fitzgerald then referred to the "guy in the bar" who Mr Wallace had described and taken out in the Naiad but said "[n]o one else has ever seen him either." The Detective referred to a guy in the bar sleazing around women but then had the following exchange with Mr Wallace:

F You say it's not him.

W I don't reckon.

F Someone else.

W The photo of, was it, Scott?

F You say it's someone else.

W Or Simon, WHAT, WHAT WOOTTON? Was the name I was given with the photos. I don't think it was him [pause] may have been two different guys sleazing round the bar.

F Not possible.

W Not possible?

F I've spoken to everybody. You tell me why four other barmen give us the description of the guy.

W Mm .....

F This guy that's been sleazing around, but no one's seen the guy you're talking about. No one's seen him.

W Well perhaps I've got it all wrong.

[532] Then followed a prolonged exchange as to whether Mr Wallace was telling the truth. It focused on the "non-existent boat" which had not been seen by the four other Naiad drivers and others not seeing the mystery man described by Mr Wallace.

[533] Mr Wallace said "I'm bloody sure it wasn't that guy that you showed me the photo, not you, was it you?"

[534] Mr Wallace's compusketch was discussed. And then:

W No, he was drinking in the bar that's all I know. He was the same guy that was on the boat that I took them over to the ketch with.

F [Pause] Did he try and pick up women in the bar that night?

W Not sure.

F Do you think this guy and this guy might be the same person [refers to identikit pictures]

W [Compares to identikit pictures] Yeah it could be, I 'spose, I dunno. Right around the eyes, slanted a lot. Looks a bit thinner in the cheeks for this guy that I thought [pause] no I doubt it [lengthy pause] Can I [refers to comparing pictures again]

F Mm.

W [Compares pictures]

F So have we got two mystery men in the bar have we? We've got two loners.

W Not as far as I go.

F We've got two loners, drinking on their own.

W One okay.

F That's it, you only saw one?

W Mm hmm.

F The other bar staff only saw one ...

[535] The Detective told Mr Wallace that other people had described the man trying to pick up women as "a local guy called Scott Watson". Mr Wallace accepted he had heard his name over at the Blenheim CIB "press up" and referred again to being shown a photo.

[536] And the following:

F All over them all night. All the other barmen seen him. All of them, all of them spoke about him, this guy sleazing, picking up women. The whole night. Left angry 'cos he never got one.

W Really?

F Mm. Scruffy, unkept hair.

W Mm hmm.

F Wavy, unshaven, tradesman like.

W [Shorts]

F Ring a bell?

W Yeah, my statement eh, yep.

[537] Mr Wallace said that he either did not hear, or took no notice of, the man apparently offering women berths on his yacht. Then:

> F I'm not saying it's him, maybe it's the same person. I don't know if it's WATSON, maybe it's the same person that everyone's describing.
>
> W Might be. Well, what do you mean, everyone's describing the WATSON guy or everyone's describing this other guy? You're saying there's one guy sleazing around the bar.
>
> F Mm.
>
> W And then you're saying about this is this guy WATSON weren't ya?
>
> F No.
>
> W Okay.
>
> F I'm saying there's one guy sleazing around the bar.
>
> W What's the description.
>
> F And then there's the mystery man that you give us.
>
> W Oh okay.
>
> F Yeah, maybe they're one and the same.
>
> W Maybe they are. Fuck I wish I could remember, I'd be home now or out at Furneaux.

Police job sheet dated 20 January 1998

[538] Following his request for advice, Mr Wallace was told not to engage with the media.

Police job sheet dated 3 February 1998

[539] Television New Zealand had interviewed Mr Wallace and shown him a video of Scott Watson. Mr Wallace said he did not believe it depicted the person he had taken to the boat with Ben and Olivia. Detective Fitzgerald explained to Mr Wallace the dangers and unlawfulness of this type of identification.

[540] Twenty minutes later, Mr Wallace returned and said that he had telephoned Julie Roberts and "told her that I didn't want her to show that story, I've thought about it and I don't think I can stand by what I have said".

Statement on 6 February 1998

[541] Mr Wallace described a trip to Nelson on 21 January 1998 to look at ketches. He rang the Nelson Police Station anonymously and was told the ketch was no longer part of the police investigation.

Statement on 7 February 1998

[542] Mr Wallace told police he wanted to tell the truth about what he said on 6 February about travelling to Nelson. He said he did not do so and had made it up because he wanted someone to believe him. He had been under a lot of pressure from the media and things got too much for him.

[543] He then said:

> I still have this picture in my mind of the ketch. I formed this picture on midday of the 2nd January 1998 when I was contacted by Police. I can only presume that I formed this image in my mind of the ketch from seeing it when I dropped them off. However I now know that a number of other people including the naiad drivers at Furneaux on the night did not see a vessel as I have described. So it is possible I'm mistaken, it surprises me that if a ketch like that was in the inlet that no one else has seen it. I just have this picture in my mind.
>
> I know that the boat Waves that I have been shown a photo of by Detective Fitzgerald, is definitely not the ketch I have described, or spoken of.

Police job sheet dated 6 March 1998

[544] Mr Wallace said the location of the drop-off was near *Rippa*, close to *Mina Cornelia*.

Police job sheet dated 31 March 1998

[545] Detective Fitzgerald met Mr Wallace and showed him a montage of seven photographs of the Main Bar at Furneaux Lodge. Mr Wallace said he remembered the person telling him he was from Picton.

Statement on 3 April 1998

[546] Mr Wallace said he was making the statement to clarify the position with regard to the lone man he dropped to a boat with Ben and Olivia on New Year's Day 1998 who was the same person he saw in the Main Bar on New Year's Eve 1997. One thing that annoyed him about the man was that he stood in front of the till and got in the way of others who wanted drinks. He was drinking both bourbon and beer. He and Roz served this man throughout the evening. He saw him consistently on and off. He next recalled seeing the man down at the jetty with Hayden Morresey by the Hobie Cat.

[547] Mr Wallace was reasonably sure the man said he was from Picton. He thought it strange at the time because he said he was from the same town as Mr Wallace yet Mr Wallace did not recognise him. He mentioned it to someone, possibly Roz.

Statement on 20 April 1998 regarding Montage B

[548] On 20 April 1998, in a formal identification procedure, Mr Wallace was shown Montage B by Detective Sergeant John Hamilton (Mr Watson was number 3). Mr Wallace said:

> Before viewing the photographs Detective Sergeant HAMILTON asked me to take my mind back to the night in question. That was no problem for me as I have retained a clear recollection of the person.
>
> … I was immediately drawn to photos number 3 and number 5. I studied the photos for about a minute and a half, and photograph 3 stood out for me more than any of the others. I took my time over the photos because Detective Sergeant HAMILTON had said it was an important matter and I should take my time. I believe photograph number 3 is the person who was in the bar and on the boat with me. At that time however he had good growth on his chin and face. He had a more unkempt look. His hair had more length to it and was more bushy and wavy. This meant that his fringe was lower down his forehead towards his eyebrows. It's the eyes of the person in photograph number 3 that stand out for me more than anything. The photograph portrays the person more as I remember him, that is his eyes do not have an open trusting look. The more I look at photograph 3 it brings me back to the guy in the bar. On first view I took notice of photograph number 5 because of the growth and dark eyes but discount him as he was not the person I saw in the bar or on the Naiad. It wasn't hard for me to discount him as his face was fuller and he doesn't fit my recollection.

[549] Detective Sergeant Hamilton set out his observations of Mr Wallace when he viewed Montage B:

> When he opened the folder he appeared immediately drawn to photos number 3 and number 5.
>
> He studied the photos for about a minute and a half, and photograph 3 stood out for him more than any of the others.
>
> I told him it was an important matter and that he should take his time.
>
> I understood from what he said, photograph number 3 was of the man who was in the bar and on the boat with him.
>
> I questioned him about photograph 3 and sought from him comments as to why he had selected that photograph.
>
> I also asked him why he had discounted photograph number 5 and he outlined his reasons to me.
>
> From his comments I understood that he had discounted the person shown in photograph 5 as being the man in the bar and on the naiad with him when he took Ben Smart and Olivia Hope from the Tamarack.

Police job sheet dated 27 April 1998

[550] On 27 April 1998, Detective Sergeant Moore spoke to Mr Wallace after he was shown Montage B and created a job sheet. The job sheet records that Detective Sergeant Moore explained to Mr Wallace that he was not to discuss Montage B with anyone and was to avoid the media, noting he had recently spoken to a reporter from *North & South*. There was reference to a private investigator hired by Mr Watson, Carl Berryman, and the statement Mr Wallace made when interviewed by Detective Fitzgerald about being shown a photograph four to five years old. The job sheet sets out Detective Sergeant Moore and Mr Wallace's discussion regarding Mr Wallace being shown the single photograph:

> I then talk to WALLACE about the statement he made to Detective FITZGERALD on video re being shown a photograph of a person when he was at the "Op Tam" base completing a compusketch.
>
> IS Guy do you recall saying to Tom (FITZGERALD) when he interviewed you on video that I showed you a photo of a male?
>
> HS Yeah.
>
> IS Well, I don't think it was me but where were you when you were shown the photo?
>
> HS I was there doing that compusketch and someone saw me in the corridor between the yacht room where the photos of the yachts are and the room we did the compusketch.

IS What did they say when they showed you the photo?

HS They just asked if I knew this guy and I said I didn't.

IS Is that all?

HS Yeah — they said that the photo was about 4–5 years old and he could have changed — but I still didn't know him.

IS And that was a black and white photo?

AS Yeah.

Job sheet dated 25 July 1999

[551] Mr Wallace remembered when he was picking up rubbish he went into the Garden Bar and that the man had a "pub pet" in the bar fridge with his name on it. He was sure it was the same man as the one he served in the Main Bar and the one he took to the boat.

Statement on 26 July 1999

[552] Mr Wallace confirmed the previous note about seeing the "pub pet" in the Garden Bar fridge. He said he remembered asking either Michael Cronin or Dave Furneaux whose it was and one of them pointed to a man he believed to be Mr Watson. He had seen the man in the bar earlier and he was the man on the Naiad with Ben and Olivia.

Depositions hearing beginning 24 November 1998

[553] Depositions were preliminary hearings held to determine if there was enough evidence to commit a defendant for trial. They are no longer held. The depositions hearing has some significance in this appeal because Mr Wallace gave evidence in re-examination of his selection of Mr Watson from Montage B. This was after he had been shown the *Mina Cornelia* photograph in cross-examination and had said that Mr Watson was not the man on the Naiad based on that photograph.

[554] At the depositions hearing, Mr Wallace said he first saw Mr Watson in the Main Bar no later than 9.00 pm. Mr Watson introduced himself, saying he was from Picton. He described the man as being about 32, "[v]ery scruffy" with "a good couple of weeks

growth on him", being about halfway between a beard and an unshaven look.[125] He was drinking bourbon as well as beer. Mr Wallace served him throughout the night and also saw him drinking in the Garden Bar. Mr Wallace could not "be sure" about what he was wearing, saying "[s]andshoes, jeans, shirt. Colours, no, I couldn't say."

[555] The man told Mr Wallace the name of his boat but Mr Wallace did not want to know the name, just directions. He said it was a short name and it may have had a "z" in it.

[556] Mr Wallace said that, when his sketch of the ketch was made on 3 January, he had a clear picture in his mind of the details of the vessel. He agreed that there was no way he was mistaken about the ketch.

[557] Mr Wallace was cross-examined on the basis that the male in the bar was the same person who was on the Naiad with Olivia and Ben. Mr Wallace agreed and said there was no possibility he was mistaken in that respect.

[558] As to whether the compusketch prepared with Mr Wallace's input on 9 January looked like the mystery man,[126] Mr Wallace said "no, he had far more stubble". In relation to hair shape, he said "I wasn't happy with the shape, but [the artist] didn't seem to be able to get the shape I wanted. It was more sort of windswept." In relation to hair length, Mr Wallace explained that "[n]ow I'm just unsure. Yeah, I'd say it would be very close."

[559] Mr Wallace was asked questions about an exchange he had with Mr Berryman, on 26 February 1998:

> Q. And you, by then, had seen pictures of a person by the name of Scott Watson, hadn't you, in the media?
>
> A. I think I must have, yes.

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125 Mr Wallace did not mention his recollection that he thought the lone man "had tattoos on his arms but wasn't sure", which was included in his deposition statement prepared prior to the deposition hearing.

126 See above at [502].

Q. And did you tell Mr Berryman the day you were talking to him that it was not Scott Watson who was on the Naiad?

A. I don't think so.

[560] Defence counsel also asked about Mr Wallace's dealings with the media and the fact that he was shown imagery of Mr Watson by a journalist:

Q. Did you tell her Scott Watson was not the one you saw getting on to the ketch?

A. No, we viewed a video and I said, "That" looking at the footage on the video, which I thought was very poor, I said, "That is not the man, by that footage".

[561] Finally, defence counsel questioned Mr Wallace about the *Mina Cornelia* photograph (taken on 31 December 1998). There was the following exchange:

Q. Just ask you to have a look at a photograph, please. And can you just have a look at that photograph. (Witness refers). Do you recognise anybody in that photograph?

A. I recognise the gentleman in the top. There's also Scott Watson in there with his eyes closed. I don't think I recognise anybody else, really.

…

Q. Well, can I just tell you that that photograph was taken on New Year's Eve?

A. Really.

Q. Yes. At probably around 10 or half past 10 in the evening some five, six hours before you delivered these people to the ketch?

A. Well, I'd find that very hard to believe.

…

Q. That is proved by other evidence in the case, and I believe it was some time around 10 or 10.30 on New Year's Eve?

A. Well, if that is the case then it wasn't Scott Watson that I dropped off.

…

Q. You identify the accused. But he was not the man that got off your Naiad with Ben Smart and Olivia Hope, was he, couldn't have been?

A. Not if that photo was in that timeframe, no.

[562] In re-examination, Mr Wallace confirmed that the man had been in the Main Bar all night, though he also saw him down in the Garden Bar. Mr Wallace saw him from "time to time". Mr Wallace was asked if he remembered looking at a montage of photographs in April 1998. The Judge ruled that Mr Wallace could be re-examined on the question of identification but not have any montage put to him. Mr Wallace was asked whether he was able to point to anyone as being the person as far as he believed, and he said, "at first I picked out two", and that at first "[e]ither one could have been" the man.

Media coverage

[563] As mentioned at the outset, this case attracted nationwide interest from the time the disappearance of Ben and Olivia became a matter of concern. The media became actively involved in reporting on the search for Ben and Olivia, and the associated police operation.

[564] On 16 November 1998, prior to depositions, the Solicitor-General issued a warning to the media noting that the case had attracted widespread media interest and saying, "[t]here will be evidence in this case about the identity of a person who was seen in circumstances alleged to be material to this prosecution." The statement said that "publication of any photograph or other detailed description of personal characteristics of Mr Watson may prejudice his right to a fair trial".

[565] Mr Chisnall maintained the IPCA's finding about the tainting effect of media coverage was corroborated by Mr Watson's decision to decline to participate in an identification parade. On 27 February 1998, trial counsel advised police that they objected to Mr Watson's placement in an identification parade, "[g]iven his visual identification by the electronic media since mid January 1998 and given the circulation in the Blenheim Picton area of a 'broad sheet', including a photographic image of him,[127] any such identification parade would be unfair and pointless." This objection was repeated on 9 April 1998 following further requests by police on 26 March 1998 and 9 April 1998. Soon afterwards, Mr Wallace was shown Montage B.

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127 Discussed below at [724].

References at the trial

[566] There were extensive references to the media coverage at the trial, the Crown prosecutor observing in his closing address to the jury that the disappearance of Ben and Olivia had attracted "perhaps unprecedented media interest and attention".

[567] The jury was aware that, on 3 February 1998, Mr Wallace was shown an image of Mr Watson by a television reporter, Julie Roberts.

[568] A number of identification witnesses were asked about having viewed media coverage, including coverage showing Mr Watson himself, the seizure of *Blade* and the compusketches of the lone man (which were released by the police after being produced with input from Guy Wallace, Roz McNeilly and Chey Phipps). This included identification witnesses of some moment,[128] namely Simon Bell, a parent who had returned to Furneaux Lodge in the early hours of the morning to collect some party-goers and who identified Mr Watson as being involved in an incident at the Main Bar around the general time when Mr Wallace gave the lone man a lift in the Naiad; Donald Anderson, who both the Crown and the defence accepted had taken Mr Watson to *Blade* sometime in the early hours of New Year's Day; Hayden Morresey, who was on the Naiad; and Guy Wallace. A large number of witnesses were also questioned about media coverage of a ketch.

[569] In September 2024, some months after the hearing before us, Mr Watson sought to file extensive additional evidence of media coverage of the police investigation in the days following New Year's Eve, including 63 video clips and 341 images of print media. Evidence of this breadth was not sought by this Court or required. We declined to admit the evidence.[129] The evidence is not fresh and, having carefully considered the material, we concluded that the evidence lacks cogency. The evidence does not materially and usefully supplement the evidence relating to media coverage at trial. All those involved in the trial could not help but be aware of the extensive media involvement in the case from the time of Olivia and Ben's disappearance.

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128 Fifteen such witnesses have been identified from a non-exhaustive review of the notes of evidence.
129 *Watson v R* [2024] NZCA 586 at [5].

IPCA Report

[570] The IPCA noted that it was clear that the relationship between Detective Inspector Pope and the media was strained, precisely because Detective Inspector Pope refused to confirm that Mr Watson was a suspect or to disclose information that might compromise the investigation or any subsequent trial. The IPCA observed that the media had many other means of obtaining information and access to witnesses, Ben and Olivia's families, the Watson family and legal team, and other members of the Marlborough Sounds community, saying the police could not be held responsible for what the media chose to publish. The IPCA said this was highlighted by the fact that much of what the media published, including continued speculation about the mystery ketch and Guy Wallace's identification evidence, undermined the case against Mr Watson rather than strengthened it unfairly.

[571] The IPCA referred to a number of steps taken by Detective Inspector Pope to prevent reporting, in particular the police sought name suppression for Mr Watson when he was arrested on an unrelated charge of stealing a dinghy in Northland (observing that Mr Watson's counsel did not seek name suppression) and he repeatedly criticised journalists throughout the investigation for actions that could have compromised the identification process, including reinterviewing witnesses and speculating about the direction of the investigation.

[572] The IPCA made the following findings:

> 119. **Finding:** Detective Inspector Pope's actions and his public comments are entirely consistent with the view that he remained extremely concerned throughout the inquiry by media speculation and identification of Scott Watson; and that he sought to avoid any statements that might compromise the investigation or prejudice any subsequent trial. …
>
> 120. In conclusion, there is no evidence of misconduct in Detective Inspector Pope's dealings with the media during Operation Tam; nor any evidence that he set about creating a situation in which the press could identify, attack and malign Scott Watson without breaching the 'sub judice' rule and risking contempt of court proceedings.

The single photograph and Montage A

[573] Mr Chisnall submitted that Mr Wallace's identification of Mr Watson from Montage B was compromised because he had earlier been shown both a single

photograph of Mr Watson and another montage, Montage A, which also depicted Mr Watson.

Was Mr Wallace shown a single photograph of Mr Watson?

[574] The Crown accepts that, on 9 January 1998, Mr Wallace was likely shown the single photograph. The single photograph had been shown by the police to a number of witnesses around this time and three had identified Mr Watson.[130] The single photograph was a black and white photograph of Mr Watson dated 19 January 1990 (taken eight years before Ben and Olivia's disappearance):

[575] The single photograph is referred to in Mr Wallace's interview on 11 January 1998 by Detective Fitzgerald. This interview was disclosed to trial counsel. Mr Wallace referred on three occasions to having been recently shown by police a photograph of a man. Trial counsel did not question Mr Wallace about this interview at depositions or the trial.

[576] On 26 February 1998, Mr Wallace was interviewed by Mr Berryman.[131] The interview included:

> Berryman: Do you think Scott Watson is the man that is responsible for this?
>
> Wallace: Well I have seen video footage of Scott, one video footage of Scott, and oh yeah, the Police actually showed me photos of Scott, and they reckon

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130 Timothy Everist on 8 January 1998; Oliver Perkins on 8 January 1998; and Teresa Geddes on 11 January 1998.

131 This was before Mr Wallace had been shown Montage B on 20 April 1998.

> they are five years old, and they are pretty similar to what I saw on video and seeing what I now believe is Scott on video, and lining him up with the mystery man, I have to say no.
>
> …
>
> Berryman: So you didn't see the mystery man at all in any of those photos?
>
> Wallace: No. Not as far as I was concerned.

[577] Mr Berryman's interview of Mr Wallace was referred to by Mr Watson's trial counsel at the depositions hearing in questioning Mr Wallace.

[578] Detective Sergeant Moore's job sheet dated 27 April 1998 was also disclosed. That referred to Mr Wallace's interview of 11 January 1998 and his statement that he had been shown a photograph of a person on the day he was completing his compusketch. Mr Wallace told Detective Sergeant Moore that someone saw him in the corridor and showed him a black and white photograph, saying it was about four to five years old but Mr Wallace did not know the person depicted.

[579] In information provided to the IPCA in 2008, police said there were "only three occasions" where witnesses successfully identified Mr Watson using the single photograph taken of him in 1990.

Our assessment

[580] Emphasising that full disclosure was required for fair trial reasons,[132] counsel for Mr Watson referred to the affidavit filed for this appeal from Ms Levy wherein she deposes that trial counsel were not aware that Mr Wallace was shown the single photograph and they would have used the information had they known it.

[581] As mentioned above, Ms Levy was junior counsel for Mr Watson at his trial, appearing with two senior counsel (Mr Davidson, as he then was, and Mr Antunovic). Although Ms Levy says she prepared the affidavit in consultation with Mr Davidson, and he concurs with its contents, neither Mr Davidson nor Mr Antunovic filed evidence. There is nothing before us to suggest Mr Davidson and Mr Antunovic are

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[132] The principles were recently discussed in: *R v Lyttle* [2022] NZCA 52, [2022] NZAR 117 at [20]–[30]; and *Hall v R* [2022] NZSC 71, [2022] 1 NZLR 131 at [25].

not competent, compellable and in New Zealand. Ms Levy confirmed that it was Mr Antunovic who led the identification part of the defence. Ms Levy also acknowledges that she did not have access to full trial file in preparing her affidavit. In these circumstances, Ms Levy's affidavit carries little weight.

[582] We acknowledge, however, that Mr Davidson raised this as a disclosure failure in a letter to the Crown Law Office after the trial dated 13 September 2000:[133]

> … at the trial there was never any suggestion by the Crown that Wallace had been shown any other montage of photographs other than Montage B which he was shown on 9 April 1998. Nor was there any suggestion that the Police had shown Wallace any solitary photograph of Watson. The clear impression from the passages in Mr Goulter's book is that Wallace was shown another photographic montage at an earlier date and was unable to nominate Watson from the montage. We can find absolutely no reference to such an event in any of the disclosure material ever made available to us. This we regard as a matter, obviously, of significance. We would have thought that prosecutorial fairness would require not only disclosure of any material suggesting that Wallace had seen another photographic montage but also for the circumstances of that, if known to the Crown, to be led as part of his evidence by the Prosecutor at the trial.

[583] Crown Law responded on 22 December 2000, saying that it had met its disclosure obligations.

[584] It is clear that trial counsel had disclosure of material which referred to Mr Wallace having been shown the single photograph. The impact of Mr Wallace being shown the single photograph some three months prior to his identification of Mr Watson from Montage B on the admissibility of that identification is a different matter. So too is the fact the jury was not aware Mr Wallace had been shown the single photograph. We will return to those issues later.[134]

Was Mr Wallace shown Montage A?

[585] A related point was the suggestion Mr Wallace was shown what was known as Montage A, something denied by the Crown.

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133 The 9 April 1998 date is an error. Montage B was shown to Mr Wallace on 20 April 1998.

134 See below at [754]–[763].

The IPCA's findings

[586] The IPCA said "there is conflicting evidence as to whether Guy Wallace was shown one or two montages".

[587] The three photographic montages that included Mr Watson (A1, A2 and B), each comprised eight photographs.[135] A1 and A2 were effectively identical, except the former uses the full-length photograph of Mr Watson taken on 8 January 1998 whereas the latter uses a full-length photograph taken on 12 January 1998.

[588] In relation to the Montages, the IPCA Report said:

> - In Al and A2, Scott Watson was the only subject with visible tattoos. Some of the witnesses who were shown these montages had already said the 'sleazy man' had tattoos;
> - In Al and A2, all subjects were photographed against an identical background at Blenheim Police Station;
> - In Al, A2 and B, all subjects had short to medium length hair. This is consistent with descriptions of the 'sleazy man', and also with the initial description given by Guy Wallace of the man last seen with Ben and Olivia, but inconsistent with identikits of the 'mystery man' (Guy Wallace's descriptions are further addressed below);
> - In Al, A2 and B, Scott Watson was the only subject who had been present at Furneaux Lodge that evening; and
> - Montage B uses a photograph of Scott Watson which [the complainant] suggest[s] shows his eyes half-closed, while other subjects have their eyes open.

[589] As to Montage A, the IPCA Report said:

> Only 8 of the total 43 witnesses that were shown either Montage A1 or A2 positively identified Watson as being the "sleazy man".

[590] As to Montage B, the IPCA Report said:

> Montage B was shown to witnesses in March and April 1998. This was after Scott Watson had been identified in the media following circulation of a suspect profile of him … ; and after the key witness Guy Wallace had been asked to identify Scott Watson from a single photograph … ; and by television

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135 See [487] above, which includes photographs of Montage A2 and Montage B. The Court does not have a copy of Montage A1 before it.

> reporters from a video. Montage B resulted in either definite or tentative identification by some additional witnesses.

[591] The IPCA Report recorded that:

> 53 witnesses were shown Montage B which contained the photograph of Watson with his eyes half closed. 27 of the witnesses shown Montage B positively identified Watson as the man they had described.

[592] The IPCA Report concluded:

> 27. **Finding**: The construction of the montages, the methods used for presenting the montages to witnesses, and the limited documentation around witness responses, were all highly undesirable, particularly given the importance of suspect identification in this case. Whilst an exhaustive examination of Police records does not reveal any deliberate intention or conscious plan on the part of Police to influence witnesses inappropriately, nor provide tangible evidence of serious misconduct, the various failures to adhere to common law principle and to the guidance in the Police Manual of Best Practice has exposed the integrity of the investigation to justifiable criticism and to the drawing of inferences about intention and motivation. It also rendered any evidence obtained vulnerable to challenge, as subsequently occurred at both the trial and on appeal.

Detective Superintendent Millar's investigation

[593] In 2001, Detective Superintendent Jim Millar investigated the question of whether Mr Wallace had been shown Montage A. He produced a report dated 27 March 2001 and a second report dated 6 July 2001 after he had interviewed Mr Wallace and obtained a written statement from him.

[594] The first version of Montage A was created by the police on 11 January 1998. A police shorthand typist provided a note of an internal police briefing on 11 January 1998 which referred to Mr Wallace being shown a photograph montage of Mr Watson but not selecting him.

[595] Although not raised by counsel, we note that in Mr Wallace's interview with Mr Berryman on 26 February 1998, referred to at [576] above, he said he had been shown "a line up in a manila folder, a brown manila folder, with about 10 guys, and

I now know which one was him". "[H]e was the only one wearing a teal-blue sweatshirt."[136]

[596] Detective Superintendent Millar spoke to members of the police who were at the Picton Police Station on 11 January 1998 when Mr Wallace was being interviewed by Detective Fitzgerald. Detective Fitzgerald told him he had precise instructions on the issue of identification and that, as a principal witness, Mr Wallace was to be saved for a formal identification parade. Detective Fitzgerald was "adamant" that at no time when he was present was a photographic montage shown to Mr Wallace. Detective Sergeant Moore was likewise adamant — he was responsible for supervising the interview, saying that, to the best of his knowledge, Mr Wallace was only ever shown Montage B. Detective McCornick was at the Picton Police Station on 11 January 1998, preparing Montage A. She told Detective Superintendent Millar that she played no part in the interview. She prepared and retained custody of the photographic montage booklet through to the time laser copies were taken some days later. She was confident no one was given the opportunity to show Mr Wallace Montage A on 11 January 1998. Detective Superintendent Millar said on 11 January 1998, the Montage was in a totally different format from when it had been laser copied.

[597] Detective Inspector Pope said, had Mr Wallace been shown Montage A, it would have been completely contrary to his specific instructions. That was despite his memorandum to the Crown Solicitor of 22 May 1998, and a comment in a book written about the murders, appearing to suggest Detective Inspector Pope believed Mr Wallace had viewed Montage A. Detective Inspector Pope was at a loss to explain those references, saying he never held that view and could only speculate that Mr Goulter had confused his comments.

[598] Detective Superintendent Millar spoke to Mr Wallace, who said he was not shown Montage A. In an undated statement, Mr Wallace said that, on 9 January 1999 when giving a statement to Detective Fitzgerald, he spoke to a person he was shown a black and white single photograph by a person he believed to be a police officer while moving between two rooms. He was unable to say if it was the person from the Naiad

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136 The original photograph and those used in both versions of Montage A show Mr Watson wearing a tee-shirt which is reproduced in the various versions in different shades of blue.

or not. Knowing that others had been shown photographs, Mr Wallace asked Detective Fitzgerald if he could view them. He was told there was a procedure that had to be followed first. He said Detective Fitzgerald saw him at a later date and showed him several photographs mounted on something but that was just photographs of the Main Bar. On 20 April 1999, he was shown Montage B by Detective Sergeant Hamilton and identified the man. He said he had never seen the selection of Montage A photographs that was shown to him.

[599] Detective Superintendent Millar concluded:

> Information supporting the fact that WALLACE was shown Montage A is either circumstantial or recorded by staff who did not actually deal directly with WALLACE. Conversely, WALLACE himself and all Police members who had the opportunity to show him the montage, deny he was ever shown it and for this reason I believe it can be safely assumed that he wasn't.

Submissions

[600] Mr Chisnall referred to the IPCA's findings that the construction of the Montages, the methods of presenting them to witnesses and the showing of the single photograph were all highly undesirable practices. He contended there was a clear factual narrative to support the finding that Mr Wallace was shown Montage A. He submitted Montage A had its own problems: Mr Watson was the only person depicted who was present at Furneaux Lodge and the only person with visible tattoos (a detail described by some of the witnesses).

[601] In explaining why the Police might reasonably have avoided putting Montage A to Mr Wallace, Mr Baker, for the Crown, referred to the police preference that Mr Wallace view an identification parade. On 27 February 1998, trial counsel refused the police request Mr Watson attend an identification parade, saying it would be unfair and pointless. There was further correspondence and, on 10 April, the request was repeated. No reply was received by the stated deadline of 15 April. Mr Wallace viewed Montage B on 20 April 1998.

Our assessment

[602] A note of a police briefing on 3 April 1998 said:

> Where any individual identifies a person of a similar description to WATSON but was not on the wharf between the times of 4.00 and 5.00 am, with the exception of the security staff, each person is being shown montage B which is a facial montage of eight persons. We are saving those persons on the Naiad and persons who have given a very good description as to WATSON's behaviour through the night for informal or formal identification parades.

[603] A note of a police briefing on 14 April 1998 said:

> At this stage we will use Montage B for these critical witnesses.
>
> Because of the extended session that some of the staff have had with WALLACE, an independent member of the Police will carry out the photographic identification with him to preclude any suggestion of bias or impropriety.

[604] Detective Superintendent Millar's search of the police file revealed that only one witness who could be considered a key witness (Sarah Dyer) was shown Montage A, which occurred on 13 January 1998.

[605] We accept, as evidenced by the approach of Detective Fitzgerald and Detective Superintendent Millar, that the police were critically conscious of the issues surrounding the need for care in obtaining identification evidence. It would have been contrary to instructions and the agreed strategy were Mr Wallace to have been shown Montage A.

[606] We consider the better view is that Mr Wallace was not shown Montage A on 11 January 1998, given the evidence of those at the police station that day and noting it was not referred to in the interview with Detective Fitzgerald (unlike the single photograph). The interview was videotaped and, if Mr Wallace had been asked to view Montage A, it would have been an integral part of the interview and obvious from the videotape. The note of the shorthand typist records the comment as coming from Detective Fitzgerald and we agree that may well have been the misrecording or misinterpretation of a comment about the single photograph. Furthermore, the Montage was still in the course of being prepared on that day.

[607] However, we cannot discount the possibility that, after that date, Mr Wallace was informally shown one of the versions of Montage A, or the photograph of Mr Watson used in it, or was told about the Montage. We note that, by the time of the Berryman interview, Mr Wallace was clearly aware others had been shown a photographic montage. Indeed, he contacted Detective Fitzgerald some time after the interview on 11 January asking to be shown it. We can only speculate that he might have discussed the Montage with others, enabling him to respond to Mr Berryman in the way he did. We point out that Mr Berryman was a private investigator hired by Mr Watson and Mr Wallace was under no obligation to speak to him or tell him the truth.

[608] In light of the material provided to us, in particular the documents associated with Detective Superintendent Millar's investigation, on balance we consider it more likely that the police did not show Mr Wallace Montage A. In our view, the prevalence of Mr Watson's name and images in the media and the media's dealings with Mr Wallace are of greater concern than the residual possibility of Mr Wallace being exposed to Montage A in some form or another.

Evidence on appeal

[609] Drs Gary Wells and Adele Quigley-McBride, both social-cognitive psychologists who are experts on eyewitness identification evidence, gave expert evidence on behalf of Mr Watson. They provided a joint report (the Report) by way of affidavit and were also examined before us.[137] At the time of the Report, Dr Wells was a Distinguished Professor of Psychology at Iowa State University and Dr Quigley-McBride was a Post-Doctoral Associate at Duke University Law School.

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137 The opinions expressed in their Report were based on their PhD education and training in social and cognitive psychology; scientific studies on eyewitness identification published in peer-reviewed scientific psychology journals; knowledge of published empirical work of other eyewitness scientists; studies of actual cases of mistaken identification proven through post-conviction DNA testing; Dr Wells' work with the United States Department of Justice and a broad section of American prosecutors and crime investigators on eyewitness identification procedure issues; continuing consultation with American crime investigators on eyewitness identification procedures; studies of photo lineup identifications in a number of police departments in the United States; their knowledge of policies and practices of crime investigators related to eyewitness identification procedures; and knowledge of investigation strategies in eyewitness cases across the United States and Canada.

[610] The Crown engaged Dr Margaret Bull Kovera, a United States-based psychologist and expert on the science of visual identification procedures in criminal proceedings to assess the Report. The Crown disclosed Dr Kovera's report to Mr Watson but did not call Dr Kovera to give evidence at the appeal. The Crown acknowledged there is very little difference between all three experts in respect of the social science on identification and the Crown did not really dispute that social science.

[611] For the purposes of the appeal, the Crown accepted that Dr Kovera concluded, on the basis of the material provided to her by the Crown, that:

> Taken together, in my opinion, there is substantial evidence that there were factors present in this case that could have adversely affected [Mr Wallace's] ability to make a correct identification. In part, my concern with the reliability of the identification stems from the suggestive practices with which the police collected the identification evidence (suspect biased lineup composition, non-blind administration of the photo array procedure, and repeated identification attempts with the same suspect and witness).

[612] The Crown accepted that the background science on eyewitness identification as set out in the first part of the Report provides a brief overview of well-established general observations and principles based on modern scientific evidence related to eyewitness identification. However, the Crown's position was that the conclusion of all three experts exceeded that which experts can properly draw, and to that extent their reports were inadmissible.[138]

First part of Report — the science of eyewitness identification

[613] Based on controlled experiments, psychological scientists have long warned that eyewitness identification evidence is less probative than people generally think. Reliable publicly available databases indicate that approximately 70 per cent of DNA-based exonerations have been cases of mistaken eyewitness identification.

[614] Many of the problems with eyewitness evidence stem from the general malleability of memory and the power of even subtle suggestions. Memory is not

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[138] Mr Watson sought an order requiring production of Dr Kovera's report pursuant to s 389(a) of the Crimes Act and requiring Dr Kovera to attend the appeal hearing to be examined pursuant to s 389(b). This Court declined that application in *Watson v R* [2024] NZCA 170.

static but changes over time as additional information (or misinformation) is encountered and incorporated into the memory.

[615] Research has shown that the chances of mistaken identification are heavily influenced by the methods used to obtain that identification. The Report referred to Dr Wells' scientific review paper published in 2020 as representing the consensus of eyewitness scientists around the world. According to the Report, the paper outlined nine conditions in collecting and preserving eyewitness identification evidence considered critical to the reliability of that evidence.[139] The Report said that particularly relevant in Mr Watson's case are the following:

(a) Avoid wherever possible presenting the eyewitness with a single individual or photograph of just one individual (a "showup"). Instead, use a lineup in which the suspected person (or photograph of that person) is imbedded amongst non-suspect persons who must fit the eyewitness's description of the suspect.

(b) The person administering an identification procedure should not know which person is the subject (called a "double-blind procedure" or "blind" administrator).

(c) Witnesses should be explicitly warned that the culprit might not be in the lineup at all and should not be told that someone in the lineup has been arrested.

(d) A clear verbatim record should be made of the witness's verbal statements immediately after the identification (ideally a video recording).

(e) No identification procedure should be repeated with the same witness and suspect (eg asking a witness to view a lineup containing a suspect

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139 Gary L Wells and others "Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence" (2020) 44 Law & HumBehav 3. We observe that what the Report termed "conditions" are described as "recommendations" in the paper, and the paper itself did not say that adherence to the recommendations is "critical to the reliability" of visual identification evidence.

> they saw previously in a showup or placing the same suspect among new lineup fillers and showing that lineup to the same eyewitness).

The showup problem

[616] The Report described one of the "most basic of all principles in eyewitness identification" as the fact that the chances of mistaken identification of innocent suspects is increased by the use of a showup rather than a proper lineup. A showup is highly suggestive to the eyewitness as it directly communicates to the eyewitness that the specific person is the suspect. A showup also contaminates any later identification procedure that uses the same eyewitness and involves the same suspect.

The problem of ignoring eyewitness non-identifications

[617] The Report said that, where an eyewitness who definitely saw the suspect rejects a lineup or showup, that rejection is *exculpatory* evidence. An identification from a lineup by one eyewitness should be judged as less credible if another eyewitness looks at that same lineup and indicates that the person they saw is not in it. The Report went so far as to suggest that "[u]nder some circumstances a non-identification totally cancels the incriminating value of an identification". The Report said:

> For instance, if there are multiple witnesses who reject the lineup and only one who identifies the suspect or if the one who makes the affirmative identification has been contaminated (e.g., via the repeated-suspect problem …), the evidence overall should be considered exculpatory of the suspected person.

The non-blind testing problem

[618] Scientific evidence shows that lineup administrators who know which person is the suspect influence the eyewitness by unintentionally and subtly steering them away from fillers and toward the suspect. They can give confirmatory reactions to the witness' choice, leading the eyewitness to express high confidence in their identification. Conducting lineups using a double-blind procedure is required by law in the majority of states in the United States.

The pre-lineup instruction problem

[619] Often, eyewitnesses presume that the suspect must be in the lineup. And as a result, eyewitnesses may pick the person who *most* looks like their memory of the suspect, even if that person is not a good match to their memory. For this reason, a pre-lineup instruction to the witness that the suspect might not be any of the people in the lineup helps reduce the propensity for eyewitnesses to make affirmative identifications from culprit-absent lineups.

Verbatim eyewitness statements must be secured, not paraphrased

[620] Knowing exactly what the eyewitness said and how it was said (for example, speed of identification, confidence, doubt) when encountering a showup or lineup is critical to evaluating the probative value of any identification.

The repeated-suspect effect problem

[621] The Report explained that every time someone's recognition of an item is tested, it creates a memory for the tested item. Therefore a lineup (or showup) is not just a test of the witness' memory but also an event that creates memories incidentally. After participating in a fair lineup procedure, the eyewitness will now have new memories of the faces in the lineup that are incidentally encoded and associated with the crime context. If the eyewitness is then shown a second lineup that contains the original suspect from the first and a new set of never previously seen filler faces, the eyewitness will feel a sense of recognition for the suspect, purely as the result of repetition.

The significant consequences of a weak memory

[622] While certain situations result in a weak memory, for example poor lighting and inattention to detail, the science shows that poor witnessing conditions in fact increase the rates at which eyewitnesses make mistaken identifications from lineups because a weak memory also reduces the ability of the eyewitness to *reject* the idea that an innocent person was the person they saw. External influences on an eyewitness have a much stronger impact on the witness when their original memory is weak rather than strong.

[623] If memory is strong and the suspect is in fact the culprit, then recognition of that person by the eyewitness should occur relatively quickly, automatically, and with confidence. If recognition does not occur, then either the eyewitness' memory is very weak, the suspect does not match the eyewitness' memory of the culprit or both. However, if the eyewitness rejects the individual with some confidence, then it is not likely to be due to weak memory but more likely because the suspect does not match the memory the eyewitness has of the culprit because the suspect is not the culprit.

Reflector variables

[624] Certain behaviours by eyewitnesses during an identification are considered, as a result of scientific studies, to be highly related to the accuracy of an identification decision. These behaviours, known as reflector variables, reflect (or indicate) something about whether the suspect is or is not the person the eyewitness previously saw. Controlled lab experiments and analyses of actual lineups conclude that low confidence identifications are fraught with error and accurate identifications are made relatively quickly whereas mistaken identifications much more slowly. By quickly, they mean a matter of seconds in time as against something that takes 30 seconds or a minute or more. This is because reliable recognition memory is largely an automatic process rather than something that requires deliberation.

The confidence inflation problem

[625] When DNA exonerations in eyewitness identification cases first began unfolding in the early-1990s, it became clear that, although the eyewitnesses were mistaken, they were highly confident at trial.

[626] This led to controlled experiments in the late-1990s, which discovered that giving an eyewitness any type of simple confirmatory feedback after they had made a mistaken identification leads to a rapid and dramatic inflation of how confident they felt in that identification decision. Subsequently, eyewitnesses who received positive feedback will report that they had a better view than they actually did, paid more attention at the time than they actually did and made their identification decision easily and quickly, even though they actually struggled to make it.

Second part of the Report — analysis of Guy Wallace's identifications and non-identifications of Scott Watson

[627] The second part of the Report then addressed what the writers considered to be the facts surrounding Mr Wallace's non-identifications and identifications of Mr Watson as best as they were able to construct them. Crucially, they did not concern themselves with the identifications made by people who saw Mr Watson only at Furneaux Lodge earlier in the evening. The Report writers considered those witnesses irrelevant to their analysis because Mr Watson's presence at Furneaux Lodge was not contested. Evaluating the documents provided to them in light of their research on eyewitness memory and identification procedures, they reached a conclusion "about the probative value of the eyewitness evidence in this case".

[628] The Report began by addressing the writers' understanding of Mr Wallace's narrative about events that night. This was taken from the notes of evidence at the trial. They referred to his description of the person as "scruffy" and that he served him drinks multiple times that night. The Report said:

> Throughout the night, there are reports of people seeing this man that Wallace described as well as other reports that Scott Watson was at the New Year party. Both men appeared to be attending the party alone. People who remembered seeing Watson at the party described his behaviour as shady and inappropriate — making women uncomfortable throughout the evening and having some altercations with men. … Testimony from security and attendees of the party also suggests that the man Wallace served drinks to was being a nuisance throughout the night in a similar way.[140]

[629] And then:

> What is not clear, however, is whether Watson was the man that Wallace reported serving drinks to at the party. Sometimes it is even unclear whether the other witnesses from the party are talking about Scott Watson.[141] For the most part, neither Wallace's description nor the other witnesses' descriptions match Watson's appearance on the night of New Years [referring to the *Mina Cornelia* photograph]. … Importantly, Wallace's description of the man

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140 [Referring to the evidence of Anna Kernick, Hannah Fox, Oliver Perkins and Christopher Bisman. We will return to the evidence of these witnesses below — the better view of the evidence, in our view, is that all of them were interacting with Mr Watson.]

141 [Referring to Simon Bell (recognised Mr Watson in the media but not from Montage B); James Forbes (did not pick anyone from Montage B but said Mr Watson was the most like the person he saw); Nicholas Sutherland (identified Watson from Montage A); and Thomas Davidson (identified Mr Watson from Montage B and mentioned recognising him in the media). We note that evidence of Thomas Davidson identifying Mr Watson was not led at trial. Further, we can find no record of James Forbes having been a witness at trial.]

> he served drinks to — scruffy, unshaven and long wavy hair — does not match Watson's appearance in this photograph.

[630] We interpose to correct an important misstatement in the Report. We have set out above Mr Wallace's evidence at trial and depositions, and his statements to the police. At no point did he say the lone man had "long" hair.

[631] The Report said that Mr Watson's "hair and other features do not match the description provided by Wallace and other key witnesses". The Report referred to the Waswo photo, observing that Mr Watson "had short dark hair that was not scraggly or near his collar". We interpose again to observe that the Waswo photograph showed Mr Watson with his head tilted forward at around a 45-degree angle and question whether it is possible to conclude whether or not his hair was near his collar.

[632] The Report noted that, when Mr Wallace was down at the jetty and came across Hayden Morresey and Sarah Dyer, "the scruffy man that he served earlier" also asked for a ride. The Report went on to say that, when Olivia and Ben boarded the Naiad, "the scruffy man … made a joke that Olivia was invited, but Ben was not".

Mr Wallace's description and composite (compusketch)

[633] The Report referred to Mr Wallace's description of the lone man in his first interview on 3 January as "about 32 years old, 5' 9'' inches with a wiry build, unshaven but no moustache, short dark wavy hair, and smelled like bourbon". The Report noted a second interview later that day but no attempt to revisit the description of the mystery man.

[634] The Report then discussed the composite created with the assistance of Mr Wallace on 9 January 1998 (the compusketch), describing it as consistent with Mr Wallace's description and "fairly consistent" with a composite produced by the bar manager, Roz McNeilly, and "other bar staff".[142] We note the only other bar staff member who contributed to Roz McNeilly's composite was Chey Phipps.

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[142] The Report also referred to composites drawn by an artist in 2002, with input from Guy Wallace and Roz McNeilly, but noted those images are less important given they were created so long after the critical event.

[635] The Report writers then compared two composites created with Mr Wallace's input with the *Mina Cornelia* photograph and conclude that the composites "do not resemble Watson as he appeared" on the night Ben and Olivia disappeared, albeit they also do not look like each other.[143]

[636] The Report recorded that Mr Wallace was satisfied his composite was a "good likeness" at the time of its creation and was only concerned about the hair, which he thought should have been even "scruffier".[144] They said Mr Wallace did not show any dissatisfaction with his composites until much later, after Mr Watson had become a suspect and Mr Wallace had been shown Montage B. In the Report writers' opinion, Mr Wallace felt the composite was inadequate only once he learned the identity of the person charged with the crime and what Mr Watson, the police suspect, actually looked like.

Mr Wallace's rejection of the single photograph

[637] The Report then referred to the fact, now accepted by the Crown, that Mr Wallace was shown the single photograph of Mr Watson in early-January 1998. The Report writers noted that three people were reportedly shown the single photograph and recognised Mr Watson as someone at Furneaux Lodge on New Year's Eve but Mr Wallace did not recognise him.[145] Importantly, the Report writers noted Mr Perkins identified Mr Watson as the person who behaved inappropriately with him using the single photograph but the Report writers then said that "because Perkins was not on the critical boat trip with Wallace, his identification could only confirm Watson's presence at the party". We will return to the importance of Mr Perkins later.[146]

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143 The first composite, created 9 January 1998, is included above at above [487]. The second composite was drawn by an artist in 2002: see above n 142.

144 In fact, at Mr Wallace's direction, someone used a pencil to draw on hair and touch up the facial hair – see above at [503].

145 Timothy Everist (who confirmed he spoke to the person in the photograph at Furneaux Lodge on New Year's Eve), Teresa Geddes (who said the person looked like the person in the Lodge who "hassled" her, saying she could not be certain but features around the eyes were the same except the person had longer hair, but the identikit looked nothing like the person) and Oliver Perkins (who agreed that Mr Watson was someone he saw at Furneaux Lodge behaving inappropriately). We have taken these comments from the Report but have not been provided with the statements themselves.

146 See below at [790]–[791].

Montages A1 and A2

[638] The Report then discussed Montages A1 and A2, noting they were shown to witnesses in February 1998.[147] It referred to the IPCA Report which concluded it is unclear whether Mr Wallace was shown either Montage A1 or A2, noting that the Crown says A1 was never shown to anyone and Mr Wallace was never shown A2. The Report (written by Drs Wells and Quigley-McBride) then said:

> [I]n our experience, it would be highly unusual and inexplicable for police to decide *not* to show the key witness a montage created for the purpose of identifying the perpetrator.

[639] We will return to this observation later.[148]

Montage B

[640] The Report noted that the officer assigned to create Montage B was tasked with making "a 'better montage using a more accurate photo of Watson'" which the Report writers said, "by which they mean a photo of Watson with 'hooded eyes'".

[641] Then, rather inexplicably given their role as experts, the Report writers said:

> The photograph of Watson that police chose to use in montage B appears to have been taken mid-blink so that his eyes look hooded, even though they typically do not.

[642] We interpose to observe that the "better montage using a more accurate photo of Watson" quote appears to have come from police briefing notes dated 3 March 1998. However, we have not found anything in the documentation before us to suggest that quote meant the police were intentionally seeking to capture an uncharacteristic photograph of Mr Watson.

[643] The Report then noted that many of those who attended Furneaux Lodge discussed the scruffy man having "slanty" or "hooded" eyes that were distinctive,[149] although neither Mr Wallace nor the others on the Naiad mentioned hooded eyes.

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147 The Report writers said they have seen Montage A2 but not A1.

148 See below at [667].

149 The Report listed Roz McNeilly, Cara Brosnahan, Amanda Egden, Camilla Savill, Jonathan Thomson and Chey Phipps as examples.

[644] The Report said that it appears Montage B was designed specifically for those who saw Ben and Olivia on the Naiad as it was the only montage Mr Wallace and Mr Morresey were officially shown. It acknowledged, however, that many other witnesses were shown Montage B. It observed that various witnesses who picked photograph number 3 from Montage B (Mr Watson) said that the eyes were the reason they settled on the photograph despite other inconsistencies in his appearance. The Report also noted that a professional photographer was asked to examine the photograph of Mr Watson used in Montage B and concluded it was poor quality, with distortions, discolouration and "not a good likeness".[150]

[645] The Report then discussed Mr Wallace's identification of Mr Watson from Montage B on 20 April 1998. That was over three and a half months since New Year's Eve and by this time Mr Wallace had not only been shown Mr Watson's photograph "multiple times" but would also have had considerable media exposure to Mr Watson's face. The Report noted that Mr Wallace narrowed the photos down to 3 and 5, and then continued to study them for approximately a minute and a half before deciding that photograph 3 "stood out more than the others" and "I believe photograph number 3 is the person who was at the bar and on the boat with me." He explained, however, that on New Year's Eve, the person in photograph 3 appeared more "unkempt", with longer, bushier, wavier hair, a fringe that came down onto his forehead, and stubble on his chin and face ("good growth").

[646] The Report concluded that Mr Wallace "was not certain", noting that in later interviews he said he selected photograph number 3 because it was the person who looked "most like" the person on the Naiad.[151] The Report then referred to Mr Wallace's trial evidence that he was "pretty definite".

[647] The Report concluded that the record made of Mr Wallace's identification from Montage B suggests some confidence, but that Mr Wallace qualified his identification of Mr Watson throughout. It then referred to his evidence at depositions, saying, "he

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150 Peter Durrant, discussed below at [725] and [780].

151 The Report cited the transcript of a single interview with Mr Wallace conducted by Kristy McDonald KC in 2010, in relation to Mr Watson's first application for the exercise of the Royal Prerogative of Mercy. The Report's Appendix also referred to a 2018 affidavit by Mr Wallace. Neither of those documents have been placed before this Court.

changed his mind and said that Scott Watson was not the man who was on the boat with Olivia and Ben" — the footnote, however, reveals that the Report writers were unable to find this in the deposition transcript itself.

[648] The Report writers concluded that Mr Wallace reported "very different levels of certainty over time".

Other key eyewitnesses

[649] Referring to the fact that non-identifications from other witnesses can provide important information about guilt and innocence, the Report writers then turn to what they described as the "only … other person who could provide [a] probative exculpatory identification — Hayden Morresey". The Report said there were five people on the Naiad but only two who saw Olivia and Ben leave with the unknown man — Sarah Dyer and Hayden Morresey. Again, we interpose. That is somewhat misleading, given Amelia Hope and Rick Goddard were also present on the Naiad with the lone man. The Report said:

> Although Hope's description was a bit more detailed, neither Hope nor Goddard could provide a meaningful, detailed description of the scruffy/lone person on the water taxi. Neither one picked Watson out of a montage they were shown. Hope's later description of a hairline at trial is not meaningful because by that point she had been exposed to Watson's image and knew that he was on trial.

[650] We address the relevance of Amelia Hope's description of the lone man's hair below.[152]

[651] The Report then said:

> [Morresey], however, was able to provide a very good description of the man — one that was very similar to the Wallace's — and also the boat that they boarded. He described the man as "between 25 and 35 years", "hair was quite scraggly looking", "longish … looked like it needed a bit of a cut", and "wavy and sort of shoulder length", "didn't appear to be that big … he wasn't stocky", wearing dark clothes, and 5'8" or 5'9". Thus, [Morresey] was in a good position to provide useful eyewitness identification evidence given that he seemed to have a detailed and vivid memory of the man who left the Naiad with Ben and Olivia.

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152 Below at [807]–[813].

[652] The Report writers considered Mr Morresey's eyewitness evidence as particularly relevant to evaluating the credibility of Mr Wallace's evidence. They considered Mr Morresey's description of the man on the boat as "detailed and similar" to Mr Wallace's descriptions and the compusketches produced by Mr Wallace and Roz McNeilly, suggesting that they all had a "similar memory" of the man on the Naiad. Furthermore, there is only one record of Mr Morresey undertaking a formal identification procedure when he was shown Montage B on 27 April 1998 and he rejected the lineup, saying none matched his memory. He also indicated that *Blade* was too small and did not have enough ropes.

[653] The Report contrasted what they describe as Mr Wallace's "contaminated" memory with that of Mr Morresey, being the only person shown a photograph of Mr Watson by the police only once, saying he "confidently" rejected the lineup when shown Montage B. The Report writers concluded that "[a] clear lineup rejection from someone who had a good view is a strong indicator that the subject in the lineup is innocent, even when another eyewitness has identified that individual."

Distillation and analysis

[654] The Report acknowledged that much has been learned about the risks of mistaken eyewitness identification since 1998. The Report concluded that numerous factors point to a conclusion that Guy Wallace had, at best, a very weak memory of the man who left the Naiad with Ben and Olivia. The Report said that although Mr Wallace's verbal descriptions were fairly detailed, those descriptions and his compusketch were "dramatically different" from the actual appearance of Mr Watson that night and:

> Even when Wallace was describing the "scruffy man" he saw at the party, whom he assumed was the same man as the one he gave the boat ride to, the description is rather clearly not that of Scott Watson. Based on the verbal descriptions and Compusketch, Wallace's memory [of] the man on the water taxi was either extremely weak or was instead a memory of a different person entirely, not Watson.

[655] That conclusion, said the Report writers, is supported by another "extremely-important" observation: in the first test of whether Mr Wallace recognised Mr Watson, he showed no sense of recognition from the single photo. That lack of

recognition was despite the highly suggestive nature of a showup procedure and the possibility that Mr Wallace had seen Mr Watson at Furneaux Lodge that night. The showup on or around 9 January contaminated any subsequent identification, in the Report writers' view. The Report writers concluded that:

> … the strong evidence (descriptions, compusketch, rejection of showup) that Watson did not match Wallace's memory of the man who left with the victims would be enough to either reject Watson as a suspect, or to reject Wallace as a credible eyewitness.

[656] Persisting with their view that Mr Wallace was shown at least one of Montage A1 and A2, the Report writers said that this was early in the investigation, mid-January 1998 when Mr Wallace's memory would have been as fresh and reliable as it would ever be, and that Mr Wallace's rejection of Mr Watson suggests he either had a very weak memory or his memory was actually of someone other than Mr Watson. Despite repeated exposure to Mr Watson's face by April 1998 (showup, Montage A, television), Mr Wallace "still struggled" when presented with Montage B. The Report described Mr Wallace as having "wavered" between two people in Montage B and settled on photograph 3 as a person who looked more like the man he remembered but noted dissimilarities. The Report pointed out that double-blind procedures were not utilised in any of the identification procedures. The Report writers then observed:

> After considering all of the circumstances in light of the eyewitness identification science, perhaps the <u>least</u> likely reason that he settled on Watson's photo was that Watson was a better match to Wallace's memory of the person he last saw with Olivia Hope and Ben Smart.

[657] The Report said the first time Mr Wallace identified Mr Watson as the person who was on the Naiad was: only after unsuccessful prior attempts by the police to have Mr Wallace pick Mr Watson and media pictorial portrayals of Mr Watson; despite neither his description nor either of his compusketches looking like Mr Watson; despite wavering among photos of two different people in Montage B; and despite reporting low confidence in his pick of number 3 in Montage B. Referring to their scientific work on confidence inflation, the experts said it was to be expected that, by the time Mr Wallace gave evidence at trial, he was more certain.

[658] Then referring to Mr Morresey, the Report said he provided a detailed description that matched the description given by Mr Wallace, which is a description that does not match Mr Watson's appearance in the *Mina Cornelia* photo, nor the Waswo picture. The Report said:

> The fact that neither description matched Watson and yet the two descriptions are highly similar to each other strongly implies that it was not Watson that they saw on the boat.

[659] The fact Mr Morresey did not identify Mr Watson from Montage B is, in the Report writers' opinion, consistent with the description not fitting Watson and again "strongly implies" that Watson was not the person on the Naiad.

[660] The Report writers concluded that Mr Wallace's identification testimony has little to no incriminating probative value regarding the identity of the lone man.

[661] That was the Report. The Crown's cross-examination of the two expert Report writers exposed considerable weaknesses in their approach and conclusions. Given Mr Watson's reliance on their evidence, we discuss those issues in some detail.

Limitations of the Report writers' evidence

Limits of expert evidence

[662] Dr Wells maintained he possessed the necessary expertise to say whether a witness's memory was weak and it was his role as an expert witness to give evidence about that. In his opinion, he was able to say if a person matched a description better than members of the public generally, given the experiments he has conducted as to how witnesses describe people and then looking at who they are describing.

[663] We were somewhat surprised by that approach, given our view that the purpose of this expert evidence was to identify vulnerabilities that *may* have affected the reliability of Mr Wallace's identification evidence. Whether those vulnerabilities in fact did so is a matter for us to determine.

[664] Our concerns were exacerbated by the way in which the experts responded to cross-examination. For example, the experts were challenged about the Report's

reference to the compusketch having been made by Roz McNeilly and "other staff" at Furneaux Lodge. It was pointed out that Chey Phipps was the only other staff member involved in the compusketch and he described the likeness as "about 65 per cent". Dr Quigley-McBride felt that misrepresentation "doesn't really matter". Dr Wells brushed the criticism aside by saying anybody who was not on the Naiad was not a key witness and they were just establishing at best that Mr Watson was at the party.

[665] We interpose to observe it is generally not an expert's task to discuss the relevance of evidence or who were key witnesses. There is also an obvious inconsistency in this aspect of the Report which does place some weight on the compusketch compiled by Ms McNeilly and Mr Phipps — even though Ms McNeilly and Mr Phipps were not on the Naiad.

Montage A

[666] Dr Wells believed it more than likely that Mr Wallace was shown one or both of Montages A1 and/or A2. That opinion added to his conclusion about the reliability of Mr Wallace's identification but he said he would have reached that conclusion even without it.

[667] The Report writers' belief on this factual issue is irrelevant and inadmissible. The factual basis for this conclusion is not put clearly in Report and in particular we have concerns they have disregarded the explanations provided by the police as to why Mr Wallace was not shown Montage A (if they were aware of them), namely, that Mr Wallace and the others with him on the Naiad were being saved for an identity parade. Further, as we conclude above,[153] we ultimately consider it more likely that the police did not show Mr Wallace Montage A.

Montage B

[668] The Report stated that the photograph of Mr Watson in Montage B appears to have been taken mid-blink so that the eyes look hooded, even though they typically do not.

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153 Above at [608].

[669] Two points can be made. First, whether Mr Watson's eyes typically look hooded is a matter of debate. They appear to be hooded in the 19 January 1990 single photograph and at least one other photograph of him on the police file.[154] Secondly, none of the witnesses at Mr Watson's trial used the word "hooded". Under cross-examination, Mr Wallace agreed that number 3 in Montage B struck him more than anything else because the eyes were "almost half closed". But Mr Wallace also indicated that number 2 in Montage B had similar eyes.

Mr Wallace wavering

[670] The Report also referred to the amount of time taken by Mr Wallace to identify Mr Watson from Montage B. Before us, Dr Wells was referred to a paper he had written together with Dr Quigley-McBride entitled "Eyewitness Confidence and Decision Time Reflect Identification Accuracy in Actual Police Lineups".[155] An extract of the paper read:[156]

> Similarly, eyewitnesses who made quick decisions were much more likely to have selected the suspect than a filler. For these real eyewitnesses, a quick decision time was approximately 6 s for sequential lineups and 30 s for simultaneous lineups.

[671] Dr Wells confirmed that Montage B was a simultaneous lineup. However, the Report said:[157]

> In addition, extensive data from both controlled lab experiments and from real-world police lineups show that accurate identifications are made relatively quickly whereas mistaken identifications are much slower. By quickly we mean a matter of mere seconds in time versus something that takes 30 seconds or a minute or more.

[672] It seems reasonable to observe that this evidence in the Report was at best somewhat misleading in this regard.

[673] The Report described Mr Wallace as wavering when selecting from Montage B. In eyewitness science, to waver means somebody does not settle right

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154 See below at [750].

155 Adele Quigley-McBride and Gary L Wells "Eyewitness Confidence and Decision Time Reflect Identification Accuracy in Actual Police Lineups" (2023) 47 Law & HumBehav 333.

156 At 344.

157 Footnote omitted.

away on one photograph and pays attention to more than one photograph. We note the Report did not mention Mr Wallace's statement, made contemporaneously with his identification on 20 April 1998, that he was "immediately drawn" to photographs 3 and 5, and that he "took [his] time over the photos because Detective Sergeant HAMILTON had said it was an important matter and [he] should take [his] time". Mr Wallace said it "wasn't hard" for him to discount photograph 5 as "his face was fuller and he doesn't fit my recollection".

When memory is most reliable

[674] Dr Quigley-McBride gave evidence about the need to focus on what witnesses say soon after the events at issue because that is when people's memory is best. Having said that, however, when asked whether the best description would be the first one given by Mr Wallace on 3 January 1998, she was somewhat equivocal, noting he made "quite a few early statements". The Report did not focus on Mr Wallace's first description of the lone man.

Non-identifications as exculpatory evidence

[675] Dr Quigley-McBride was asked about recent research on non-identification and whether it should be considered exculpatory evidence. She was one of six authors of a 2024 piece of research entitled "New Insights on Expert Opinion About Eyewitness Memory Research".[158] Only 28 per cent of the 76 scientists surveyed agreed with the statement: "When eyewitnesses do not identify anyone in the lineup, that generally means the suspect in the lineup is innocent".[159] The Report did not qualify its comments on non-identifications being exculpatory evidence with reference to this very recent study which indicates their view is not shared by a surveyed majority of experts.

[676] It was put to Dr Quigley-McBride that the recent research also said:[160]

> The statement about lineup projections may have been difficult to answer as well because eyewitnesses can reject the lineup for a multitude of reasons such

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158 Travis M Seale-Carlisle and others "New Insights on Expert Opinion About Eyewitness Memory Research" (18 April 2024) Perspect Psychol Sci.

159 At 5 and 7.

160 At 10.

> as when they have no memory for the perpetrator or when they are overly cautious in making a selection.

[677] The Report made no mention of this qualification.

Mr Morresey

[678] Both experts were challenged on their conclusion that Mr Morresey's rejection of the lineup was exculpatory of Mr Watson. The Report says Mr Morresey "confidently" rejected the lineup. Notably, Mr Morresey was clear that he had only seen the lone man in the Naiad from the back. It was therefore hardly surprising that he could not have identified anyone from Montage B.

[679] Dr Quigley-McBride attempted to justify the weight placed on Mr Morresey's evidence, saying it was because of the distinctive aspect of the descriptions of the lone man's hair — which Mr Morresey was able to see from the back. When it was put to her that the reader of the Report would not know that Mr Morresey had only seen the man from the back, Dr Quigley-McBride responded that it was not their job to tell people everything about the case. Dr Quigley-McBride maintained that:

> Morresey was the only other person on the boat that night that was able to give any sort of good description of the person that was on the boat. So if there was anyone else in a relative sense that could have provided an identification it was him. I don't think it's misleading.

[680] While it appears that Drs Wells and Quigley-McBride had all of Mr Morresey's statements, it seems they may not have had the notes of the evidence from the depositions. Mr Morresey was asked in examination in chief at depositions if he got a good look at the man's face, and he replied "[n]o"; "[s]o I take it you wouldn't be able to identify him again?", and he replied, "[n]o". In cross-examination, he was asked "[n]ow, you never really saw that man's face did you?", and he replied "[n]o."

[681] Mr Morresey made much the same points in his trial evidence. When asked "[y]ou can just really talk about his hair?", he replied "[y]eah, that's about it."

[682] We regard the experts' conclusion that Mr Morresey's rejection of Mr Watson from Montage B is a strong indicator that Mr Watson is innocent as irresponsible.

Amelia Hope

[683] Dr Wells was asked why he had rejected Amelia Hope's evidence that the person on the Naiad had receding hair. He said her 4 and 7 January descriptions did not mention hair and it was not until 3 February that she referred to short hair and receding hairline, by which time, in Dr Wells' view, Mr Watson had been presented on television as a suspect. There was some confusion about whether the experts had seen Amelia Hope's handwritten statement of 10 February which included a drawing of the receding hairline or her unchallenged evidence at depositions.

[684] However, the fact that Amelia, who had been on the Naiad with the lone man, described his hairline as "receding" was particularly relevant given that Mr Watson's hair was receding and the experts themselves based much of their conclusion on descriptions of the lone man's hair. [161] Dr Quigley-McBride said that the most distinctive aspect of this person from the descriptions was the hair.

Composites/compusketches

[685] In the Report, Drs Wells and Quigley-McBride put some weight on their assessment that Mr Watson did not look at all like the compusketches. They did not make any comment on the accuracy of composites generally. However, the 2020 review paper, which outlined their nine recommendations, does.[162] The paper makes the point that composites have little value as an identification tool "because composites do not reliably represent a recognizable representation of the culprit …".[163]

[686] When cross-examined on this, Dr Wells emphasised that Mr Wallace described "long hair, scraggly" and demonstrated what he meant by that by the composite, which he then endorsed. We repeat, nowhere did Mr Wallace describe the lone man's hair as "long". The Crown reminded Dr Wells that Mr Wallace's first description on

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161 Donald Anderson (who took Mr Watson back to *Blade*), Darryl Waswo (who photographed Mr Watson at the Furneaux Lodge jetty) and Richard Egden (who saw Mr Watson when the Perkins incident was unfolding) all referred to Mr Watson having a receding hairline when they saw him on New Year's Eve. Thomas Forbes also referred to the man that he identified as Mr Watson from Montage B having a receding hairline.

162 Wells and others, above n 139, at 8–9, citing Margaret Bull Kovera, Steven D Penrod, Carolyn Pappas and Debra L Thill "Identification of Computer-Generated Facial Composites" (1997) 82(2) J Appl Psychol 235.

163 At 13.

3 January 1998 was that the lone man had "short dark wavy hair". Dr Wells said the composite was itself still a very early statement.

[687] As noted above, despite the rather misleading way the experts discussed Roz McNeilly's compusketch, Chey Phipps was the only other member of the bar staff involved in its production. Mr Phipps said in evidence, "[w]e did come up with a final product, although I was not happy with the likeness, likeness of it", and in relation to how good a likeness it was, "I'd say about 65 per cent".

[688] This suggests the Report writers were not provided with the witnesses' evidence which, in our view, seriously limits the weight that can be given to their comments and means their observations must be treated with considerable caution.

[689] Dr Quigley-McBride conceded that composites were hard to create because they require a person to be able to describe someone really well.

Ignoring other evidence

[690] It was then put to Dr Wells that the Naiad driver, Donald Anderson, described the individual both the Crown and Mr Watson accepts was Mr Watson as having dark hair, unkempt, needing a haircut, being a bit curly on top, hair brushing up on the sides at the back with quite long stubble, almost a beard. While accepting that people can describe the same person in different ways, Dr Wells repeated his confidence in the compusketch and the difference between it and what he knew Mr Watson looked like that night because of the *Mina Cornelia* photograph.

[691] The fact Mr Wallace observed the person during the course of the evening at the Main Bar and in the Garden Bar was discounted by Dr Wells, saying that Mr Wallace also saw many other people and that he did not know if the person Mr Wallace remembered from the bar was the same as the person who got on the Naiad. When it was put to him that the trial was run on the basis that it was the same man and that is what Mr Wallace said, Dr Wells then referred to there being a lot of people giving different descriptions who seemed to be talking about different people at different times, and that it may well be that Mr Wallace was describing and remembering a different person.

[692] Dr Wells was not really interested in descriptions other people gave, saying: "a lot of people are describing a lot of different people. I don't think they're all describing the same person." He was then asked about the statement in the Report that some of the descriptions of the lone man were consistent with Mr Watson's appearance that night, whereas others were not.[164] Dr Wells was reluctant to accept that the witnesses were all describing the same person, saying that maybe they were describing somebody else and that was why they could not identify the person they were describing from Montage B.

Ultimate issue

[693] Dr Wells said the fact people can give different descriptions of the same person was "part of the unreliability of witnesses". He was asked about the Law Commission paper entitled *Total Recall? The Reliability of Witness Testimony* published in August 1999, which discussed a 1997 study of archival data (2,229 descriptions by 1,313 witnesses of 582 different robbers in the Netherlands) from official court records:[165]

> 67 … the most frequently mentioned characteristic used to describe the suspect was sex, the second was the height of the suspect, and over half of the descriptions contained information about the age, appearance (including race), skin colour and type of head covering or disguise worn by the offender … Overall the completeness of the descriptions was rather poor …
>
> 68 … Sex was reported with perfect accuracy, hair colour descriptions were 73 percent accurate, and both age and appearance were correctly reported in about 60 percent of the descriptions. In contrast, facial hair was almost always incorrect, and both type of hair and type of speech were reported incorrectly in two-thirds of the descriptions in which they were reported …

[694] Dr Wells regarded the study as very problematic because it assumed that any time the witness identified the suspect, that was an accurate identification. We accept that assumption undermines the study's results to some extent but nevertheless the study provides some support for the proposition that descriptions of head and facial hair by eyewitnesses are often unreliable.

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164 See above at [629].

165 Law Commission *Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999).

[695] Dr Wells maintained that Mr Wallace was not confident in his identification of Mr Watson from Montage B but was wavering. He described him as "struggling" between 3 and 5. By this point, in his opinion, Mr Wallace's memory was contaminated. He referred to the confidence shown by those who had made eyewitness identifications in cases where subsequent DNA evidence absolved the person charged. Dr Wells accepted that at depositions Mr Wallace had changed his mind but then said he had come around by the time of trial to a position of confidence.

[696] Dr Wells referred to the "incredible discrepancy" between Mr Wallace's description and compusketch, which Mr Wallace said was a good likeness, his clear rejection of the single photograph, the rejection of Montage A and that Mr Wallace tentatively selected Mr Watson from Montage B after he had been exposed to images of Mr Watson multiple times in the media. He referred to the contamination involved when Mr Wallace was shown the video footage of Mr Watson on 3 February. Mr Morresey's significance was the reference to the long hair.

[697] Dr Quigley-McBride agreed that descriptions were not always accurate but said "in this case there were multiple descriptions from different people that were the same, so that gives us a little more confidence that they were correct". By that, she meant Mr Wallace and Mr Morresey. She was then taken to Mr Anderson's description and was of the opinion that was "quite similar" to Mr Wallace's description set out above, particularly in relation to the hair. Mr Anderson's description was put to Dr Quigley-McBride with the proposition that she could not discount a person describing Scott Watson because somebody described the person as having longer hair and facial stubble and that Mr Anderson's description was a good example of that. Dr Quigley-McBride responded by saying: "Well, I mean, that's not consistent with the photograph of him from the evening." She continued:

> … the length of somebody's hair, and especially if you have a photograph of the person they're supposedly referring to, you can kind of surmise that it's not long enough to be the same.

Showup

[698] The showup on 9 January 1998 was discussed, noting that the photograph had been taken on 19 January 1990. Dr Wells maintained that Mr Wallace said "that

doesn't even look like my composite" and "that's not him, I don't know who that guy is". Leaving aside the uncertainty as to what Mr Wallace actually said,[166] opinions might vary as to whether there are any similarities between the 1990 photo and Mr Wallace's composite. It was put to Dr Wells that the 1990 photograph was black and white and the circumstances of it being shown to Mr Wallace were unknown.

[699] Dr Wells expressed the opinion that the 1990 photograph looked like Mr Watson to him. Dr Quigley-McBride said it looked quite similar to Mr Watson but conceded it was a subjective matter.

Is Drs Wells and Quigley-McBride's evidence admissible?

Law

[700] We have already discussed the test for admission of new evidence on appeal above — namely the requirement for the evidence to be fresh, reliable and cogent.[167]

[701] In addition, for expert evidence to be admissible on appeal, it must satisfy the usual admissibility requirements of expert evidence. For present purposes, *Pora v R* provides a useful illustration.[168] There, the appellant's conviction was heavily reliant on Mr Pora's confessions.[169] The reliability of those confessions was a central issue on appeal.[170] Assisted by expert evidence, the Privy Council concluded that the reliability of Mr Pora's confessions was sufficiently dubious to give rise to a risk of a miscarriage of justice.[171]

[702] Professor Gudjonsson had provided very extensive expert evidence in support of the appellant's appeal but in the Board's view went beyond the scope of his duty:[172]

> Professor Gudjonsson trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their

166 See below at [759].
167 Above at [57]–[63]; and *Lundy* (PC), above n 38, at [120].
168 *Pora v R*, above n 48.
169 At [19]–[20].
170 At [2].
171 At [58].
172 At [24] (emphasis added).

> possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable.

[703] The Board concluded that Professor Gudjonsson's report was inadmissible.[173] In contrast, other experts' evidence was admissible because it was relevant and, at least potentially, extremely helpful in determining whether Mr Pora's confessions could properly be relied on.[174]

Submissions

[704] Mr Watson's case was that the trial evidence that Mr Wallace "identified" Mr Watson from Montage B was inadmissible and caused a miscarriage of justice.[175] Mr Chisnall submitted Drs Wells and Quigley-McBride's evidence was relevant and extremely helpful in determining this issue. He submitted that the evidence was fresh, referring to Drs Wells and Quigley-McBride's comment:

> At the time of the trial against Watson, eyewitness identification science was well-established but there was still a lot of work to be done to implement that knowledge in the real world.

[705] The evidence was credible, he said, noting the expertise of Drs Wells and Quigley-McBride, and it was cogent.

[706] The Crown did not dispute that the nine recommendations of the 2020 review paper can help to prevent mistaken eyewitness identifications and the experts' evidence reflecting general principles relevant to these matters was largely accepted. However, the Report's own terminology is "recommendations", which are for "pristine" procedures and would be patently impracticable in 1998 in Mr Watson's case.

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173 At [34].

174 At [43] and [48].

175 Referring to *Ellis* (SC substantive judgment), above n 25, where the Supreme Court said at [87] that "[i]t is well established that under this ground, the court has the flexibility to identify and intervene to prevent a miscarriage of justice however caused." (Footnote omitted).

[707] The Crown challenged the admissibility of the experts' evidence on the basis a large part of it failed the substantial helpfulness test. In Mr Baker's submission, Mr Watson was not only relying on the Report to put before the Court expert evidence in relation to eyewitness identifications, but also as a vehicle to put material before the Court in relation to whether Mr Wallace was shown the single photograph and/or Montage A. This material did not form part of the trial record and had not been properly adduced as fresh evidence.

[708] Further, in Mr Baker's submission, the experts made findings of fact on matters that were not agreed, based on their analysis and interpretation of incomplete material. They were not provided with all the notes of evidence from the trial but only the notes of evidence for some witnesses and some of the statements of some witnesses (such as Amelia Hope). They refer to the depositions hearing but it appears they were not provided with the notes of evidence from the depositions hearing.

[709] Mr Baker criticised Drs Wells and Quigley-McBride's reliance on Mr Morresey as, in their opinion, the only one other person who could provide probative exculpatory identification. Their analysis was premised on Mr Morresey having provided a very good description, saying he seemed to have a "detailed and vivid memory of the man". While the experts referred to Mr Morresey's 27 April 1998 statement, they failed to record what his statement actually said:

> I have viewed Photograph Montage B, but I am unable to identify anyone from this.
>
> As I have stated in my earlier statements I only ever saw the male on the Naiad with us from behind, therefore it is very difficult for me to identify him.

[710] In Mr Baker's submission, the correct position was therefore that Mr Morresey did not "confidently" reject the lineup but was "unable" to identify anyone as it was difficult for him to do so *having only seen the male from behind*.

[711] Despite this, Drs Wells and Quigley-McBride asserted:

> A clear lineup rejection from someone who had a good view is a strong indicator that the suspect in the lineup is innocent, even when another eyewitness has identified that individual.

[712] While there is no doubt that misidentifications are of genuine concern, in the Crown submission disputes post-trial as to the actual reliability of visual identifications, based on standards that are not reflected in our statutory requirements today, let alone those that applied at the time of trial, are not capable of supporting an argument for inadmissibility.

Our assessment

[713] We agree that the first section of the Report is admissible. It meets the substantial helpfulness test in that it discusses the considerable limitations associated with eyewitness identification evidence and the ramifications of steps taken in obtaining that evidence. It is fresh, reliable and cogent.

[714] We recognise the note of caution sounded by the Crown to the effect that the nine "conditions" referred to in the Report represent an ideal world not reflected in the law's current requirements, let alone those applicable in 1998. Dr Wells' evidence was that today the "majority" of States in the United States require eyewitness identification procedures to follow four basic principles he, Dr Wells, had laid out in 1998: a double-blind procedure should be used, meaning the person administering the identification procedure should not know who the suspect is; the eyewitness should be informed that the suspect is not necessarily in the lineup; there should be one suspect only in the lineup and they should not stand out; and a statement should be obtained at the time the identification is made.[176] Dr Wells confirmed that his 1998 recommendations did not include avoiding repeated identifications or a requirement that a verbatim record of the identification procedure was made. Dr Wells accepted that the recommendations from the 2020 paper were "pristine procedures", acknowledging that the recommendations evolve in light of the results of continued research.

[715] The 1997 *Police Manual of Best Practice* (the 1997 Manual) did not require use of a double-blind procedure, a verbatim record or that the witness be explicitly warned that the suspect might not be in the lineup at all.[177] While the latter is now a

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[176] There was some confusion in that Dr Wells said there were five recommendations in the 1998 paper but the fifth was not clarified.

[177] *Police Manual of Best Practice* (New Zealand Police, 1997) vol II at 318.

requirement of a "formal procedure" under the Evidence Act, the two former requirements are not.[178]

[716] The conditions outlined in the Report are nevertheless helpful to our evaluation of the procedures used and the admissibility of evidence of identifications from Montage B.

[717] However, we have considerable reservations about the second part of the Report where the experts descend into what can fairly be described as advocacy. Their conclusions on significant aspects of the evidence do not withstand scrutiny and cannot be considered substantially helpful. Our concerns fall into five categories:

(a) Incomplete material. It is clear that the experts were either not provided with or did not take account of relevant evidence, for example witness statements and evidence from depositions.

(b) Misrepresenting the evidence. In relation to Mr Morresey, for example, the experts place considerable reliance on his evidence yet they fail to acknowledge his evidence that he saw the lone man only from the back and would not be able to identify him. To rely on the fact Mr Morresey did not select Mr Watson from Montage B as a strong indicator of Mr Watson's innocence is quite wrong.

(c) Ignoring other relevant evidence, in particular that of other attendees at Furneaux Lodge that night, suggesting they were not talking about Mr Watson when a review of the evidence (which we undertake below) demonstrates they clearly were.[179]

(d) Drawing conclusions which were inappropriate for them to draw, for example as to whether Mr Wallace was shown Montage A and commenting that Mr Watson does not have hooded eyes.

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178 Evidence Act, s 45(3).
179 Below at [821]–[843].

(e) Giving evidence which was inconsistent with their position in other forums or the papers they cite, for example as to the value of composites and the time that would be expected for a person to make a reliable identification.

[718] Given the limited evidence they considered, it was not for the experts to conclude that Mr Wallace's identification evidence had little to no incriminating probative value regarding the identity of the lone man. It was not for the experts to draw conclusions in relation to credibility or reliability.

[719] For these reasons, we are satisfied that the second part of the Report did not meet the requirements for expert evidence. It and the related evidence given by Drs Wells and Quigley-McBride before us is inadmissible.

[720] Despite this conclusion, given the way the identification ground was argued before us, we will address the comments made by the experts in the course of our own evaluation below.

May 1999 pre-trial hearing as to the admissibility of Montage B

[721] The admissibility of Montage B was challenged prior to Mr Watson's trial at a hearing in May 1999. Trial counsel's memorandum set out the basis for the challenge. As well as contending Mr Watson's photograph was taken without his consent and that its use was unlawful, counsel said in any event use of Montage B was unfair for a number of reasons, including:

(a) the image of Mr Watson is visually prominent because of the partially closed eyes and hooked nose;

(b) of the 7 distractors, 2 have prominent facial hair and could be immediately excluded;

(c) the image of Mr Watson is a poor image of him with distortion and shadowing;

(d) Mr Watson is the only person pictured in Montage B who was at Furneaux Lodge on New Year's Eve (he admits this);

(e) Mr Watson is the only person pictured in Montage B who was also pictured in Montage A;

(f) Montage B was used after 17 March 1998 for investigative purposes and there must have been a significant risk of inter-witness discussion; and

(g) Mr Watson's image featured in the electronic media and print media prior to 31 March 1998.

[722] Detective Senior Sergeant Edward Rae gave evidence at the admissibility hearing and explained the choice of the photograph used in Montage B. Montage A had comprised full length photographs, and a decision was made to create a head and shoulders montage. He said:

> … a head and shoulders profile w[a]s wanted to show features generally described by those people so it would accurately reflect what he looked like to them on the night.

[723] Montage B was used exclusively from around 17 March 1998 onwards.

[724] Detective Senior Sergeant Rae was also asked about the leaking of a police suspect profile of Mr Watson created on 11 January 1998. It was provided by a police officer to six members of a civilian search team. Although the copies were supposed to be returned after the search, it appears copies subsequently found their way to members of Ben and Olivia's families, to Scott Watson's family and to the media. The IPCA Report noted the press response was not to publish or broadcast the profile's contents.

[725] Peter Durrant, a commercial and scientific photographer, was a witness for the defence at the admissibility hearing.[180] Mr Durrant said that, overall, the photograph

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[180] At the hearing on 5 May 1999, after the evidence for the Crown concluded, a brief was admitted by consent prior to Mr Watson being sworn.

of Mr Watson in Montage B was not a good photographic image and not a good likeness of Mr Watson. He said the quality of the images in Montage B was poor.

[726] On 13 May 1999, the trial Judge ruled that Montage B was admissible.[181] Given the importance of the Ruling, we set out large passages of it:[182]

> There can be no doubt that this montage was carefully prepared so far as the distracters were concerned. Any criticism of additional facial hair seems to me not to be justified as all of the photographs show some degree of unshave[n]ness. … Overall the witness says this is not a good photographic image and would say it is not a good likeness of him. Comment is made that his eyes are partly closed and that a greater than normal 5 o'clock shadow on his upper lip appears. That may be so but there will be many cases where photographs are taken which do not represent the individual as he is perceived by himself or by others. To that extent a poor quality photograph might be of assistance to the accused in that a number would fail to identify him from the photograph. In this case I understand that a number of people did not identify him but identified others in the montage. As a montage it seems to me that it was as good a range in the circumstances and I reject the criticism of it. Furthermore I think that the two distracters who have slightly more facial hair is not such a significant feature as would necessarily exclude them. It is a matter of degree I accept.
>
> It must be remembered that there are other identifications made of the accused at Furneaux Lodge by other means. It is true that it was thought that the photograph might depict the accused as he was late in the evening with the slightly hooded eyelids. It is to be remembered however, that he was photographed in the afternoon when arguably one would not expect that condition, if it had anything to do with lack of sleep. Accordingly it is obvious that the accused does from time to time maintain that appearance. That being so, it was a legitimate photograph to put forward and as I have said before, if it was uncharacteristic that is likely to be of assistance to the accused. … It was agreed that the montage contained no persons who were, as far as anyone knows, at Furneaux Lodge, … I cannot see any inherent unfairness in the use of this particular photograph. A number of the objections to the identifications to be given by a number of witnesses based on the photograph in montage B are said to be the subject to risk of inter witnesses discussion, electronic media and the like. I cannot see that the specific photographic identification should at this point be outweighed by general objections of that kind. It seems to me that those are all matters for the jury to take into account if the evidence is put before them, as to the witnesses['] overall reliability. … but at this stage I cannot see how a legitimately taken photograph of the accused, albeit in an arguably unfavourable appearance, can result in its exclusion for the reasons I have given.

[727] The Judge's ruling on the admissibility of Montage B was not appealed.

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[181] Montage B admissibility ruling, above n 22, at 8–10.
[182] At 8–10.

Was Mr Wallace's identification of Mr Watson admissible?

The law

[728] Given s 5(3) of the Evidence Act, as interpreted by the Supreme Court in *Ellis v R*, issues of admissibility in this appeal are to be determined under the law of evidence that applied at the time of Mr Watson's trial.[183]

[729] Prior to the Evidence Act, there was no rule excluding any particular sort of identification evidence.[184] Rather, the admissibility or otherwise of identifications was a matter of discretion based on general principles of the law of evidence, as articulated by Richmond P in *R v Russell*:[185]

> … evidence of identification by photograph is legally admissible and relevant. The real question in all cases is whether or not the trial judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on the ground that its prejudicial effect is out of proportion to its true evidential value, or on general grounds of "unfairness". All the decided cases are, we think, no more than illustrations of this principle.

[730] At the time of Mr Watson's trial, the leading case on the admissibility of identification evidence was this Court's decision in *R v Tamihere*.[186] There, the Court reiterated that the exclusion of identification evidence had "customarily been put on the ground that the prejudicial effect of the evidence exceeds its probative value".[187] This was described as "an application of the general jurisdiction to exclude evidence obtained unfairly".[188] Referring to Somers J's remarks in *R v Ormsby*, it was noted that "a material consideration in [identification] cases is the need to maintain effective control over police procedure generally".[189]

[731] Therefore, the key factors we must consider in determining whether Mr Wallace's identification of Mr Watson was admissible are:

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183 *Ellis* (SC substantive judgment), above n 25, at [86].

184 Adams on Criminal Law EC7 archived commentary at [EC7.01(2)]. See also *R v Harris* (1991) 7 CRNZ 611 (CA) at 613.

185 *R v Russell* [1977] 2 NZLR 20 (CA) at 27. See also *R v Ormsby* [1985] 1 NZLR 311 (CA) at 312-313; *R v Tamihere* [1991] 1 NZLR 195 (CA) at 198; *R v Harris*, above n 184, at 613; *Dixon v R* CA77/97, 25 June 1997 at 3; and *R v Kerr* (2003) 20 CRNZ 592 (CA) at [22].

186 *R v Tamihere*, above n 185.

187 At 198.

188 At 198.

189 *R v Tamihere*, above n 185, at 203, citing *R v Ormsby*, above n 185, at 313.

(a) the probative value of the identification;

(b) the risk of the identification being inappropriately relied upon by the jury; and

(c) whether exclusion was necessary to maintain effective control over police procedure generally (or for other reasons of fairness).

[732] *R v Tamihere* emphasised that the strength of the other evidence supporting the identification is relevant to whether it is safe to admit the questioned identification evidence.[190] This approach reflects that taken in *Regina v Turnbull*, the seminal decision of the Court of Appeal of England and Wales identifying the danger of visual identification evidence bringing about miscarriages of justice.[191]

[733] Of the four cases before the Court in *Turnbull*, two appeals were dismissed because there was ample other evidence supporting the correctness of the identification at issue and thus the implication that both defendants were guilty.[192] Two appeals were allowed because the Court found there was insufficient evidence to support what it considered to be very poor quality and weak identification evidence.[193]

[734] Though we accept that the existence of other supporting evidence is relevant to the admissibility inquiry we must undertake, we also take heed of Tipping J's warning in *R v McIntosh* that admitting highly prejudicial evidence with little probative value creates a risk that "the final nail will be one of prejudice not proof", even if there is other evidence tending to prove the same point.[194]

[735] In that respect, we note the Supreme Court's confirmation in *Ellis v R* that, when reviewing the safety of a conviction, it is "impossible to conduct that review other than through present day eyes".[195] That means, in assessing the reliability of

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190 *R v Tamihere*, above n 185, at 203.
191 *Regina v Turnbull* [1977] 1 QB 224 (CA).
192 At 234.
193 At 236 and 239.
194 *R v McIntosh* HC Invercargill T8/90, 22 August 1990 at 13.
195 *Ellis* (SC substantive judgment), above n 25, at [90], quoting *R v Fell* [2001] EWCA Crim 696 at [85].

Mr Wallace's identification and the risk of the identification being inappropriately relied upon by the jury, we must have regard to the developments in eyewitness science that have occurred since Mr Watson's trial. If we consider the admission of the identification unsafe in light of modern eyewitness science, it is no answer that the identification would have passed muster when measured against eyewitness science in 1999.

[736] That does not mean contemporary standards are to be applied in all respects. In enacting s 206 of the Evidence Act, Parliament expressly provided that the provisions of that Act governing the admissibility of identifications do not apply to identifications made before those provisions came into force. The rationale for this was explained by this Court in *Peato v R*: "Obviously Parliament did not want to rule evidence from such identification procedures to be inadmissible, provided the procedures had been undertaken in accordance with best practice at the time."[196]

[737] We consider it follows that whether exclusion is necessary to maintain effective control over police procedure must be assessed in light of expected police procedure at the time of Mr Wallace's identifications — that is, the procedures required by the 1997 Manual.[197] Obviously, the exclusion of an identification cannot be necessary to deter the police from breaching requirements that were not in force when the identification was made. Whether contemporary requirements of a "formal procedure" under the Evidence Act were complied with is of no direct relevance to the admissibility inquiry.[198]

[738] We therefore do not need to determine what the position would be if the admissibility of Mr Wallace's identification was subject to the Evidence Act. Without traversing counsel's detailed submissions on the point, we consider the better view is that a "formal procedure" in terms of s 45(3) was not followed, so s 45(2) would place the onus on the Crown to prove beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification. Not all evidence supporting the correctness of the identification would be relevant to that

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196 *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [19].
197 *Police Manual of Best Practice*, above n 177.
198 Section 45(3).

inquiry.[199] However, all such evidence would nevertheless remain relevant to the subsequent step of determining whether, if identification evidence had been wrongly admitted, the proviso to s 385(1) of the Crimes Act would apply.[200] The point is that the evidence supporting the correctness of the identification would still be considered, albeit at a different stage.

[739] The 1997 Manual required photographic identification procedures to conform to the following requirements:[201]

(a) witnesses should be shown at least eight photographs;

(b) witnesses should be given no names or other indications of identity, and should not be helped or consulted;

(c) the subjects in the photographs must all be of similar appearance; and

(d) after the witnesses have been shown the photographs, Police should prepare a written report setting out, among other things, the details of the photograph from which the witness made a positive identification.

[740] The 1997 Manual also provided that, if possible, suspects should be identified using an identification parade rather than photographic identification.[202]

[741] The 1997 Manual is not binding, in that a technical breach of its requirements does not inevitably mean the resulting evidence should be excluded, but departures from its requirements are relevant to assessing whether exclusion is appropriate.[203]

[742] Though we will address the point in more detail below,[204] we note at this stage that the trial Judge in Mr Watson's case gave the jury the warning then required pursuant to s 344D of the Crimes Act.[205]

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199 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [32].
200 *R v Matenga*, above n 28, at [31].
201 New Zealand Police, above n 177, at 318.
202 At 318.
203 *Tamihere* appeal, above n 185, at 198.
204 See below at [914]–[919].
205 Crimes Act, s 344D was inserted by the Crimes Amendment Act 1982, s 2.

Submissions

[743] Counsel for Mr Watson pointed out that the IPCA Report concluded that the identification methods the police used "fell well short of best practice". Mr Chisnall submitted the trial Judge erred in ruling Montage B admissible for the following reasons:

(a) Contrary to the approach established in *R v Tamihere*,[206] the Judge did not assess whether the circumstances in which Mr Wallace's purported identification was made produced a reliable assertion that Mr Watson was the lone man by reference to the *Regina v Turnbull* factors.[207]

(b) The Judge did not assimilate Detective Senior Sergeant Rae's evidence that the "hooded eyes" image was selected because it made Mr Watson's appearance more closely match the descriptions of the sleazy man provided by some of the witnesses, and the influencing effect it had, predisposing Mr Wallace to select Mr Watson's photograph.

(c) The Judge did not address the fact that police explicitly rejected a photograph taken on the same day that showed Mr Watson with his eyes open. This photograph undermined the notion that police had simply captured Mr Watson's typical facial posture in the photograph used in Montage B.

(d) The Judge's reliance on the consistency of Mr Wallace's identification with "other identifications made … at Furneaux Lodge by other means" did not reflect the deficiencies in the formal procedures adopted in respect to those witnesses.[208] It also disregarded the media saturation of Mr Watson's image. The specific criticisms levelled at the use of Montage B with Mr Wallace apply equally in respect of other witnesses at Furneaux Lodge.

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206 *Tamihere* appeal, above n 185.
207 *Regina v Turnbull*, above n 191, at 228.
208 Montage B admissibility ruling, above n 22, at 9.

(e) The conclusion that the jury could assess for itself the criticisms of Montage B is at odds with modern research which emphasises that decision-makers are not able meaningfully to distinguish between reliable and unreliable identifications. The Judge's observation that, if the photograph of Mr Watson in Montage B were "uncharacteristic", this would likely assist rather than harm Mr Watson's case, was speculative.[209] It reinforced that the Judge overvalued the jury's ability to make the assessment of reliability required.

[744] In the Crown's submission, the issues in relation to the construction and use of Montage B were fully litigated at the pre-trial hearing in May 1999, including by way of evidence. The photograph of Mr Watson that was not chosen shows Mr Watson clearly looking to the side. Notably, in the Crown submission, Mr Watson does similarly give the appearance of having hooded eyes in the single photograph. The 1997 Manual permitted photographs to be used to establish identity.[210] If the identity of the suspect was known, photographic identification was to be used only if the suspect was unavailable for a formal or informal identification parade.[211] The police complied with the practice guidelines of the time.

[745] In the Crown submission, the fresh evidence did not establish that the Montage B aspect of Mr Wallace's identification evidence was so unreliable as to be inadmissible. In any event, even if Mr Wallace's identification of Mr Watson from Montage B were removed from consideration in this appeal, the total body of admissible evidence pointed overwhelmingly to Mr Watson's guilt.

The structure of our analysis

[746] The trial Judge's pre-trial decision allowed evidence of identifications from Montage B to be elicited at trial in general. The focus before us is a more specific question: was Mr Wallace's identification of Mr Watson from Montage B admissible?

[747] To answer that question, we will address the following topics:

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209 At 9.
210 New Zealand Police, above n 177, at 318.
211 At 318.

(a) whether Montage B predisposed witnesses to select Mr Watson;

(b) the impact of Mr Wallace being shown the single photograph;

(c) the circumstances in which Mr Wallace made his identification;

(d) the other evidence supporting Mr Wallace's identification;

(e) the evidence suggesting the boat where Ben and Olivia disembarked was a ketch;

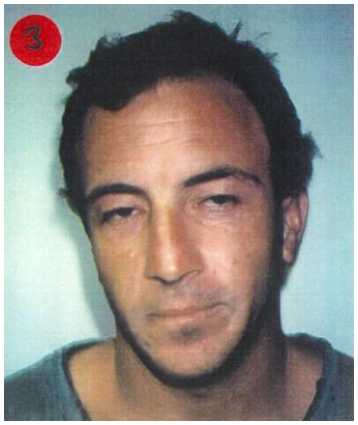
(f) the issue of the "two-trip theory";

(g) the trial Judge's summing up on the issue of identification; and

(h) ultimately, whether Mr Wallace's identification of Mr Watson from Montage B was properly admitted at trial.

Did Montage B predispose witnesses to select Mr Watson?

[748] For convenience, we set out again Montage B, the photograph of Mr Watson used in Montage B (bottom left) and the alternative photograph of Mr Watson that the police also considered using in Montage B (bottom right):



[749] At the May 1999 admissibility hearing in relation to Montage B, Detective Senior Sergeant Edward Rae explained the choice of the photograph used in Montage B. He had discussed which photograph should be used with at least Detective Sergeant Moore and Detective Inspector Pope. Montage A comprised full length photographs and a decision was made to create a head and shoulders montage, as some witnesses described seeing the male close up and they did not take in a

full-length view. The police wanted to show features generally described by those people so it would accurately reflect what the male looked like on the night. In relation to head and shoulders photographs, it came down to two photographs, and the one used "described more accurately [how the lone man was] described by witnesses in the bar".[212]

[750] The photograph selected has been criticised as showing Mr Watson either with his eyes half closed or mid-blink. However, we suggest the Judge may have been more accurate when he referred to "slightly hooded" eyes.[213] We note that Mr Watson's eyes have such an appearance in other photographs on the police file, including the single photograph: [214]

[751] We do not accept that the photograph of Mr Watson in Montage B was misleading or predisposed witnesses to select Mr Watson. Rather, we consider it was appropriate for the police to use the photograph of Mr Watson closer to his

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212 Mr Wallace described the lone man's eyes as not "fully opened", "slanty" with a "closed aspect" (see [491] of this part of this judgment); "half closed" ([504]); "mistrusting" ([511]); and lacking an "open trusting look" ([548]). Roz McNeilly described "slanted", "half-closed" eyes ([801]). Chey Phipps described "droopy" or perhaps lazy, perhaps tired eyes ([802]). Sarah Kernick referred to "very dark" eyes when discussing the photographs she identified from Montage B, noting that applied to both photographs 3 and 5. Philip Hale, whose girlfriend Anna Kernick was told she had a "nice set", described distinctive eyes because they were "droopy". Oliver Perkins remembered Mr Watson's eyes. Julia Walker, who encountered a man describing himself as Mr Prozac, was drawn to photographs 3 and 4 of Montage B because of the eyes. Lance Rairi selected Mr Watson from Montage B but said number 1 had more similar eyes.

213 Montage B admissibility ruling, above n 181, at 9.

214 It is unclear when this photograph was taken. It was included in the police memorandum prepared for the IPCA, discussed above at [593]–[599].

hypothesised appearance on New Year's Eve, as informed by the descriptions of witnesses (which we shortly discuss). The alternative photograph had its own problems in that it not only showed Mr Watson looking sideways but also appeared to show him with unnaturally raised eyebrows. As the Judge noted, the photograph used was indeed a photograph of Mr Watson.[215]

[752] Even if Mr Watson's photograph was uncharacteristic, the question becomes whether it predisposed witnesses to select Mr Watson's photograph *rather than* one of the other photographs in Montage B. This leads to the question of whether Montage B included "at least eight photographs" showing people "of similar appearance", as required by the 1997 Manual.[216] As this Court put it in *Ah Soon v R*:[217]

> [23] Whether the photographs show men of similar appearance to the appellant is a fact-dependent evaluative exercise. Whether the others shown in the montage are similar in appearance to the suspect is a question of degree. Similar does not mean identical. The police are not required to go to extraordinary or impractical lengths to ensure that those shown are similar in appearance. However, there may be cases where an accused person has particular identifying features which, unless the others shown in the montage have similar features, may lead to a witness unfairly picking out the accused. The guiding principle must be whether the photo montage or other formal procedure is such as to avoid any material risk of predisposing the witness to identify the accused.

[753] We consider Montage B satisfied that requirement. In relation to eyes in particular, Mr Wallace focused on photographs 3 and 5 but we consider photographs 2 and 6 could also be said to show a person with hooded eyes. Additionally, it would appear that a number of witnesses shown Montage B made no reference to eyes when describing their identification decision.[218] It is important to avoid overstating the importance of a single characteristic and consider the similarity of the photographs in Montage B overall.[219] Looking at Montage B overall, we are satisfied the photographs

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215 Montage B admissibility ruling, above n 181, at 9–10.

216 New Zealand Police, above n 177, at 318.

217 *Ah Soon v R* [2012] NZCA 48, in the context of s 45(3)(b) of the Evidence Act.

218 For example, Thomas Forbes (who emphasised the receding hair line of the man in photograph number 3) and Cara Brosnahan (who was "positive" about her identification of the man in photograph number 3, making no reference to eyes). However, this is based on trial evidence as the statements the witnesses made contemporaneously with their identifications are not before this Court.

219 See *Fukofuka v R* [2012] NZCA 510 at [25], where this Court suggested that a photographic montage must be looked at overall to determine whether it shows individuals of similar appearance.

were sufficiently similar that there was no material risk of Montage B predisposing witnesses to identify Mr Watson's photograph rather than one of the other photographs.

What about the fact Mr Wallace was shown the single photograph?

[754] In Mr Chisnall's submission, the Judge was not asked by either the Crown or defence to address the complete circumstances of Mr Wallace's identification of Mr Watson from Montage B. The use of the single photograph in particular reinforced why Mr Wallace's "identification" of Mr Watson through Montage B was inadmissible. Mr Wallace's identification was contaminated because he was effectively told that Mr Watson was the police suspect and was shown the single photograph of him. The IPCA said it was "highly undesirable" that police showed Mr Wallace the single photograph on 9 January 1998 and it was unsatisfactory that no contemporaneous record of the procedure was made. Mr Chisnall contended that, had the trial Judge known of the complete picture, he would have concluded that the need to maintain effective control over general police procedure, described in *Tamihere*, meant he would have excluded the evidence on the ground of fairness.[220]

[755] This Court in *Tamihere* described the "displacement effect" associated with showing a witness a single photograph in the following way:[221]

> A danger in a witness identifying the accused on being shown a single photograph, or on seeing him in a situation where it is plain that he is the suspect or the person charged, is that the witness may tend, perhaps subconsciously, to think that the accused must indeed be the person implicated in the crime whom he saw at the material time. A mere general resemblance may then convince the witness of the correctness of his or her identification. Yet, if invited to select one from a group of persons of somewhat similar appearance or in a situation where there is nothing to point to a particular individual as being the person thought by the police to have committed the crime, the witness may not be able to make an identification or may prove to be mistaken. The single photograph, or a realisation that the person now observed is suspected of or charged with having committed the crime, may create a displacement effect in the mind of the witness.
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> Such considerations have led the Courts to disapprove of the showing by the police of only one or only a few photographs to a potential witness in order to obtain identification evidence, and also of purely courtroom identifications and the like. If the risk of unfairness to the accused is serious, the evidence is

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220 *Tamihere* reference, above n 112.
221 At 197–198.

> likely to be excluded. The desirability of a properly conducted identification parade, providing a true test of the ability of the witness to pick out the person who has previously been seen in incriminating circumstances, has been repeatedly stressed. Also, a distinction has been drawn between the detection process, when the police may not yet even have a suspect and when the use of single photographs may be unobjectionable, and the stage at which the police are gathering evidence for a prosecution. As the present case illustrates, a hard-and-fast line cannot always be drawn between these stages; but broadly it can be said that the showing of a single photograph to a witness in an attempt to strengthen the prosecution's identification evidence, or the use of any other procedure likely to influence the witness in the direction of a particular identification, are especially likely to be regarded as tainting the evidence and requiring exclusion.

[756] *Tamihere* endorsed an approach that enables consideration both of the circumstances in which the purported identification was made that bear on the quality of the opinion given by the witness (an application of the *Turnbull* factors),[222] as well as the "cumulative effect of the evidence against the accused".[223]

[757] The facts of *Tamihere* provide an important illustration.[224] There was no identification parade. A montage was shown to the two identification witnesses but Mr Tamihere's photograph was not selected. There was media coverage of Mr Tamihere but neither of the witnesses identified him from that coverage. The witnesses were then shown single photographs of him and one of the witnesses, but not the other, identified him. They were then told to attend court when he was appearing. The witness who had earlier identified Mr Tamihere expressed they were positive it was him, whereas the other witness said they were 90 per cent sure it was him. Both witnesses subsequently made dock identifications of Mr Tamihere. Bearing in mind the significant body of evidence supporting the correctness of the identifications, this Court allowed that evidence to go to the jury, properly directed.[225]

[758] Even cases subject to the Evidence Act have not necessarily excluded visual identification evidence where the witness' memory has been potentially contaminated.[226] In *Boote v R*, the complainants had been told the name of their alleged attacker and sought out photographs of him on Facebook prior to viewing a

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222 *Regina v Turnbull*, above n 191, at 228.
223 See *Tamihere* reference, above n 112, at 198–202.
224 At 199–200.
225 At 202–204.
226 *Boote v R* [2013] NZCA 122; and *Fukofuka v R*, above n 219.

police montage.[227] They conceded that their identifications must have been affected to a degree by the photograph they saw on the Facebook page.[228] This Court observed that the fact of contamination is just one of a number of factors relevant to a judge's decision as to reliability.[229] The Court admitted the identifications.[230]

[759] The single photograph was black and white and dated 19 January 1990, eight years prior to the events at issue. It was shown to Mr Wallace in the corridor between rooms. The actual circumstances of it being shown, the conditions, precisely how long it was viewed and so on are unknown. How Mr Wallace described his response to viewing it varied across his various statements:

(a) 11 January 1998 interview: "I don't think it was him", then later "didn't look like him at all, like not like, sorry not like the guy [in] the sketch".

(b) 27 April 1998 Exchange with Detective Sergeant Moore: "They just asked if I knew this guy and I said I didn't."

(c) 2001 Statement to Detective Superintendent Millar: "I was unable to say if it was [the person in the photograph] or not."

[760] Despite this uncertainty, we do not consider the displacement effect of Mr Wallace being shown the single photograph was sufficiently serious to require exclusion of Mr Wallace's subsequent identification from Montage B — bearing in mind the significant body of evidence supporting the correctness of the identification, to which we will soon turn.[231] And we do not consider the fact Mr Wallace was shown the single photograph would or should have altered the trial Judge's ruling on the admissibility of Montage B. The circumstances were significantly less serious and contaminating than those in *Tamihere*, where this Court ruled the evidence admissible.[232] Unlike the exposure of the identification witnesses to the defendant's

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227 *Boote v R*, above n 226, at [2].
228 At [15].
229 At [45].
230 At [48].
231 We consider *R v Ormsby* can be distinguished given there was no evidence pointing to the defendant's guilt other than the identification in that case: see *R v Ormsby*, above n 185, at 312.
232 *Tamihere* appeal, above n 185, at 203.

image in *Tamihere*, the evidence does not suggest Mr Wallace's exposure to the single photograph was anything other than fleeting. Although a matter of individual perception and noting that Oliver Perkins for example did identify Mr Watson from that photograph, the fact it was not a current photograph of Mr Watson is a relevant factor when considering the displacement effect. It showed a considerably younger Mr Watson, most notably with a fuller face and closely cropped hair.

[761] That Mr Wallace was shown a single photograph was contained in more than one source of information available to Mr Watson's trial counsel who did not use that information. Even if evidence of the single photograph being shown to Mr Wallace had been before the jury, in our view it was unlikely to have had material impact over and above the other material before the jury in any event. That material included the fact Mr Wallace had been shown a video of Mr Watson by the media. At trial, the defence challenges to Mr Wallace's identification of the man in photograph 3 of Montage B (Mr Watson) were based on many of the same matters relied on by Drs Wells and Quigley-McBride — the *Mina Cornelia* photograph, media exposure, the compusketch and the three-and-a-half-month delay before Mr Wallace was shown Montage B. The jury was therefore alive to the key factors tending to suggest Mr Wallace's identification of Mr Watson from Montage B could not be relied upon.

[762] As to whether Mr Wallace's evidence was not challenged before the jury to the extent it might have been (for example, by suggesting the media coverage of Mr Watson contaminated Mr Wallace's memory rather than merely representing a probative non-identification of Mr Watson), that appears to reflect a deliberate defence strategy to avoid undermining Mr Wallace's credibility in the eyes of the jury. It must be borne in mind that, given his description of the lone man's boat as a ketch completely dissimilar to *Blade*, his 9 January 1998 compusketch and his ruling out of Mr Watson as being the lone man based on the *Mina Cornelia* photograph, Mr Wallace was in fact an important and potentially helpful witness for the defence. At the 2000 appeal, counsel for Mr Watson contended that Mr Wallace's evidence did not amount to an identification of Mr Watson and was in fact *exculpatory* of Mr Watson.[233] Against that background, and absent trial counsel error being raised as a ground of

[233] 2000 appeal, above n 2, at [23].

appeal by Mr Watson with the evidential foundation that would entail, we do not accept this issue gave rise to a miscarriage of justice.

[763] We consider the position is essentially the same in relation to the residual possibility that Mr Wallace saw a photograph of Mr Watson used in one of the versions of Montage A.

What were the circumstances relevant to Mr Wallace's identification evidence?

[764] Counsel for Mr Watson referred to the Report writers' opinion that Mr Watson's presentation on New Year's Eve 1997 neither matched the description provided by Mr Wallace, *nor that provided by other witnesses*. They emphasised that, while Mr Wallace selected Mr Watson's photograph, he was not certain he was the man and described Mr Wallace's shifting confidence in his positive identification of Mr Watson. The experts explained why they concluded that Mr Wallace's subsequent identification of Mr Watson when shown Montage B was unreliable.

[765] Mr Baker referred to Mr Wallace's statement when shown Montage B and submitted there was no apparent struggle or waver, demonstrating that this was not a low confidence identification. He said Mr Wallace's response to cross-examination and his reaction to the *Mina Cornelia* photograph was the opposite of "confidence inflation".

Our assessment

[766] Mr Wallace was of course a crucial witness. He was also a challenging one. It would seem he felt the weight of responsibility very heavily and agonised over his role as an indisputably important witness. However, the importance of his identification of Mr Watson from Montage B needs to be put in its correct context.

[767] We have already canvassed Mr Wallace's trial evidence, evidence at depositions and his police statements in detail. To recap, briefly. A man stood out compared to others, who generally appeared to have tidied themselves up. The man introduced himself, saying he was from Picton, causing Mr Wallace to ask

Roz McNeilly if she knew the man.[234] The man was served drinks by Mr Wallace at the Main Bar — he drank both beer and spirits.

[768] At around 1.30 to 2.00 am, Mr Wallace went to the Garden Bar and saw the man standing on his own. At that stage, the Garden Bar had thinned out and there were fewer people there. He made the comment that the man had dark brown, pretty slanty eyes that did not look trustworthy.

[769] Then, when Mr Wallace had agreed to take Sarah Dyer and Hayden Morresey to Solitude Jetty, a man approached from the area where the Hobie Cat was located, the same man, said Mr Wallace, as had introduced himself in the Main Bar as having come from Picton, the same man he had seen in the Garden Bar. The man may have asked him for a light.

[770] This was not a case of a fleeting glance by Mr Wallace. Rather, Mr Wallace observed the male at the Lodge for some time throughout the evening, both in the Main Bar and the Garden Bar. He then recognised that male at the jetty before he took him on the Naiad to *Tamarac*k and then to his boat. It was the defence case that it was the same man.

[771] Mr Wallace's descriptions of the lone man varied over time. His first description of the lone man given to the police on 3 January 1998 at the start of the investigation, before there could be any suggestion of taint or corruption of his memory, was that the man was unshaven with short, dark, wavy hair. Yet within six days, on 9 January 1998, Mr Wallace contributed to a compusketch which was not consistent with his earlier description and which he said was a good likeness of the lone man.

[772] Mr Wallace was cross-examined by Mr Antunovic about the compusketch, the *Mina Cornelia* photograph and what happened at the depositions hearing. He was questioned about his selection from Montage B and he told the jury about what he considered were the differences between the photograph in the Montage and the person he saw. The Crown and defence comprehensively addressed the same matters

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234 Albeit this was slightly qualified in cross-examination: see above at [505].

in closing, as did the Judge. The jury was therefore aware of the issues which might have had a bearing on Mr Wallace's identification of Mr Watson from Montage B and the reliability of his evidence. The Judge gave a comprehensive direction.

[773] The weaknesses of Mr Wallace's identification of Mr Watson were squarely before the jury. What was important, however, was the totality of Mr Wallace's evidence, in particular his early descriptions of the lone man and the position of the boat where he dropped the lone man, Ben and Olivia. There was much about Mr Wallace's evidence which was consistent. He served the man on the Naiad in the Main Bar early on during the New Year's celebrations and saw him a number of times that night, both in the Main Bar and outside it. The man told Mr Wallace he came from Picton.

[774] We have already touched on Drs Wells and Quigley-McBride's suggestion that Mr Wallace was wavering when he selected Mr Watson's image from Montage B.[235] We consider Mr Wallace taking a minute and a half to make his identification is readily explainable in the circumstances. Montage B was a simultaneous lineup, for which a quick decision time is approximately 30 seconds.[236] Mr Wallace was specifically told to take his time and would have appreciated that his decision was going to assume substantial importance. He was "immediately drawn" to two of the photographs, numbers 3 and 5. He did not find it difficult to discount photograph 5 based on facial features. It would seem that Mr Wallace was, by the time of the identification, wedded to his description of the lone man's facial and head hair — a description which, we emphasise, was not his first account. That provides a plausible explanation for why Mr Wallace was drawn to photograph number 5.

[775] In line with *Tamihere*, we now turn to consider the other evidence supporting Mr Wallace's identification of Mr Watson.[237] This demonstrates that Mr Wallace's evidence of what the lone man said to Olivia when on the Naiad was consistent with Mr Watson's lewd suggestions to women throughout the New Year's celebrations.

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235 See above at [670]–[673].
236 See above at [670].
237 *Tamihere* appeal, above n 185, at 203.

Further, the drop-off location was consistent with the area in which *Blade* was moored. We will also address the issue of the two-trip theory.

Analysis of other supporting evidence

[776] In analysing the other evidence, the experts' criticisms provide a useful agenda. Drs Wells and Quigley-McBride concluded that Mr Wallace's identification evidence had little to no incriminating probative value because of the following factors:

(a) Mr Wallace was shown the single photograph and did not identify Mr Watson at the time;

(b) Mr Wallace was shown Montages A1 and/or A2 and did not identify Mr Watson at the time;

(c) Mr Morresey's non-identification of Mr Watson from Montage B;

(d) Mr Watson's appearance that night, as depicted in the *Mina Cornelia* and Waswo photographs;

(e) the composites/compusketches;

(f) putting to one side the evidence of Amelia Hope;

(g) opining that many of the descriptions were clearly not Mr Watson; and

(h) considering the evidence of others at Furneaux Lodge that night irrelevant.

[777] We have already discussed the points relating to the single photograph, Montage A,[238] and Mr Morresey's non-identification.[239] We do wish to analyse in some detail the other factors on which the experts relied.

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238 See above at [754]–[763].
239 See above at [678]–[682].

Mr Watson's appearance that night as depicted in the Mina Cornelia *and Waswo photographs*

Fresh evidence — facial hair

[778] James Ruhfus, a digital technology specialist, was instructed on behalf of Mr Watson for the purpose of this appeal to assess the quality of the *Mina Cornelia* photograph depicting Mr Watson on 31 December 1997. Specifically, Mr Ruhfus was, "informed that the facial hair … was of particular interest".

[779] He said:

> Mr Watson himself looks to be clean shaven, or at least with the absence of stubble. … based on the amount of nuanced visual information evident within the photograph … should there have been visible stubble evident on Mr Watson at the time the photograph was taken, the photograph (and subsequent scan that we now view) would capture it.

[780] The Crown conceded that Mr Ruhfus' evidence is credible (saying it does not dispute his conclusions). However, the Crown submitted the evidence is not fresh, pointing out that the photograph and negative was provided to Mr Watson's photographic expert, Mr Durrant, whose evidence was adduced at the pre-trial hearing concerning the admissibility of Montage B in May 1999. Mr Durrant did not give evidence at the trial. Further, in the Crown's submission, Mr Ruhfus' evidence lacks sufficient cogency. It is not capable of disproving or resolving the body of countervailing and conflicting evidence from witnesses as to how Mr Watson appeared to them. It could not have led to a different verdict.

[781] We accept that submission. Mr Ruhfus' evidence is inadmissible. While in closing the prosecutor asked the jury whether Mr Watson looked totally clean shaven in the photograph, suggesting it did not "reproduce accurately" what Mr Watson looked like that night, we reject any suggestion that submission was unfairly prejudicial. The Judge dealt with this issue in his summing up, essentially making the same point as Mr Ruhfus, when he said: "That photo does have problems does it not, Mr Foreman and members of the jury. It is a photo of the eyes shut and it looks decidedly clean shaven". And a little later, "there is a great deal of evidence that the man who is identified as Mr Watson had not shaved and the photo tends to suggest to the contrary".

[782] What the photograph actually showed and what it meant was, of course, ultimately a matter for the jury.

Evidence at trial — facial hair

[783] The trial record shows the inconsistency in descriptions of Mr Watson that night and whether he was clean shaven. Some witnesses referred to Mr Watson as clean shaven before he went ashore for the evening, including people on *Mina Cornelia*.[240] Others, again including those on *Mina Cornelia*, did not perceive or recollect Mr Watson as clean shaven. This is a graphic demonstration of the fact that people who see the same person can provide different descriptions.

[784] Marcel Rutte said Mr Watson was "unshaven" when he was on *Mina Cornelia* at the time the photograph was taken. Mr Rutte said Mr Watson had the same state of unshavenness as Larry McKay. Monique Rutte said Mr Watson looked unshaven, and that her partner, Mr McKay was also unshaven. In contrast, Ernestus Rutte Jnr was shown the *Mina Cornelia* photograph and agreed that Mr Watson appeared clean shaven and that was his recollection of seeing him that evening.

[785] Geoffrey Hall saw Mr Watson on *Unicorn* between around 5.00 to 7.00 pm. He described Mr Watson having "a couple of days stubble". He was shown the *Mina Cornelia* photograph. He said that it had looked like Mr Watson had gone back to his boat, had a wash and was a bit tidier. He said his facial hair looked "a bit cleaner, but [was] approx[imately] the same", and maintained under cross-examination that Mr Watson still had "a 5 o'clock shadow appearance".

[786] So, despite the *Mina Cornelia* photograph, Marcel Rutte, Monique Rutte and Geoffrey Hall still perceived Mr Watson as not clean shaven.

[787] Mr Watson is the man shown on the jetty in the Waswo photograph, which was taken on Furneaux Lodge jetty on New Year's Eve. Janine Morrison, who was in the photograph, described him as having "messy dark brown hair" that was "shortish" but

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[240] Brigitte Radford, Ernestus Rutte Jnr and Stefan Zajkowski.

was "slightly longish at the back". She said he "was not clean shaven, he looked like he hadn't had a shave for days or a day, he had a bit of stubble".

[788] Evan Doolan was working security and was at the jetty when Mr Watson arrived at Furneaux Lodge that night. He told Mr Watson he could not take his bottle of rum on shore, an incident recalled by those aboard the *Mina Cornelia* with whom Mr Watson travelled ashore. Mr Doolan described Mr Watson as having stubble on his face.

[789] It was common ground ultimately between the Crown and defence that Mr Anderson had transported Mr Watson to *Blade* in the early hours of New Year's Day. Mr Anderson described Mr Watson's facial hair as "quite long stubble to the point where you would seriously consider keeping it as a beard rather than like a day's growth".

[790] Oliver Perkins — a person with whom, when interviewed by the police, Mr Watson admitted interacting in what we term the Perkins incident — described, "a few days growth all over". Others who were involved in or observed that incident described Mr Watson having "a couple of days growth" (Christopher Bisman), "stubble" (Edward Sundstrum), "half a centimetre … of growth" (Samuel Radford), "at least a couple of days of unshavenness" (Nicholas Harvey), "had a bit of stubble" (Amanda Egden), "unshaven" (Camilla Savill), and "a bit of a shadow, … he could have shaved sort of 18 hours beforehand" (Simon Bell). Timothy Guthrey gave a more qualified answer, saying it "wasn't like he was growing anything" but he "maybe just hadn't shaved in a day or maybe two, if that".

[791] This evidence demonstrates that Mr Watson cannot be excluded from being the man a witness is describing simply because the witness describes the man as having facial hair. While the *Mina Cornelia* photograph is relatively compelling evidence suggesting Mr Watson was at least close to clean shaven, many witnesses — who, we emphasise, there is no real doubt were talking about Mr Watson — noted Mr Watson having facial hair that evening. The study discussed in the Law Commission paper finding facial hair descriptions are almost always inaccurate is apposite.[241]

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[241] Law Commission, above n 165, at [68]. See above at [693].

The lone man's "long" hair

[792] The Report placed considerable weight on the length of the lone man's hair, referring to the compusketches (which we discuss below) and Mr Morresey's evidence. The experts opined that these descriptions do not match Mr Watson's appearance that night as depicted in the *Mina Cornelia* and Waswo photographs.

[793] We have already discussed Mr Morresey's statements saying he saw the lone man from the back only.[242] His evidence at trial involved a brief description of the lone man, relevantly saying "he had wavy hair down to about his shoulder level" which was a "browny colour". The cross-examination of Mr Morresey was clearly focused on creating the impression the lone man had long hair. The following exchange took place:

> [Q:] Now his hair, would you describe his hair as being longish?
>
> [Mr Morresey:] I didn't see, I didn't pay any attention of him when he was on the Naiad …
>
> …
>
> [Q:] From what you saw of his hair when he got off the Naiad and onto the second boat, was your impression then that he had longish hair?
>
> [Mr Morresey:] Yes.
>
> [Q:] And by that, would you say that at the time it looked like it needed a cut, his hair?
>
> [Mr Morresey:] Yes.
>
> [Q:] And generally would you be happy to describe his hair as wavy and sort of shoulder length?
>
> [Mr Morresey:] Yes.
>
> [Q:] So the person that was on the Naiad with you and that got off the boat, you would describe as having hair that was longish rather than shortish?
>
> [Mr Morresey:] Yes.
>
> [Q:] That's really all you can safely say about the description of that man?
>
> [Mr Morresey:] Yes.
>
> [Q:] You can just really talk about his hair?

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242 Above at [678]–[682].

[Mr Morresey:] Yeah, that's about it.

[794] We suggest great care needs to be taken with Mr Morresey's description of the lone man. Furthermore, we do not consider that Mr Morresey's evidence can be considered "detailed" or "highly similar" to Mr Wallace's descriptions of the hair other than that it was dark and wavy. We emphasise that Mr Wallace's first description of the lone man referred to him having "short dark wavy hair".

[795] Witnesses describing a person we know was Mr Watson gave varied accounts of his hair length, ranging from "short" to "medium length" to "shortish" hair that was "longish at the back".[243]

[796] Gary Cassidy was at Momorangi Bay when Mr Watson was there around 27 December 1997. He and a number of other witnesses gave evidence and there was no dispute that the man they were describing was Mr Watson. Mr Cassidy described Mr Watson by saying "his hair was about shoulder length and curly and short on top".

[797] Donald Anderson's description of Mr Watson's hair is particularly noteworthy given it is accepted he took Mr Watson to *Blade* in the early hours of New Year's Day. Mr Anderson's statement on 5 March 1998 described Mr Watson as follows:

> As I got closer to the wharf I could see this guy and thought he looks like a rough bugger, a fisherman sort of character. He had several days growth, not just two days growth. It was like quite a few days growth on his face like you got to the point where you thought about keeping it for a beard. He had a dark olive complexion not Māori but someone who had been in the sun or a hardened complexion. His hair was dark, more black than brown and his stubble was dark too. His hair was very unkempt like he hadn't done anything to it for a very long time, it wasn't really long. His hair was like the guy in the identikit picture that was in the paper, not quite as long as the one with the longer hair in the sketches. His hair was almost getting curly, like wind blown. He didn't have a fringe, like his hair was off his face. He could have been receding but I couldn't say for definite.

[798] Mr Anderson's trial evidence was consistent, saying Mr Watson's hair was dark and unkempt, to the point where he "sort of needed a haircut". Mr Anderson similarly remarked that it "looked like he needed a haircut" in his police statement of 6 February 1998.

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[243] For example, Evan Doolan ("short"), Jennifer Skelton ("medium length") and Janine Morrison ("shortish" hair that was "longish at the back").

[799] This leads us to conclude that Mr Watson cannot be excluded as the lone man based on how the lone man's hair was described by Mr Morresey or by Mr Wallace in his later statements and at trial.

The composites/compusketches

[800] Roz McNeilly and Chey Phipps were working in the Main Bar on New Year's Eve and observed the man in Reg's Corner (in the Main Bar, just inside the entrance). Both contributed to the second compusketch which can be considered different from that of Mr Wallace as it shows a narrower face and what could be described as hooded eyes.

[801] Ms McNeilly described seeing the lone man from "about 12.30ish" for about an hour and a half, during which time she served him double bourbon and cokes five or six times. She described the lone man wearing a V-necked, darkish jersey down to his wrists. The man's hair was scruffy, mid brown and unkept, covering and extending below his ears. He looked like "he hadn't shaven for a day", having "a 5 o'clock shadow". He was smoking roll your own cigarettes. He had a brown or olive weather beaten face with "slanted", "half-closed" eyes, "skinny" lips and "bony" hands. She identified Mr Watson from Montage B, saying it was the eyes which drew her attention to the photograph of Mr Watson. The hair in the photograph was shorter than her recollection of the man on the night, but the whiskers and stubble were "similar" and the eyes were "exactly the same". She said her compusketch was "[a]s accurate as we could get it" but her recollection was that the man's hair was "stringier" and "wasn't as thick". She "was never entirely happy with this hair coming down over his fringe". The man's facial hair also had less growth when seen in person.

[802] Mr Phipps served the lone man starting sometime between 11.10 and 11.50 pm and ending at around 2.00 am. He thought he served him spirits. He described the man as wearing a coloured shirt slightly unbuttoned with rolled up sleeves and maybe a jersey or cardigan over the top. Mr Phipps described the man's hair as light mousy brown, wispy or wavy. He said the man was "slightly unshaven" with two to three days growth. The man was five foot six to five foot seven, medium to wiry build with "droopy" — or perhaps lazy, perhaps tired — eyes. Mr Phipps was not happy with

the compusketch, in particular the hair length and style. The man's hair was about "shoulder length" at the back, whereas the front and top part was "whispy straightish", like a "shortish crewcut" but "it wasn't a crew type, it was sort of more long". The man's eyes in the compusketch were "getting towards" what he remembered. He described the compusketch as about a 65 per cent likeness.

[803] Notably, other witnesses, whose evidence we discuss in more detail below,[244] interacted with a lone man in the Main Bar. In some cases we know that man was Mr Watson and in other cases there is very strong reason to conclude the man was Mr Watson.

[804] The composites must be put in context by considering the totality of the relevant witnesses' evidence. For example, the description provided by Roz McNeilly has important linkages to a number of factors consistent with Mr Watson — she said the man rolled his own cigarettes and her description of his complexion, eyes and lips can reasonably be considered consistent with Mr Watson's appearance at the time.

[805] Furthermore, we take it from Drs Wells and Quigley-McBride's own expert evidence that the most reliable identification evidence is generally that given closest in time to the relevant event. Mr Wallace's compusketch was not Mr Wallace's first attempt at capturing the lone man's appearance. The first description Mr Wallace gave is in his 3 January 1998 statement:

> The guy on this ketch would have been about 32, about 5'9" tall, wiry build. He was unshaven but didn't have a moustache. He had short dark wavy hair and smelled like a bottle of Bourbon.

[806] In any event, as noted above, it appears that the opinion of those with expertise in identification evidence is that composites are unreliable.[245]

Putting to one side the evidence of Amelia Hope

[807] Amelia Hope's evidence at trial was that she had not seen the lone man's face. She said he was aged "late 20s, early 30s". She described his hair as dark, "receding"

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244 Below at [821]–[829].
245 See above at [685].

and “short, but it wasn’t spiky, it was sort of sitting flat on his head”. Rick Goddard, who was with Amelia, did not describe the lone man.

[808] Amelia’s first description of the lone man was on 4 January 1998. She described him as “slim and quite tall” and “in his late 20s”.

[809] On 7 January 1998, Amelia provided a more detailed description. The lone man was Caucasian, with “short hair like a crew cut” that was “dark brown”. He was “about 25 years plus” with a “medium build”.

[810] Amelia’s statement of 10 February 1998 said:

> I can’t remember much about the unknown male, except to say that he had short dark hair. It wasn’t short and spikey because you could see it sitting flat on his forehead. His hair was straight and fine. It may have been receding off his forehead, his whole hair was receding, but not majority. I could see his forehead through his hair, you could tell that it would have been if he had his hair shaved off.

[811] The handwritten version of her statement then includes two diagrams. The first shows how Amelia imagined the man’s hairline would look if he had his hair shaved off. The second, labelled “short hair 1 inch long approx[imately] with a slight peak”, shows the man’s hair as Amelia recalled it.

[812] Although not evidence at trial, Amelia was shown Montage B on 2 May 1998 but did not identify Mr Watson. As to whether anyone came close to looking like the lone man in the Naiad, Amelia responded, “Maybe No. 1 photograph, but only the hair looks at bit similar. I didn’t see the guy’s face at all.”

[813] Amelia Hope’s description of the lone man on the Naiad is important and cannot, as the experts suggest, be put to one side. Her reference to the lone man having a receding hairline was consistent with evidence of those we know were referring to Mr Watson, such as Donald Anderson, Darryl Waswo (who photographed Mr Watson) and Richard Egden (who saw part of the Perkins incident). In many ways Amelia can be seen as a counter to some of the expert objections because she did not identify Mr Watson from Montage B — meaning it can be said with some confidence that her

evidence was limited to what she could in fact remember which was the receding hairline and short hair.

Opining that many of the descriptions were clearly not Mr Watson

[814] Drs Wells and Quigley-McBride discounted the identifications made by a number of those who attended Furneaux Lodge that night, saying they were irrelevant. They noted that it was always accepted Mr Watson had attended Furneaux Lodge that night and opined that the witnesses seemed to be talking about a different person or persons and, in any event, they could not have been talking about Mr Watson because they described the "scruffy" man. But we know that Mr Watson was described just so.[246]

[815] A key feature of the evidence is the different descriptions of the person who was clearly Mr Watson and the failure of witnesses to identify him using either Montage, despite the fact we know the witnesses were talking about Mr Watson.

[816] We start with the descriptions of two witnesses who saw Mr Watson at Momorangi Bay on 27 December 1997, which demonstrate a recurring theme of differences in the way witnesses described him. James Greer said Mr Watson's hair was "short, not long", whereas Gary Cassidy said Mr Watson's hair "was about shoulder length and curly and short on top".

[817] When the group from the *Mina Cornelia* arrived at Furneaux Lodge during the evening of New Year's Eve, Mr Watson was told by security he could not take his bottle of rum up to the Lodge. Those who observed the incident variously described Mr Watson's hair as "short dark",[247] "shaggy" or "messy",[248] or "receding".[249] He was described as unshaven with stubble.[250] While some present at that incident identified

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246 For example, Sean Thompson (witnessing Mr Watson apologising to Oliver Perkins) and Mr Anderson. Before and after New Year's Eve there are descriptions of him as scruffy (eg at Momorangi Bay and Erie Bay).

247 Stewart Allen and Mr M. Evan Doolan similarly said that Mr Watson had "quite short hair".

248 Catherine Conder and Janine Morrison.

249 Darryl Waswo.

250 Evan Doolan, Catherine Conder and Janine Morrison.

Mr Watson from Montage A[251] and another from Montage B,[252] Catherine Conder, for example, did not make a definitive identification.

[818] In his statement to the police on 6 February 1998, Mr Anderson described Mr Watson as follows:

> The person I took to *Blade* would have been medium to slight build. He was wearing a denim shirt, a lighter colour than his jeans I think. He was wearing blue denim jeans. The shirt was long sleeved and had a collar. I can vaguely recall that he was wearing a T-shirt under the shirt. The clothes looked clean but the guy looked scruffy. He looked like he had 3 or 4 days of growth on his face and unkempt "curlyish" dark hair. It looked like he needed a haircut.

[819] Those involved in or who had witnessed the Perkins incident described the lone man's hair as variously "messy",[253] "fairly short",[254] "brushed forward",[255] or "receding".[256]

[820] An analysis of the evidence of the witnesses shows a large number of them anyway were talking about the same person (with one or two exceptions, for example in relation to a fight where it is not clear whether it was Mr Watson who was involved). But it is the consistency and links between the witnesses which is identification evidence of significant weight. We address those links or themes next.

Considering the evidence of others at Furneaux Lodge that night irrelevant

[821] While the experts disregarded the evidence of those who attended Furneaux Lodge that night, we consider their evidence was crucial because we know the lone man was at Furneaux Lodge before he was taken from the Furneaux Lodge jetty to the boat which he, Olivia and Ben boarded. We now canvas in some detail the evidence of earlier incidents at Furneaux Lodge in order to analyse whether they involved the same man — that man being Mr Watson. The purpose of that is to ascertain the likelihood that there was another lone man at Furneaux Lodge that night who could have been the lone man on the Naiad.

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251 Stewart Allen and Evan Doolan.
252 Andrew Bailey.
253 Edward Sundstrum.
254 Simon Todhunter.
255 Oliver Perkins.
256 Richard Egden.

[822] To provide some context, when Mr Watson was at Momorangi Bay, around 27 December 1997, he talked to a number of witnesses about calling his boat "Mad Dog",[257] and used the words "fuck a dog on a chain" and "kill the dog".[258] He also told a number of witnesses of his plan to go to Tonga.[259] James Greer referred to Mr Watson rolling his own cigarettes.

[823] The consistent themes that emerged from the evidence of witnesses at Furneaux Lodge are:

(a) Use of the expression "dog on a chain": Three people who were staying on a boat called *Jans Coastal* (Teresa Geddes, Ray Padden and Nicholas Cooper) described interacting with a man who used the expression "dog on a chain". All three described him wearing a denim shirt, two saying it was blue and one saying it was "Levis I thought". When he saw Mr Watson on television, Mr Padden recognised Mr Watson as the man.

(b) Rigger in the Garden Bar cooler: Michael Cronin was working that night spending most of his time in the Garden Bar. Just after 10.00 pm a man bought a "rigger" (a large plastic bottle) of beer and asked for it to be kept in the cooler. His description of the man's clothing was consistent with Mr Watson's clothing that night — a blue denim shirt with the sleeves rolled up. He identified Mr Watson from Montage B. Mr Wallace also referred to there being a "pub pet" in the Garden Bar fridge.

(c) Inappropriate interactions with women:

(i) Before he went ashore, Mr Watson spoke offensively to Lynette Hall on *Unicorn* (referring to her by an unflattering nickname in her presence). On *Mina Cornelia*, again before he went

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257 Deborah Cassidy, Gary Cassidy, Gary Greer, Yvonne Greer, Ian Masters, Dennis Greer and James Greer.

258 Gary Greer, Yvonne Greer, Dennis Greer and James Greer.

259 Gary Cassidy, Simon Skelton, Yvonne Greer and James Greer.

ashore, Mr Watson made similar comments about Deborah Corless's brown eyes.

(ii) Around the time of the Waswo photograph, Mr Watson was described as hassling young women and being a nuisance, such that they swore at him and told him to leave. Brigitte Radford and Deborah Corless described the *Mina Cornelia* group using Mr Watson's detainment at the jetty to get away from Mr Watson as quickly as possible, given the group's unpleasant interactions with him.

(iii) Chey Phipps noticed a man in Reg's Corner who was there for a while. He observed him talking to a young woman who was clearly not impressed by his behaviour. He contributed to Roz McNeilly's compusketch and we have discussed his evidence more extensively previously.[260]

(iv) Three people staying on the *Kalea Rose* (Emma Harron, Phillippa Holstein and Lois Knowles) described a man wearing a blue denim shirt with messy brown hair. Ms Harron saw the man on a boat (which we deduce to be *Blade*)[261] lifting his top up and saying "hey baby". Ms Holstein recalled the man saying words to the effect that her glow stick looked like a penis, later recognising him as Scott Watson based on newspaper and television coverage. Ms Knowles recalled the man asking about a blonde with "big boobs" he had seen on the *Kaela Rose*'s deck.

(v) Several witnesses described Ms H encountering a man who, according to Ms H, said he was from Christchurch. He said he had a boat and asked her to go on it with him. He brushed her breasts. He then commented to Anna Kernick "nice set you

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260 See above at [800]–[806].

261 Ms Harron described the boat as being one in the raft of boats we know contained *Blade*, *Mina Cornelia* and *Bianco*. Ms Harron's description of the boat, together with the fact she noticed the boat was gone the following morning, leads us to conclude she was describing *Blade*.

have got there love". A little later, he said to Anna Kernick that she should "come down onto my boat, I'll do things to you you have never imagined or dreamed of". Their descriptions were largely consistent — the man wore a blue denim shirt and had dark hair, which was described as "wavy, short but like maybe touched his collar", "sea blown" and "messy". Anna Kernick, Philip Hale and Lance Rairi identified the man as Mr Watson from Montage B. Sarah Kernick identified both photographs 3 and 5 (Mr Watson was number 3), Ms H said the people in photographs 1 and 5 were most similar and Mr Rairi also thought photograph number 1 had similarities.

(vi) Thomas Forbes and Nicholas Sutherland, from the boat *Equaliser,* described a man asking if one of their female friends was for sale. Mr Sutherland described the man sidling around the girls in the pool table area and making a nuisance of himself. They both described the man wearing a blue denim shirt and having receding dark hair. Mr Forbes selected Mr Watson from Montage B, citing the man's receding hair line. Mr Sutherland selected Mr Watson from Montage A, saying he was not certain but the resemblance was very close.

(vii) Kristal Bailey described a man making a disgusting comment about how she looked and what he thought of her, saying he wouldn't mind sleeping with her and she should go off with him. She saw him again later in the evening and he grabbed her arm as she walked away. She described him wearing a light blue denim shirt with the sleeves rolled up and a white top underneath. His hair was dark brown with tight curls coming over his ears and halfway down his neck. She identified the man as Mr Watson from Montage B. This incident was witnessed by two others who gave similar descriptions.[262]

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[262] Louise Featherston and Delina Mihaere.

(viii) Regan Marfell described a man staring at a young girl who wore a short skirt and then bending down and looking up. He identified the man as Mr Watson from Montage B. He described the man's hair as "about to the shoulder" and "frizzy unbrushed".

(ix) Tamara Watkins and Julia Walker spoke to a man who called himself Mr Prozac as they were exiting the Main Bar at around midnight. Ms Walker identified Mr Watson from Montage B, though she was also drawn to photograph number 4.

(x) Hannah Fox described a very confident, loud man in the Main Bar who came across as being really sleazy. She saw him several times when she was getting a drink from the bar and he was always in the same area — right up the front, in the middle area of the bar. He asked about her necklace and whether one of her male friends was her boyfriend. She recalled the man having his sleeves rolled up and dark green or black tattoos on both his forearms. She identified him as Mr Watson using both Montage A and B but said the man in photograph number 3 of Montage B (Mr Watson) was clean shaven and had slightly shorter hair, compared to the man's appearance on the night.

(xi) A number of those who observed the Perkins incident described a man (who we know was Mr Watson)[263] being sexually explicit towards girls, talking to them about crewing on his boat to Tonga, offering them free Prozac tee-shirts and describing himself as Mr Prozac. Amanda Egden described the man offering her and her friends free Prozac tee-shirts in exchange for coming onto his boat. He also suggested she should crew on his boat on a trip to Tonga by providing him sexual favours. The man told Edward Sundstrum, Richard Egden and Ms Egden

263 See above at [790].

that his name was Scott and he was from Wellington. Most of the witnesses referred to the man wearing a denim shirt. Mr Sundstrum and Camilla Savill noticed tattoos on his left arm, and Ms Egden tattoos on his left hand and arm. Of the 13 witnesses, 11 identified Mr Watson from Montage B.[264]

(xii) It was not in dispute that at some stage in the early hours of New Year's Day, Mr Watson boarded *Bianco* and told Mr Crawshaw to give his partner to him and that he would "look after her" and "show her a good time".

(d) General aggressive behaviour:

(i) Ryan Shaughnessy described bumping into a man who responded aggressively. He was wearing denim, had untidy black hair and had unkempt facial hair, with a "5 o'clock shadow". He identified photographs 5 and 6 from Montage B as resembling the man (not Mr Watson, who was photograph number 3). Samuel Radford saw that incident occur and, later in the night, recognised the man involved in the Perkins incident (who, we repeat, we know was Mr Watson)[265] as being the same man.

(ii) At about 10.30 pm, Sarah Holland witnessed a man on the jetty, who had an "olivy complexion" and was wearing a blue denim shirt and denim jeans, arguing with a bouncer. While she selected Mr Watson from Montage B, she said the man on the night had more facial hair and a rounder face.

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[264] At trial, there was no mention of Mr Sundstrum being shown a photographic montage. Nicholas Harvey did not recognize anybody when shown a Montage. Oliver Perkins, Simon Todhunter, Samuel Radford, Timothy Guthrey, Christopher Bisman, Cara Brosnahan, Richard Egden, Timothy Everist, Amanda Egden, Camilla Savill and Jonathan Thomson all identified Mr Watson from Montage B.

[265] See [790] above.

(iii) Claire Williams described seeing a man annoying two young men near the entrance to the Main Bar. She said he was Caucasian, medium build, clean shaven with short brown hair, had a tattoo on his right arm and wore a long-sleeved blue denim shirt with sleeves which were "prob rolled up" together with either blue or black jeans. She identified Mr Watson from Montage A.

(e) Part of his finger missing: Duane Schroeder was with two friends when a single man came up and chatted to them. He said he had a boat and was cruising the sounds, picking up odd jobs. Mr Schroeder shook his hand and noticed part of his little finger missing (Mr Watson has part of a little finger missing). He described the man as wearing a denim shirt and having short dark brown hair. He saw the man again later that night, after midnight. He identified Mr Watson from Montage B.

(f) Rolling his own cigarettes: Simon Bell, Nicholas Sutherland and Roz McNeilly all described the man they encountered rolling his own cigarettes. Mr Watson's former partner confirmed in evidence that he rolled his own cigarettes.

(g) Telling people he had a ketch:

(i) Oliver Perkins said the man we know was Mr Watson[266] talked to him about his yacht, describing it as a "[d]ouble masted ketch".

(ii) Amanda Egden talked to the same man. He told her he had "a double masted ketch, the only one in the bay". She was cross-examined about whether she was present when a Mr Tapley told the police, on 5 January 1998, that he had been invited to a ketch.[267] It was put to her in cross-examination that

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266 See above at [790].

267 We cannot find any record of Mr Tapley being a witness at the trial.

she might have remembered reference to a ketch as a result of what Mr Tapley had told the police. She was clear that was not the case, although conceded it was possible. In re-examination, she confirmed she remembered the man saying he had a double masted ketch in the bay and it was her own evidence.

(iii) Alexandra MacFarlane was cross-examined about her connection with Mr Tapley. She said that he was speaking to a man, who appeared to have two other males with him, and they were talking about a yacht. She agreed that the man speaking to Mr Tapley said he had a two-masted yacht and "it was the only double masted yacht out in the bay". She was asked to describe him and she said:

> … dirty, he had hair that was sort of down to below his ears maybe, shaggy not washed, he had some stubble and it was dark, but he could have been Māori, …

She had been shown the compusketch produced with Guy Wallace's input and said the face was similar to the person who talked about having a double masted yacht in the bay but she could not be sure. In re-examination she said the hair was shaggy and dirty and scruffy. We consider that description, in conjunction with what was said, to be consistent with other descriptions of Mr Watson.

[824] The links which we consider tie the various witnesses' descriptions together and to Mr Watson are:

(a) references to sailing around Tonga;

(b) asking women if they wanted to go back to his boat or crew for him;

(c) using the phrase "dog on a chain";

(d) giving his name as Scott but giving different places where he was from;

(e) being more than simply flirtatious but overtly coarse and offensive to a number of women;

(f) being aggressive and generally behaving inappropriately;

(g) consistencies in descriptions of the man's physique, complexion and clothing (wiry or medium build, olive complexion, a white tee-shirt underneath a blue denim shirt with rolled up sleeves, and jeans);

(h) tattooed arms and a missing fingertip;

(i) spending a significant amount of time near Reg's Corner at the front of the Main Bar;

(j) rolling his own cigarettes and drinking spirits; and

(k) telling people he had a ketch.

[825] Some of those witnesses deviate from those descriptors. For example, Hannah Fox described the man she encountered wearing a "dark shirt, possibly dark green". But that discrepancy is placed in context by the fact Janine Morrison (who saw Mr Watson on the jetty when the Waswo photograph was taken) and Nicholas Harvey (who witnessed the Perkins incident) described Mr Watson's shirt as "forest green" and "bluey green" respectively in early statements. Overall, we do not consider the witnesses were talking about different men — the minor discrepancies between their descriptions and the links we set out are merely the expected product of the vagaries of memory.

[826] It was this type of analysis which we view as critical and which was missing from the experts' evaluation of the visual identification evidence. We can demonstrate the consequences of what we consider was a flaw in the experts' approach.

[827] Anna Kernick said a man who appeared to be alone, drifting through the Main Bar around the pool table, told her she had a "nice set" and invited her to "come down onto my boat, I'll do things to you you have never imagined or dreamed of". Those comments and that behaviour was consistent with Mr Watson's behaviour generally, starting with comments he made at Momorangi Bay, to how he behaved on the *Mina Cornelia*, to the behaviour with a number of young women that night including those in the group relating to the Perkins incident, to what he did on New Year's Eve after his return to *Blade* when he boarded *Bianco*. Bearing that consistency in mind, it is reasonably clear that it was Mr Watson who Ms Kernick encountered.

[828] Drs Wells and Quigley-McBride characterised as a joke what the lone man in the Naiad said to Olivia — "you can come … but he [(Ben)] can't". We question why the experts considered it appropriate or relevant to discuss what the lone man said or how it should be interpreted. In any event, not only was it inappropriate for them in their role as experts to draw that conclusion but there was inconsistent evidence to support it. In one of his statements (5 January 1998), Mr Wallace characterised that comment as joking. At trial he described it as "like bar talking" but said he "didn't feel too good about it". He said a little later in his evidence that, when they had alighted from the Naiad, he asked Ben and Olivia if they were sure they were okay "with this" and that he "just had a funny feeling".

[829] When considered in the context of the other evidence of what had occurred at Furneaux Lodge that night, the comment becomes of greater significance. The comment could be considered an important link to Mr Watson and his behaviour at Furneaux Lodge. It was consistent with Mr Watson's behaviour not just with one young woman at Furneaux Lodge but with a number of them, whom he also asked to go back to his boat. It was, therefore, a significant piece of evidence relevant to identification and not one to be disregarded as a joke.

Our assessment

[830] This case demonstrates the fallibility of people's descriptions and identification evidence.

[831] We have *one* clear photograph of Mr Watson on New Year's Eve, the *Mina Cornelia* photograph. We then have photographs taken shortly after New Year, being those used in Montages A and B. There is a photograph of Mr Watson not used in Montage B. We also have the compusketches contributed to by Mr Wallace, and Roz McNeilly and Chey Phipps, respectively.[268]

[832] We then have the descriptions given by witnesses where there is no dispute they were describing Mr Watson. Yet even amongst those witnesses, there are variations in description and a number were unable to identify him from a Montage or from television.

[833] For example, on 4 May 1998, Mr Anderson was shown Montage B. After viewing the Montage for some time, he was unable to identify any of the persons featured as the male he took to *Blade*. Mr Anderson had previously viewed Montage A too. He said two of those shown, including Mr Watson, resembled the man he had taken that night. He said photograph number 4 showed someone with similar hair but it was definitely not the person. The closest in appearance was number 6 (Mr Watson).

[834] Mr Anderson saw a television clip of Scott Watson walking down the street. Mr Anderson said:

> It didn't look like the person I put onto the boat called the Blade. The person I put on the boat had longer hair and he didn't look as big a build as the person on TV.

[835] While most of those who were involved in or witnesses to the Perkins incident selected Mr Watson's photograph from Montage B, Nicholas Harvey did not recognise anyone when shown a Montage (it is not clear which one). Simon Bell, a parent who had come to Furneaux Lodge around 2.30 am on New Year's Day and went to have a drink in the Main Bar while waiting to collect his charges, witnessed the end of the Perkins incident. He did not select Mr Watson's photograph when shown Montage B but identified him from television footage. At trial, he said he did recognise the person from Montage B and perhaps should have picked him out. He said photograph number

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[268] See above at [487].

3 was more like the man he saw but "I would still not say it was a perfect likeness of that person that night".

[836] As we say, there is no dispute the man these witnesses observed or interacted with was Mr Watson. This evidence leads us to reject the experts' opinion that a non-identification is necessarily strong exculpatory evidence in this case.

[837] Dr Wells and Dr Quigley-McBride's reliance on descriptions to say Mr Watson can be excluded is simply not correct. In light of how others who saw Mr Watson at Furneaux Lodge that evening described Mr Watson, Mr Watson cannot be excluded as the lone man just because of variations and discrepancies between descriptions.

[838] The same is true of differences between the witnesses as to the timing of events. It is clear that Mr Watson came ashore at around 10 pm. It is also clear that Mr Wallace, Roz McNeilly and Chey Phipps were talking about the same lone man — the defence explicitly said so in closing at trial. Mr Wallace gave evidence he first saw the lone man at the Main Bar when the bar was starting to get busy, which he thought was between 8.00 pm and 9.00 pm. Roz McNeilly, by contrast, said she first saw the lone man at about 12.30 am. Mr Phipps gave yet another time, saying he served the lone man starting sometime between 11.10 and 11.50 pm (albeit he only started working at around 10.30 pm). The reality is that the people at Furneaux Lodge that evening, including bartenders, were generally not making a note of the exact times they saw a lone man, nor were they keeping any such men under continuous observation.

[839] The experts placed weight on a comparison between Mr Watson's appearance on the night as shown in the *Mina Cornelia* photograph and the composites, saying they were "quite different".

[840] However, the same could be said of a comparison between the *Mina Cornelia* photograph and Montages A and B. The Montage photographs taken in early-January 1998 show Mr Watson looking quite different. He looks somewhat dishevelled and his hair is curling on the top of his head and over his ears. The *Mina Cornelia* photograph was taken relatively early on New Year's Eve, prior to Mr Watson

travelling by water taxi to shore. There is a suggestion that Mr Watson had gone back to *Blade* to tidy himself up before reboarding the *Mina Cornelia*. Notably, Stefan Zajikowski remarked that when he saw Mr Watson after dinner, he had brushed his hair and had a shave. The Waswo photograph was taken just after Mr Watson arrived on shore. So both photographs reflected Mr Watson's appearance at a relatively early stage of the New Year's Eve celebrations. Once ashore, Mr Watson consumed, by his own admission, a considerable quantity of alcohol, and socialised in what was evidently a highly interactive and confrontational way, matters which might be thought to contribute to a person's appearance becoming more dishevelled.

[841] We accept that the identifications from the Montages do not necessarily meet today's requirements for a "formal procedure" under s 45 of the Evidence Act. In Montage A, Mr Watson was the only person with tattoos (which was also contrary to the 1997 Manual). Identifications from Montage B were delayed given that Montage was only created in March 1998. Mr Watson also challenges a number of the identifications of him from the Montages by suggesting the witnesses' memories were contaminated by the saturating media coverage at the time.

[842] But what we can rely on is the consistency of the witnesses' descriptions of the man's clothing and behaviour, in particular his topics of conversation, as well as general consistency in description of skin tone, the presence of tattoos, rolling his own cigarettes and the type of liquor he was consuming. The evidence supported a conclusion that the witnesses were discussing their interactions with the same man, Mr Watson. To that extent, even when we set the identifications of Mr Watson from Montages A and B to one side, the evidence against him is not materially weakened.

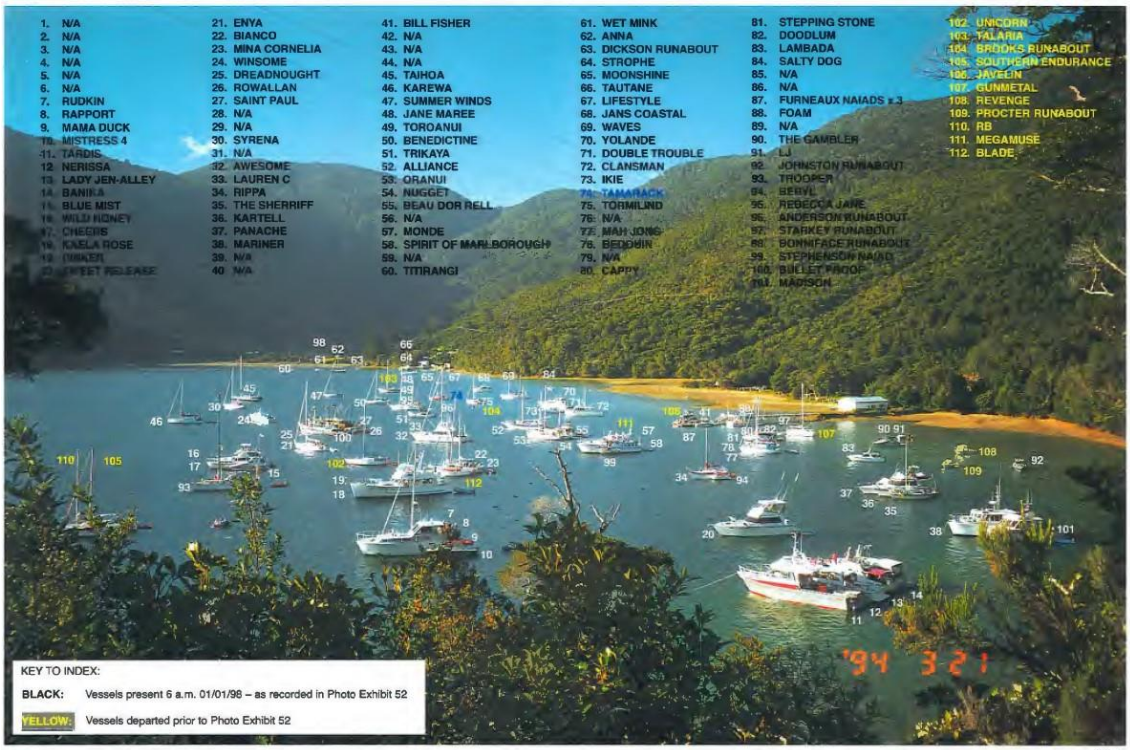
[843] Had the trial been held today, with the benefit of expert evidence, the jury could have been better informed about the potential contaminating effect of the media coverage in particular. But when we stand back and analyse all the evidence as we have, essentially putting to one side the fact of identifications from the Montages, it is reasonably clear, for the reasons we have identified, that the witnesses were talking about the same person and that person was Scott Watson.

[844] As to whether Mr Wallace was talking about the same person, his evidence and the difficulties with it, was well exposed to the jury. But the above analysis is generally corroborative of his identification evidence and supports the admissibility of his identification of Mr Watson from Montage B.

[845] And then it is important to consider what the witnesses did not see — the ketch described by Mr Wallace in the location where the lone man, Ben and Olivia alighted the Naiad.

A ketch?

[846] Below is a photograph of the boats in Furneaux Lodge on New Year's Eve which provides some context to the description of the boat to which Ben and Olivia were dropped having two masts: [269]



OP TAM Photo Exhibit 36 - FERRIER Furneaux Bay moorings at 7pm on 31.12.97 25

Blade is the boat numbered 112, *Bianco* is numbered 22 and *Mina Cornelia* is numbered 23.

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269 This photograph was taken by David Ferrier between 6.30 and 7.00 pm on 31 December 1997. Mr Ferrier's evidence to that effect was read to the Court by consent.

[847] Before us, Mr Chisnall emphasised that Mr Wallace was the Crown's central witness, yet Mr Wallace refused to resile from what he said from the start: the boat at which he had dropped Olivia and Ben was a ketch.

Mr Wallace's trial evidence about the lone man's boat

[848] In his evidence at trial, Mr Wallace said the boat at which he dropped the lone man, Ben and Olivia "appeared to me to be a ketch, 38 to 40 foot, very well maintained vessel". The sides of the vessel did not appear to be that high in comparison with his location on the Naiad. It had portholes with brass surrounds and appeared to be timber-hulled. The portholes were not that far off the water and were of round thick glass with very thick brass surrounds. The hull appeared to be white with a blue stripe running through where the portholes were. There were ropes hanging off the aft end of the vessel on the flexi rail, which is the top rail, roped up in a sort of figure eight and hanging off by the tether end of the rope. There were at least three ropes secured like that. The boat appeared to have "a solid rubber fender, quite a long one, a metre, 1200 long maybe".[270]

[849] Mr Wallace confirmed the sketch he drew for the police on 3 January 1998 represented the features and appearance of the boat as best he could recall. He was also asked about the sketch of the two-masted boat that he drew on 5 January.

[850] One of the boats in the vicinity was spotlighting. It was one of the larger launches. He thought it was a boat called *Squadron*. That boat was further out into the inlet than the one at which he dropped the three people.

[851] Mr Wallace was asked about television footage of the police removing *Blade* from the water at Waikawa Bay. He said about the only similarity with the boat to which he dropped the lone man was that "it floats". It was too short, the masts were different, the cabins seemed much lower and it was the wrong colour.

[852] Mr Wallace was asked about being shown a video taken in early-January 1998 showing boats on the water in the vicinity of the jetty. He was able to recognise one

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[270] A boat fender is a protective cushion used to prevent damage to a boat's hull when it comes into contact with other boats or structures.

boat in particular as close to the drop-off location. He said he thinks it may have been the *Squadron*. Mr Wallace identified what he thought was the *Spirit of Marlborough* in the vicinity.

[853] We interpose to observe that *Spirit of Marlborough* is shown, in a photograph of the boats at Furneaux Lodge included at [846] above, to be in front of and closer to the jetty than *Mina Cornelia*.

[854] Mr Wallace was then shown a sketch of the two-masted boat, which was drawn by an artist based on his description early in the investigation, and asked to compare it with the drop-off boat. He said it appeared to be a very good representation.

[855] Mr Wallace said in cross-examination he remembered the letter Z in the boat's name. He thought he remembered the lone man saying something to the effect that he was "just crew" and he got the impression he did not own it.

[856] Mr Wallace made about five trips in the Naiad that night and the only yachts he came into contact with were *Tamarack* and the ketch. He reiterated the differences between what he said was the ketch and *Blade*, and agreed *Blade* was completely different from the boat to which he dropped Ben and Olivia.

Submissions to the jury

[857] In his closing address, trial counsel put it to the jury that the Crown had effectively selectively promoted Mr Wallace's identification of Mr Watson and demoted his identification of the boat concerned. He referred to the following factors:

(a) Mr Wallace had considerable experience with boats over many years and knew the difference between various types of boats.

(b) On New Year's Eve he was working and had consumed little alcohol — the trip in question was the first one he took that night.

(c) Although it was nighttime, he did not need any light or torch to see his way around the boats.

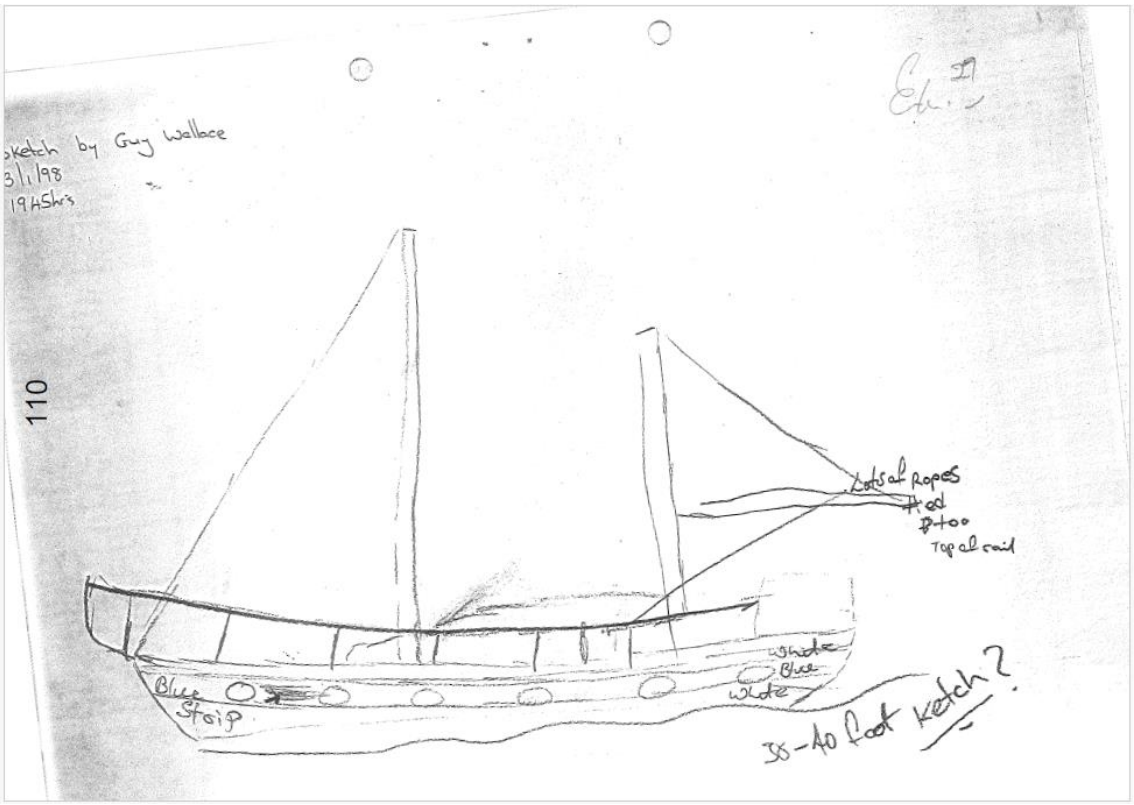
(d) He had consistently told the police, media and work associates that the boat was a ketch.

(e) He knew what he saw.

[858] Conversely, the Crown prosecutor suggested that Mr Wallace's evidence when he described the ketch was "rather remarkable" because of the amount of detail he provided about a vessel seen briefly in darkened conditions. Mr Wallace said it was fairly dark and it was a brief stop, yet Mr Wallace was able to identify the colour of the strip around the boat as being blue or dark blue. The Crown had called evidence from an astronomer suggesting that, even holding up a distinct and obvious colour card from a distance of a metre or two metres away, colours are unable to be discerned at all an hour or an hour and a half after sunset. The astronomer's evidence was that, on 31 December between 11.06 pm and 3.47 am, the sky was as dark as it was going to get. In light of that, the Crown prosecutor asked the jury to consider Mr Wallace's evidence that he was able to detect the colour blue.

[859] The Crown prosecutor noted that there were no lights on the boat and no lights on the Naiad. He then referred to Mr Wallace's detailed description of the boat and asked the jury to consider how likely it was that someone with a limited amount of time in the dark of night could have that sort of recollection.

[860] Mr Wallace's first sketch for the police on 3 January included a question mark after "ketch".



[861] Mr Wallace's second sketch on 5 January included more detail but the Crown prosecutor suggested that what had been a ketch followed by a question mark had developed when Mr Wallace found himself in the spotlight of the inquiry. Mr Wallace had apparently spoken to Mr Morresey's mother. He was undoubtedly under a great deal of pressure.

[862] The Crown prosecutor addressed the fact that, if the jury concluded Mr Wallace was right about the man and wrong about the boat, that was consistent with Mr Watson being the lone man. However, if the converse were correct, then it was inconsistent with Mr Watson being the lone man. He suggested to the jury that rather than focusing on the boat, Mr Wallace would have been paying attention to his passengers, making sure that Olivia did not stumble again. He asked the jury to compare the short opportunity Mr Wallace had to observe the boat and its features with the significant number of opportunities and the duration of them that he had to observe the man that he described from the Naiad — he had encountered him several times during the night, served him at the bar several times, met him at the jetty, talked to him — all of these creating a much greater opportunity to imprint a more reliable recollection of that person's appearance.

[863] And, of course, it is always open to a jury to accept parts of what a witness says and not other parts: "It is not necessarily illogical for a jury to be convinced as to the credibility of some aspects of one person's story, but not as to others".[271]

[864] Mr Morresey's evidence about the lone man's yacht broadly matched that of Mr Wallace. He said he thought the boat was a ketch, albeit it was (in contrast to Mr Wallace's evidence) by itself and not rafted up to other boats. Mr Morresey said the boat onto which Olivia and Ben climbed was not *Blade*. He was shown a photograph of it and said it was too small, did not have a stripe, was too low in the water and had a lee cloth around the back. Mr Morresey confirmed he had little experience with boats.

[865] In re-examination, it transpired that Mr Morresey made statements to the police on 7, 8 and 30 January 1998 but in none of those statements had he suggested that the boat he was describing had two masts. The first time Mr Morresey said that it might have been a ketch was in his fourth statement, made on 8 February 1998. That statement was made after Mr Morresey had been interviewed by a television crew who had given him a newspaper and were at the time interviewing for part of a news segment, which also involved Guy Wallace, about whether the lone man's boat was a ketch. The Crown prosecutor asked the jury to consider whether it was just coincidence that Mr Morresey first came up with the idea of a ketch immediately after his involvement with the media and exposure to the account being given by Guy Wallace, who was at that time defending his claim it was a two-masted vessel.

Elimination of other boats at Furneaux and ketch sightings

[866] One of the core circumstantial planks of the Crown case was the elimination of all of the other boats that could be identified as having been at Furneaux that night. The Crown prosecutor told the jury that it did not matter that there might have been ketches out off the Taranaki Coast or down on the Queen Charlotte Sound. The issue was whether there was a ketch such as Mr Wallace described in the location where Mr Wallace dropped the three people off.

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[271] *B (SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [80], quoting *R v Shipton* [2007] 2 NZLR 218 (CA) at [77].

[867] A Mrs Walsh had described seeing a boat when she was down on the jetty, referring to its beautiful rope work, describing it as looking like a Chinese junk, off out towards The Pines when she saw it. The Crown prosecutor pointed out that that is not the area where Mr Wallace said he dropped the trio off. Mrs Walsh said she saw it again in Queen Charlotte Sound on 2 January. She drew a sketch of it which, in the Crown prosecutor's submission, bore no resemblance to Mr Wallace's description. Her husband, Mr Walsh, spoke of seeing a boat off to his right, notable for its handrails and bow rail, but he could not recall seeing any masts. The Crown prosecutor submitted that it was an "amazing situation" that Mr Walsh could see the portholes from 50 metres away but could not see the masts. He said there were two young people near the back of the boat, one of them with "very white blonde" hair. The Crown prosecutor observed that Olivia's hair was reddish blonde, not a very white blonde.

[868] The Crown prosecutor reminded the jury that the mystery ketch had to have been in the location where Mr Wallace dropped the three people to be of any relevance at all. He said that, if it was such a standout boat, it would have had come in under cover of darkness (given nobody at Furneaux Lodge noticed it apart from the Walshes), notwithstanding the "flotilla" of boats in its path, and thread its way through to get to the Wallace drop-off point. It had to raft up to another boat (we interpose to note that, on Mr Morresey's evidence, it might alternatively have been anchored on its own) and no one had come forward to say that. The occupant would then have to have gone onshore and bear a "striking resemblance" to Mr Watson. He would have had to leave Furneaux first thing in the morning. If Mr and Mrs Walsh were correct, the vessel was still going up and down Queen Charlotte Sound on 2 January.

IPCA Report

[869] The IPCA Report noted that, at a briefing on 10 January 1998, officers involved in investigating the vessels at Endeavour Inlet expressed the view that there was a "high probability" that the ketch did not exist. By that stage they had identified 73 of the 96 vessels reported to be at Furneaux Lodge on New Year's Eve. No witness had reported seeing a vessel fitting the ketch described by Guy Wallace. The final figures were that 176 boats were identified as being in the vicinity and 105 in the immediate vicinity of Furneaux Lodge.

[870] The IPCA noted that, at the interview 11 January 1998, Guy Wallace accepted he might have been mistaken. By 27 January 1998, police had stopped appealing for sightings of a ketch, although were quoted in the media as saying they remained open-minded despite their focus being on the sloop and vessels known to be in the inlet at the time Ben and Olivia disappeared. By 3 March 1998, Detective Inspector Pope was quoted in the media as saying he believed the ketch did not exist. But by that stage the police believed they had accounted for all vessels arriving in and leaving the area, and all the people who were on those vessels. While there were some ketches near Furneaux Lodge during the New Year period, Detective Inspector Pope said they had been identified and eliminated.

Drop-off location

[871] As the Crown prosecutor put it to the jury, if Mr Wallace had dropped the couple off somewhere to the north of the jetty, it could not have been to Mr Watson's boat. At the trial, a videotaped reconstruction was shown to the jury when Mr Wallace took the water taxi to positions off the jetty that he remembered. There was also a still shot from a video tape taken by a Mrs Beban used during Mr Wallace's evidence. Mr Wallace said, looking directly out from the jetty, the drop-off destination was to the left, two to three lines out of the mooring lines as set up. Not significantly to the left or just at a slight angle, but in between. A still shot of Mrs Beban's videotape was used for Mr Wallace's evidence about where he would position the boat and he said it was behind a raft which involved boats *Megamuse*, *Spirit of Marlborough* and *Monde*, and a raft which involved *Doodlum*, *Stepping Stone*, *Cappy* and *Starkey*. In the Crown prosecutor's submission, looking behind those two rafts where Mr Wallace said he dropped the group, was a raft of three boats, *Blade*, *Mina Cornelia* and *Bianco*.[272]

[872] During the reconstruction, Mr Wallace was asked to take the water taxi out and go to the locations. In the Crown prosecutor's submission, he clearly illustrated the drop-off location as a position pretty close to *Blade*.

[873] Trial counsel described Mr Wallace's evidence of delivery of Ben and Olivia to an area to the left of the jetty as "opportunity" evidence but categorised it as

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[272] See the photograph above at [846].

"equivocal", something which was capable of supporting both the prosecution and defence. He suggested there was a conflict of evidence between Mr Morresey and Mr Wallace, Mr Wallace saying the boat was rafted whereas Mr Morresey gave evidence the boat was on its own. He referred to Mr Wallace's evidence that Ben commented to the effect that he hoped it was "the gin palace" and the lone man replied saying it was next to it.

Our assessment

[874] The question of whether or not Mr Wallace dropped Mr Watson at a ketch or a sloop seems to have captured the attention of pockets of the public and become a focus for some of them. But when the issue is considered alongside all the other evidence, and in particular the evidence as to the drop-off location, the issue falls away in importance and is simply another example of the vagaries of memory and perception.

[875] Contrary to the defence submission at trial that it was equivocal, we consider the evidence of the drop-off location did undermine the plausibility of the defence theory that the lone man's boat was a ketch. The yacht, on Mr Wallace's evidence as the driver of the Naiad, was in a raft of three to five boats in the vicinity of the *Spirit of Marlborough*, which was large and distinctive. Behind the lone man's boat was what Mr Wallace called a "gin palace launch", a "great big [boat] like a Markline". That description appears consistent with the Naiad approaching *Blade* and seeing the *Kaela Rose* behind it.[273] Mr Wallace's evidence as to the drop-off location was corroborated by the evidence of Hayden Morresey and Sarah Dyer as to the direction the Naiad travelled when it left the *Tamarack*.

[876] That drop-off location responds to the ketch theory because, based on our review of the evidence, nobody other than Mr Wallace and Mr Morresey said they saw a ketch in that area. It was a matter for the jury to consider the likelihood that a ketch could have come into that location, been rafted to another boat or anchored on its own for the time the lone man was at Furneaux Lodge, then left without being seen.

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[273] See the photograph at [846] above.

[877] We repeat that Mr Perkins and Ms Egden said Mr Watson told them that night that he had a ketch.[274] There is no doubt Mr Perkins and Ms Egden were referring to Mr Watson because they were involved in and witnessed respectively the Perkins incident, which Mr Watson admitted he was involved in.[275] Mr Perkins' evidence that Mr Watson told him he had a "double masted ketch" was not challenged in cross-examination. Although Amanda Egden was challenged about her evidence, there was no suggestion the man who made the comment was different from the man she had otherwise encountered and who we know was Mr Watson. Those consistencies also apply to Ms MacFarlane. It would be a remarkable coincidence if somebody who was described using the same descriptors as were used to describe Mr Watson (scruffy, shaggy hair, stubble) was also at Furneaux Lodge and also suggesting he had a ketch, describing it as "the only double masted yacht out in the bay".

The two-trip theory

[878] Mr Chisnall levelled some criticism at the fact the Crown closed to the jury on the "two-trip theory" whereby Mr Watson returned to *Blade* alone when taken by Mr Anderson, disturbed those on *Mina Cornelia* and *Bianco* and then returned to Furneaux Lodge, by means which were not established, before taking the trip with Mr Wallace. He submitted the late introduction of the two-trip theory meant that more refined evidential challenges in respect of those who said they interacted with Mr Watson were not made, something he suggested had "fair trial implications".

[879] The two-trip theory was addressed by this Court in the 2000 appeal and, as this Court then explained, once the defence elicited from Mr Anderson the concession that *Blade* was the yacht he took a lone man to on his Naiad, it must have become apparent that the Crown would need to grapple with the point.[276] It can have been no surprise that the Crown would address Mr Anderson's evidence by contending that a return trip remained a possibility consistent with its case. The essence of the Crown case never changed: that Mr Watson was the lone man on the Naiad with Ben, Olivia and Mr Wallace. We do not consider there was unfairness in this regard.

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274 See above at [823].
275 See above at [790].
276 2000 appeal, above n 2, at [43].

[880] However, the plausibility of the two-trip theory was relevant to the issue of identification. If Mr Watson remained on *Blade* after being taken there by Mr Anderson, the lone man on the Naiad with Ben and Olivia cannot have been Mr Watson.

[881] At trial, the Crown submission was that Mr Watson was involved in the Perkins incident (which, we repeat, Mr Watson referred to in his second statement to the police)[277] *after* he returned to Furneaux Lodge. The Crown accepted that nobody knew how Mr Watson returned to shore but said it did not matter because, if he was back on shore at around 3.30 to 4.00 am, then he could not have been asleep on *Blade*. Mr Watson then took the Naiad driven by Guy Wallace and Ben and Olivia were dropped off at *Blade* with Mr Watson.

[882] On the defence version of events, the Perkins incident occurred shortly before Mr Watson was taken to *Blade* by Mr Anderson. It could not have happened afterwards because Mr Watson remained on *Blade* after being taken there by Mr Anderson.

The evidence

[883] We have carefully analysed the timings provided by the various witnesses, with the benefit of the submissions of Mr Cook on this topic and the appendix addressing timing issues he filed post-hearing.

The Perkins incident

[884] We consider that the most reliable evidence on the timing of the Perkins incident comes from Simon Bell and Arthur Murray, who arrived at Furneaux Lodge around 2.30 am to pick up a number of young people and went to the Lodge bar for a drink while they waited. There were about 100 people in the vicinity. At what seems to have been the end of the Perkins incident (when Mr Watson was being confronted by several of Mr Perkins' friends), Mr Watson backed up to where Mr Bell and Mr Murray were standing. Mr Bell does not know if Mr Watson was still in the bar

[277] See above at [790].

when he left sometime after 3.00 am but he recognised at least two or three of the youths who had been involved in the incident sitting at a table outside. Mr Bell later recognised Mr Watson on television as "the joker that was in that scuffle … in the Furneaux bar".

[885] Mr Murray remembered arriving around 2.30 am and that he and Mr Bell stayed in the Main Bar for possibly three-quarters of an hour, leaving around 3.30 am, but accepted that it may have been as early as 3.15 or 3.20 am. Nicholas Sutherland was with Mr Bell and Mr Murray when he witnessed the scuffle in the Main Bar. He initially said this was at around 3.30 am but, during cross-examination, conceded that their boat left around 3.30 am. Thomas Forbes (one of those whom Mr Bell and Mr Murray picked up) confirmed they left around 3.30 am but did not recall the exact time.

Donald Anderson's trip with Mr Watson

[886] Mr Anderson remembered that at around 2.00 to 2.30 am, as he was returning to the jetty, he was asked by a man, who was accepted to be Mr Watson, for a ride out to his boat. In cross-examination, Mr Anderson agreed the general timeframe for the trip with Mr Watson was between 2.00 and 4.00 am. But in re-examination he said it would be speculation to estimate whether the time was closer to 2.00 or 4.00 am.

[887] Mr Anderson said he believed his trip with the lone man happened after his trips with Mr Brent MacDonald and Mr John Mullen. Mr MacDonald said he had taken a water taxi to his boat around 12.45 am. Mr Mullen's evidence was that Mr Anderson dropped him to his boat at around 3.00 am, as he had arranged for Mr Walsh and Mrs Walsh to give his wife a ride. Mrs Walsh said it was around 3.00 am when she finished and that she could remember that time as she was wearing a watch and recalled looking at it.

[888] Although not before the jury, counsel provided Mr Anderson's various police statements from 1998.[278] We refer to them briefly only but note that, in his statements, he appeared to be firmer on timing than he was at trial. Most relevantly, on 5 January

[278] Mr Anderson gave statements on 5 January, 8 January, 20 January, 6 February, 5 March and 4 May.

1998, Mr Anderson said he recalled dropping Mr Mullen to his boat at 2.00 to 2.30 am. Then on 6 February, Mr Anderson said he recalled taking a male to a yacht that the male referred to as *Blade*, and thinks he did that at about 2.30 to 3.00 am. He identified *Blade* in a police photograph.

Waking up others on *Mina Cornelia* and *Bianco*

[889] In his statement to the police, Mr Watson said he returned to *Blade* around 2.00 am. What is not in dispute is that, once Mr Anderson returned him to *Blade*, Mr Watson boarded first *Mina Cornelia*, and then *Bianco*, in an effort to continue socialising.

[890] Ernestus Rutte, who was aboard *Mina Cornelia*, remembered going to bed around 2.00 am, but was disturbed from his sleep by the sound of someone stumbling onto the back of the boat. He recognised Mr Watson's voice asking "where the party was", and said that he seemed drunk, as his voice was "a bit slurred". Mr Rutte said he was disturbed before he had gone into a deep sleep, and that it was "maybe 4.00 [am] or something like that, or maybe even earlier but I couldn't be sure". It was still pitch-black outside.

[891] An expert witness astronomer, Briar Carter, said sunrise on 1 January 1998 was 5.54 am. Between 3.47 and 5.54 am, he said it would have become increasingly lighter.

[892] Also aboard *Mina Cornelia* was Deborah Corless who went to bed around 1.30 am but could not sleep. She stayed there for 20 to 30 minutes and then sat on deck for another 20 to 30 minutes before returning to bed and going to sleep. The inference was that she did not hear Mr Watson.

[893] Following his unsuccessful attempts to rouse those on *Mina Cornelia*, Mr Watson went onto *Bianco*. Deanna Cunliffe said she went to sleep around 1.15 to 1.30 am and was woken by Andrew Crawshaw talking to someone who had come onto the boat. The person was "fairly drunk" and saying "were we partying" and "come out and party". Mr Crawshaw told Mr Watson in no uncertain terms to go, but he did not. Mr Watson then said, "give her to me mate, I'll look after her, I'll show her a

good time". Ms Cunliffe said this happened not long after they had gone to sleep, "maybe an hour or two".

[894] Mr Crawshaw said he went to bed aboard *Bianco* at around 12.30 to 12.45 am, but he was not asked how long he had been sleeping when this incident woke him.

The Naiad trip with Mr Wallace

[895] Mr Wallace said last drinks were called at 2.25 am and he was definite about that because he was wearing a watch. He went outside, had a cigarette and then began collecting rubbish, after which he was asked by two young people for a ride back to the Solitude jetty, having been turned away by another taxi driver. Mr Wallace said he would take them.

[896] Robert Mullen gave evidence of being approached by a young couple wanting a ride to the Solitude jetty at around 4.00 or 4.30 am. Mr Mullen had said no, but five to 10 minutes later he saw them return with Mr Wallace who was back from the trip five to 15 minutes later.

[897] Rachel Veitch said that, between 4.00 and 4.30 am, Mr Wallace came down to the jetty and told Mr Mullen he would do a couple of runs.

[898] Mr Anderson recalled Mr Wallace first used his Naiad "very late on in the morning" (when asked about the early hours of New Year's Day) when Mr Anderson was having a cup of coffee. Mr Anderson was not wearing a watch that night but believed he finished work around 4.00 am. Mr Anderson said a couple had approached him for a ride to the Solitude jetty but he sent them away. He saw them walking back towards the jetty with Mr Wallace, who asked if he could use Mr Anderson's Naiad. Mr Anderson said he continued to watch the group until all the passengers were on board.

[899] After dropping off Olivia, Ben and the lone man, Mr Wallace dropped off Ms Dyer and Mr Morresey at the Doctor's jetty (which is near to the Solitude jetty). He then returned to Furneaux jetty and ferried a number of other passengers to their boats. He said he made a total of about five trips on the Naiad from the jetty in the

early hours of 1 January. Upon returning, he helped pack down the other Naiads with Mr Mullen and Ms Veitch and then went to bed at around 5.30 am.

[900] Ms Dyer was wearing a watch that night. She said she and Mr Morresey decided to head home around 2.30 am. Mr Morresey said he had looked at his watch at about 2.45 am and he and Ms Dyer left the bar not long after that. Ms Dyer said they slept on the side of a track for around an hour and then continued to the jetty seeking a ride. She believed that, around 3.30 am, she stopped to use the toilet and then met a staff member carrying a bag of rubbish (who we can fairly conclude was Mr Wallace). He said he would give them a ride. Ms Dyer was pretty sure she arrived at the bach where they were staying at around 4.15 to 4.20 am — she had looked at her watch.

[901] Amelia Hope remembered looking at her watch before heading down to the jetty to return to *Tamarack* at 3.10 am. She and Rick Goddard waited five or so minutes before three other people arrived. She said it was around 3.20 or 3.25 am by the time they got into the Naiad. Likewise, Rick thought it was approximately 3.00 am when he and Amelia left the Lodge, and that they waited on the jetty for at least 15 minutes. He said he was back on *Tamarack* by 4.00 am.

[902] Mr Anderson's parents, Timothy Anderson and Karen Anderson, gave evidence they were taken to their boat shortly after 4.00 am by Mr Wallace. Mr Wallace thought this trip occurred after dropping off Ben and Olivia.

Our assessment

[903] It is not possible to identify an exact timeframe in the circumstances. Most of the witnesses had been involved in celebrations and were not focused on time. But a general consistency does emerge.

[904] It is reasonably clear that the Perkins incident, which apparently took place over a period of at least half an hour (and possibly an hour), came to a conclusion with the scuffle at the bar some time after, or around, 3.00 am (likely closer to 3.30 am).

[905] Mr Cronin, who was working in the Garden Bar, and who we can reasonably assume was relatively sober, said the man he identified as Mr Watson left the bar around 3.30 am, at which point Mr Cronin had checked his watch. Mr Cronin first interacted with the man at around 10.00 pm and in the defence closing address at trial it was suggested that the man he interacted with was indeed Mr Watson.

[906] The evidence therefore suggests that Mr Watson was at Furneaux Lodge around 3.30 am.

[907] As the Crown stressed, by this time the numbers of revellers had significantly reduced. Mr Bell said there were only about 100 people left, a number of whom would have been women. This further reduces the likelihood of there being another lone man who was dropped to his boat, which happened to be a yacht located near *Blade*, sometime after the conclusion of the Perkins incident.

[908] Mr Anderson ultimately gave evidence that he dropped Mr Watson at *Blade* some time after 2.00 am but before 4.00 am. Evidence from those on *Mina Cornelia* and *Bianco* does not really assist except to confirm it was after 2.00 am. An exact time or more narrow time interval cannot be confidently inferred.

[909] It appears that Mr Wallace's trip on the Naiad with the lone man occurred sometime between 3.30 and 4.15 am. We know the trip must have been after Mr Anderson's trip to *Blade* given Mr Wallace took over driving Mr Anderson's Naiad (with Mr Anderson staying ashore from that time onwards). Mr Wallace took over at around 4.00 am it seems and the Naiad trip with the lone man was Mr Wallace's first trip. Mr Anderson was still down by the jetty to witness Ms Dyer and Mr Morresey getting into the Naiad.

[910] Mr Anderson said from the jetty to *Blade* took "a couple, five minutes, 2-3 minutes maybe". That suggests a trip from *Blade* back to shore would not have taken long at all.

[911] There is therefore nothing in the timing evidence to discount the Crown's two-trip theory as a reasonable possibility.

[912] As there was no direct evidence of Mr Watson returning to shore from *Blade*, the fact the Crown case required Mr Watson to have made that trip, by means unknown, was clearly a weakness in the Crown case. Nevertheless, we consider it was certainly open for the jury to infer that Mr Watson did indeed make that trip. The evidence of Mr Watson attempting to rouse those aboard *Mina Cornelia* and *Bianco* established that Mr Watson wanted to continue partying after Mr Anderson took him to *Blade*, providing an obvious reason for Mr Watson to return to shore. More generally, to the extent other evidence tended to prove that Mr Watson was the lone man on the Naiad, it followed that Mr Watson must have returned to shore one way or another.

Did the Judge's summing up adequately address the issues on identification?

[913] The trial Judge's summing up on to the jury on the identification evidence also came in for some criticism from Mr Watson on the basis it did not sufficiently emphasise the risk of a miscarriage of justice arising from a misidentification.

[914] The Judge gave the jury a clear warning of the special need for caution in accepting identification evidence. He emphasised the need to examine closely the circumstances in which any identification is said to have been made, referring to the *Turnbull* factors.[279] He repeated his warning to jury about the possibility of witnesses being mistaken in the recognition of others.

[915] The Judge addressed Mr Wallace's evidence specifically as follows:

> Now was it Watson who was on Wallace's boat? Was it Watson who was being driven by Wallace in the naiad? Wallace says it was. He identified Watson from a photograph and then identified him as the person drinking at the garden bar and, apparently had some liquor stored there on behalf. That was the person also that Mr Cronin identified as Watson.
>
> As [trial counsel] has said, he has criticised strongly the identification, saying it is a poor identification. Well it is the identification I suppose, at the catamaran, at the Hobie Cat, that is important. But of course relevant to that, is the opportunity that he has had of seeing him, if you find that he did, earlier in the bar and as someone who drew attention to himself in one way or other, and you may think that he certainly did draw attention to himself. Not so much perhaps to Mr Wallace but certainly to other people and perhaps,

[279] *Regina v Turnbull*, above n 191, at 228.

through this, be seen by virtue of that alone by Mr Wallace, and his identity noted accordingly.

You might think that a barman and a barkeeper no matter how busy they might have been, you might think was someone that would have had the opportunity of seeing people at close range, and that is what the Crown says, when they brought drinks in good light and an opportunity of observing them clearly they would be busy, but busy all the time the Crown says — not likely. An opportunity of seeing them and there were fights and scuffles and so on that would attract attention and require some sort of overall surveillance, I suppose, of a barman in the position that Guy Wallace was occupying that night.

In any event, I think [trial counsel] said it was some three months really before he was shown the photographs. Some difficulty about his identification but he did finally identify him through the montage. He characterised him by his eyes and calling them untrustworthy. That is not a terribly confident description I suppose, but nonetheless he identified him with a photograph which others had found that was suitable and satisfactory to identify him by. You will recall the Ollie Perkins group of events as part of that. And of course people have hooded eyes. He is photographed in that Police photograph with hooded eyes. Sometimes it is regarded as a feature, regarded as bedroom eyes I think they are sometimes called, but you may think the photograph is a legitimate one or you may think that it carries its own identification. If it was out of character with Mr Watson you may think that it's unlikely that he would be recognised but he has been recognised by a number of people from the photograph, and I suppose you can have some regard to that in what you may think of Mr Wallace's identification. But of course, not only his identification there, his identification at the Hobie Cat and thereafter no doubt on the well lit wharf that he walks down with him depending on what opportunity he had for seeing him there and so on. Getting into the boat, having some sort of conversation with him it seems.

[916] The Judge then turned to the evidence of others at Furneaux Lodge that night. He explained that Mr Watson's encounters with various people at various times would be part of a chain of evidence to which the jury could refer when it came to resolving, if they could, a confused picture. He explained he allowed in evidence from the time of Mr Watson's visit to Momorangi Bay onwards to ensure the jury had available a complete picture, rather than only part of the story, to resolve the complicated evidential and fact situation at hand. He referred to the defence case that there were people with a similar description to Mr Watson acting in a similar way. He adverted to the defence suggestion that the lone man on the Naiad came from a boat that might well have appeared at Furneaux Bay that night, before departing with Ben and Olivia onboard — whereas Mr Watson went to his boat on his own, cooked himself a meal and then left early in the morning, just as he said he did.

[917] And then:

> The Crown must prove that he was the person who got onto the boat with Olivia and Ben and there was no possibility that it was another person on another boat, then are you entitled to convict him. If you have any reasonable doubt about that scenario, as I have said you must acquit him.

[918] We are satisfied the Judge's direction on the special need for caution in relation to identification evidence conformed with the requirements of s 344D of the Crimes Act:[280]

> **344D Jury to be warned where principal evidence relates to identification—**
>
> (1) Where in any proceedings before a jury the case against the accused depends wholly or substantially on the correctness of one or more visual identifications of him, the Judge shall warn the jury of the special need for caution before finding the accused guilty in reliance on the correctness of any such identification.
>
> (2) The warning need not be in any particular words but shall—
>
> (a) Include the reason for the warning; and
>
> (b) Alert the jury to the possibility that a mistaken witness may be convincing; and
>
> (c) Where there is more than one identification witness, advert to the possibility that all of them may be mistaken.

[919] In our view, the Judge conveyed the seriousness of the exercise being undertaken by the jury and the need for real caution. His direction reflected the purpose of the warning that jurors must be made aware of the factors affecting the reliability of eyewitness identification evidence. The Judge addressed the *Turnbull* factors,[281] highlighted the issues raised by trial counsel in respect of identification and overall addressed the matter of identification in a fair and comprehensive way.

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[280] Crimes Act, s 344D was inserted by the Crimes Amendment Act, s 2. An enhanced warning is required nowadays to the effect that a mistaken identification can result in a serious miscarriage of justice: Evidence Act, s 126(2)(a). Section 344D does not require such an enhanced warning: *R v Mei* [1990] 3 NZLR 16 (CA) at 25.

[281] *Regina v Turnbull*, above n 191, at 228.

Our assessment

[920] The admissibility of Mr Wallace's identification of Mr Watson from Montage B was a question of overall evaluation. The question was whether the identification's "prejudicial effect was out of proportion to its true evidential value, or [exclusion was warranted] on general grounds of 'unfairness'".[282]

[921] We acknowledge there are factors suggesting Mr Wallace's identification of Mr Watson as the lone man, when considered without reference to other supporting evidence, was not a reliable identification.

[922] The identification occurred more than three months after Mr Wallace saw the lone man. His later descriptions of the lone man's head and facial hair were inconsistent with Mr Watson's appearance as depicted in the *Mina Cornelia* photograph. The compusketch produced with Mr Wallace's input on 9 January 1998 does not bear a close resemblance to Mr Watson.

[923] Prior to the identification, Mr Wallace had been shown video footage of Mr Watson by a reporter. At the time of the identification, he was well aware that Mr Watson was the police's prime suspect and no doubt that it would be of assistance to the police if he identified Mr Watson. Mr Wallace was also shown a black and white single photograph of a young Mr Watson early in the investigation, on 9 January 1998 and there is the residual possibility that Mr Wallace may have seen a further image of Mr Watson used in Montage A.

[924] As against that, Mr Wallace had viewed the lone man in the Main Bar over a long period (no issue was taken with his ability to see him) and he recognised the lone man on the Naiad as being the man he had earlier seen at the Main Bar and in the Garden Bar. Mr Wallace's first description of the lone man was a remarkably accurate description of Mr Watson as depicted in the *Mina Cornelia* photograph. The man told Mr Wallace he was from Picton. Mr Wallace's later descriptions of the lone man were consistent with descriptions given by others who we know were describing Mr Watson, most notably Mr Anderson. Most importantly, we consider there are

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[282] *R v Russell*, above n 185, at 27.

strong links tying the various witness descriptions of a lone man together and to Mr Watson, suggesting all those witnesses (including Mr Wallace) were talking about the same man, and that man was Mr Watson.

[925] We have addressed the concern that Mr Wallace was wavering when he selected Mr Watson's image from Montage B to the extent that his identification was unreliable.[283] We consider Mr Wallace taking a minute and a half to make his identification is readily explainable in the circumstances.

[926] The police officer charged with overseeing Mr Wallace's identification became involved in order to resist any suggestion that Mr Wallace was pressured to make an identification of Mr Watson by the investigating police officers. Mr Wallace did not mould his account to match the Crown case. To the contrary, he maintained his description of the lone man's boat as a ketch that could not be confused with *Blade*, despite the application of considerable pressure by investigating police officers.

[927] Stepping back, we consider that the requirements of the 1997 Manual were substantially complied with. The photograph of Mr Watson used in Montage B did not mean witnesses were predisposed to identify Mr Watson.

[928] Ultimately, we consider Mr Wallace's identification was moderately probative evidence that Mr Watson was the lone man and, therefore, that Mr Watson is guilty of the murders of Ben and Olivia. We reach that conclusion notwithstanding our careful consideration of the expert evidence concerning eyewitness science provided by Drs Wells and Quigley-McBride.

[929] We turn now to any unfairness associated with admitting the identification.

[930] First, there is the general concern than Montage B unfairly predisposed witnesses to identify Mr Watson. We acknowledge that the IPCA found that "the construction of the montages, the methods used for presenting the montages to witnesses, and the limited documentation around witness responses, were all highly undesirable" given the importance of suspect identification in the present case.

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283 See above at [670]–[673] and [774].

Nevertheless, as discussed above, we do not consider Montage B unfairly predisposed witnesses to identify Mr Watson.[284] We note that part of the basis for the IPCA's conclusion appears to be concerns about Montage A, in which Mr Watson was the only man with visible tattoos.

[931] Secondly, there is the concern that Mr Wallace was shown the single photograph and, potentially, the image of Mr Watson contained in Montage A. That information was not before the jury. However, as explained above, we do not consider this circumstance gave rise to any significant unfair prejudice to Mr Watson in the circumstances of this case.[285] We also do not consider it required the identification of Mr Watson using Montage B to be excluded to maintain control over police procedure generally or for other reasons of fairness.

[932] Thirdly, there is the concern that the overall unreliability of Mr Wallace's identification means it should have been excluded to avoid the jury placing improper, decisive weight on it. We do not consider exclusion was required bearing in mind the significant body of evidence supporting the correctness of Mr Wallace's identification — evidence we are required to take into account under the law at the time of Mr Watson's trial.[286] In our view, the cumulative effect of that evidence as we have discussed strongly supports the admissibility of Mr Wallace's identification of Mr Watson from Montage B. We add that the respective Crown and defence closing addresses brought into sharp relief the need for the jury to critically consider, in light of all the evidence presented, which aspects of Mr Wallace's evidence were correct and which were not. Either Mr Wallace was right that the man in photograph number 3 was the lone man or he was right about the lone man's boat being a ketch. This is not a case where misplaced reliance on an overconfident eyewitness appears to be the fulcrum on which the jury's verdict turned.

[933] Finally, we note that the Judge appropriately summed up on the issue of identification, including in relation to Mr Wallace's identification in particular. The jury was equipped to evaluate Mr Wallace's identification evidence. It is not lost on

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284 See above at [748]–[753].
285 See above at [754]–[763].
286 See *Regina v Turnbull*, above n 191, at 234; and *Tamihere* appeal, above n 185, at 203.

us that, at the 2000 appeal, it was argued on his behalf that the Judge erred in giving an identification warning in respect of Mr Wallace on the basis that, properly viewed, Mr Wallace excluded Mr Watson as the lone man rather than identifying him.[287]

[934] Ultimately, we consider the evidential value of the identification outweighed any unfairness associated with admitting it. It was properly admitted at Mr Watson's trial. Its admission did not give rise to a miscarriage of justice.

PART III — THE OVERALL CASE AGAINST MR WATSON

Introduction to Part III

[935] Given our conclusions in Parts I and II, we do not need to address the proviso to s 385 of the Crimes Act.[288] Nevertheless, given the continued controversy surrounding this case and to demonstrate that we have fully considered all matters raised on behalf of Mr Watson, we now turn to the case against him overall.

[936] We will:

(a) provide an overview of case against Mr Watson at trial;

(b) address the submissions made regarding the evidence of the "Three Es" and the evidence of prison inmates Mr J and Mr K;

(c) address the adequacy of the trial Judge's directions as to the burden and standard of proof; and

(d) provide an overall assessment of the case against Mr Watson.

[937] All the evidence in this case was circumstantial evidence. Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred.[289] Where there is no direct evidence of a crime, for

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287 2000 appeal, above n 2, at [23].
288 See above at [54]–[56].
289 Steven Powles, Lydia Waine and Radmila May *Criminal Evidence* (6th ed, Thomson Reuters, London, 2015) at 4.

example from an eyewitness, the prosecution will have to rely on inferences drawn from the evidence in order to prove a defendant is guilty. This is a common situation in criminal trials. Circumstantial evidence derives its force from the involvement of several factors that independently point to a particular factual conclusion.[290] The logic that underpins a circumstantial case is that the defendant is either guilty, or is the victim of an implausible and unlikely series of coincidences. As noted above,[291] the individual strands of evidence themselves need not be proved beyond reasonable doubt.[292] The question whether guilt has been proved beyond reasonable doubt is answered by reference to the evidence as a whole.[293]

[938] As this Court explained in *Webb v R*:[294]

> In a circumstantial case, it is trite that the Crown is entitled to rely upon the cumulative effect of a number of strands of evidence or circumstances in order to support a finding of guilty to the criminal standard. While it may be possible to challenge aspects of each of the strands, it is the combined weight of the evidence that counts.

[939] The essential question for the jury was whether they were sure the lone man on the Naiad was Mr Watson. All the strands of circumstantial evidence were potentially relevant to that question. If the jury were sure the lone man was Mr Watson, then the other issues of which they had to be sure, such as murderous intent, were easily answered.

[940] We will endeavour to avoid repeating discussion of the Hair evidence and the evidence traversed in Part II. That evidence, of course, formed a substantial part of the case against Mr Watson. The evidence traversed in Part II was also the evidential basis for the defence case that the lone man was not Mr Watson and the lone man's boat was a ketch, not *Blade*.

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290 *Commissioner of Police v de Wys* [2016] NZCA 634 at [9], citing *Guo v R*, above n 112, at [49]–[52]; and *R v Hoto* (1991) 8 CRNZ 17 (HC) at 21.
291 Above at [476].
292 *Guo v R*, above n 112, at [49] citing, among others, *Thomas v The Queen* [1972] NZLR 34 (CA).
293 *Guo v R*, above n 112, at [50].
294 *Webb v R* [2013] NZCA 666 at [22].

The case against Mr Watson at trial

[941] A good starting point is to consider, as the Crown prosecutor suggested to the jury in his closing address, what was not in dispute. The person was male and apparently alone. He was seemingly unknown to his victims. The man had to have a boat moored off Furneaux Lodge in the general location described by Mr Wallace — out from the jetty, slightly to the south (to the left when looking out from the jetty). The man had to have been ashore. He needed an opportunity to kill — an opportunity to be alone with the victims, at a time when he was unobserved.

[942] The Crown prosecutor told the jury they could discount those who were with others because they did not have the privacy and opportunity to kill, and then dispose of the bodies.

[943] The Crown case was that the person must have had a reason or motive that triggered him to carry out the killing of a pair of strangers. Robbery could be discounted because all Ben and Olivia had with them was a sleeping bag and a pack. The Crown prosecutor observed that the lone male was young and one of the victims was an attractive young female. He suggested, therefore, that the motive might have been a sexual one. Given Olivia was accompanied by Ben, in order to achieve that objective, the lone man would need first to subdue and eliminate Ben's ability to come to Olivia's aid.

[944] The lone man's comment that he had room on his boat and that "you [Olivia] can come … but he [Ben] can't" carried a sinister overtone, suggested the Crown prosecutor, given that the lone man was the last person to be seen with Ben and Olivia. He contended the comment was directed to Olivia in a sexual way and it revealed a sexual motivation of some kind.

[945] As the Crown put it in closing, if Mr Watson was not the man on the Naiad, then the lone man, like Mr Watson, just happened to be alone, happened to have a yacht, happened to have moored his yacht out from the jetty, happened to be in the same age range (late 20s or early 30s), happened to have an appearance which was so like Mr Watson's as to mislead Mr Wallace into thinking it was the same man and also happened to have the distinctive hairline that Amelia Hope recognised. The two men

with those features must also have been moored out alongside one another or fairly close together.

[946] Trial counsel in his closing address on behalf of Mr Watson accepted that circumstantial evidence was at the heart of the case but submitted to the jury that the circumstances identified by the Crown did not lead to the irresistible conclusion of guilt.

[947] Trial counsel summarised 12 strands of circumstantial evidence relied on by the Crown and sought to undermine each of them.[295] And, in his submission, only three of those factors were capable of demonstrating an association between Mr Watson and *Blade*, on one hand, and Ben and Olivia, on the other: Mr Wallace's identification, the two Hairs and the purported cellmate confessions. He suggested to the jury that if those three circumstances could not be proved, then there was no case and they did not even need to consider any other circumstances.

[948] The Judge instructed the jury:

> The circumstantial evidence should be so cogent and compelling as to convince you that upon no rational hypothesis other than murder by [Mr] Watson can the facts be accounted for, but no more than that.

The other circumstantial evidence relied on

[949] Most of this judgment has focused on a subset of the evidence against Mr Watson: the Hair evidence and the evidence of various witnesses who were at Furneaux Lodge the night of New Year's Eve 1997. But, as we set out in the introductory section, there were other strands of circumstantial evidence relied on by the Crown. We now discuss a number of those strands.

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[295] Those strands being: (1) Mr Wallace's purported identification of Mr Watson; (2) the missing couple being delivered to a yacht out to the left of the jetty; (3) the presence of two hairs, said to be from Olivia; (4) that Mr Watson lied about his movements on 1 January 1998; (5) that Mr Watson changed the outward appearance of his boat by repainting it and removing the windvane; (6) that Mr Watson cleaned the interior of his boat in a substantial fashion; (7) the scratches on the hatch cover; (8) the missing squab cover and holes in two pieces of foam; (9) the police being unable to locate the shirt Mr Watson wore on New Year's Eve; (10) Mr Watson's admissions of involvement to Mr J and Mr K at Addington Prison; (11) Mr Watson was a man with a motive, a man with an intention in respect of females; and (12) that the Crown set about excluding as many other boat operators in the immediate vicinity on New Year's Eve as possible.

Mr Watson's behaviour post New Year's Eve

[950] The Crown case at trial was that Mr Watson's behaviour from early January 1998 was further circumstantial evidence. In the Crown's submission, he behaved in a way consistent with trying to conceal something.

[951] Mr Watson completed a police questionnaire on 7 January and provided statements to the police on 8 and 12 January 1998. In both his 8 January and 12 January statements, Mr Watson said he returned to *Blade* at about 2.00 am. However, as discussed in Part II, Mr Watson admitted his involvement in the Perkins incident, which the evidence suggests came to an end at around 3.00 am (likely closer to 3.30 am).[296]

[952] On 12 January, Mr Watson told the police he left Furneaux Lodge between 6.30 and 7.00 am on New Year's Day and then sailed to Erie Bay, arriving at around 9.00 to 10.00 am. He also said he went to Marine Head first (that detail having been absent from his statement on 8 January).

The time and mode of Mr Watson's departure from Furneaux Lodge on New Year's Day

[953] Mr E said he got up at 5.30 am on New Year's Day and Mr Watson had already left by that time. This was corroborated by a photograph taken just before 6.00 am on New Year's Day, which showed that Blade was not present amongst the boats that were moored in the bay off Furneaux Lodge at that time.

[954] The evidence therefore suggests Mr Watson departed Furneaux Lodge very early on New Year's Day, prior to sunrise (which occurred at 5.54 am). This evidence, the Crown submitted, was consistent with Mr Watson leaving earlier than he told the police he did, noting that no-one on *Mina Cornelia* heard anything. Mr Watson also left behind a fender.

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296 See above at [790].

Mr Watson's movements on New Year's Day

Marine Head

[955] Three members of the Edwards family saw a boat they identified as *Blade* stationary at Marine Head, the northern entry point to Endeavour Inlet, on 1 January 1998. The boat was positioned "almost right on" the Edwards' fishing spot, located about 15 to 25 metres from the shoreline. The Edwards positioned their own boat very close to the boat — about six to 10 metres away. There appears to have been no indication at trial that there were other boats present in the immediate vicinity.

[956] Zane Edwards, whose helm seat was positioned facing the port side of the boat, said he first noticed a man moving through the boat's cabin. The man then emerged on deck but he was crouching down such that only his mid-stomach area and above was visible. The man moved towards the rear of the boat and did something there, leaning over the back. The man then returned to the interior of the boat. Zane remarked that "the movement seemed to be precipitated by our arrival", as there was nothing visible as they were approaching the boat. After the activity on deck finished, the boat motored to a position about 100 or 200 metres away. It remained there for about five or 10 minutes before moving on again.

[957] Zane said the sighting occurred around 9.00 to 9.15 am, and that he saw the man on the boat from about six metres away, for about five minutes. He said the man was around 30, had dark hair (which was black rather than brown), that his hair was dishevelled, and that it was also shorter than shoulder length. He later identified the man as Mr Watson from Montage A.

[958] John Edwards recalled a 20- to 30-year-old Caucasian man with brownish hair, who was not groomed. He sung out "good morning" to the man but the man did not provide any acknowledgement — whether verbally or via a gesture or a wave. He looked at the Edwards with an unhappy, sour expression on his face.

[959] A similar description was given by Nicole Edwards, but she put the timing of the encounter earlier than Zane. She said the sighting occurred around 8.30 to 9.00 am.

[960] At trial, the Crown prosecutor suggested the jury could safely proceed on the basis that this was Mr Watson at Marine Head at about 9.15 am. As noted above, Mr Watson omitted to tell the police that he had gone to Marine Head before Erie Bay in his first statement of 8 January 1998 but acknowledged he was there in his second statement on 12 January.[297]

[961] Sea trials done on *Blade* revealed it took 36 minutes to get from Furneaux Lodge to Marine Head. If Mr Watson left Furneaux before 5.30 am, the Crown prosecutor asked the jury to consider what he was doing during that time. He also pointed out that the area at the rear of *Blade* where Mr Watson was seen to concentrate his attention when at Marine Head was consistent with the location of the wipe marks noticed on *Blade*'s hull discussed below.[298]

Sightings of *Blade* in Queen Charlotte Sound and the Tory Channel

[962] Samuel Edwards knew Mr Watson and *Blade*. He saw Mr Watson on *Blade* near Kurakura Point in the Queen Charlotte Sound at about 10.00 or 10.15 am on 1 January 1998.

[963] Oliver Matson was entering Tory Channel from the Queen Charlotte Sound at about 11.30 am and gave evidence that he saw a boat resembling *Blade*. However, he did not "take a huge amount of notice" and could not say categorically whether it was in fact *Blade*.

[964] Mr Watson's brother, Thomas Watson, went out on his boat on 1 January, looking for Mr Watson. He arrived at Punga Cove at around 12.30 and spent time there, in Endeavour Inlet and in Queen Charlotte Sound, before returning to Waikawa Bay at about 4.00 or 5.00 pm. He did not see Mr Watson's boat and did not see Mr Watson until 3 January.

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297 See above at [951].
298 See below at [1002]–[1005].

Sightings of *Blade* in the Cook Strait

[965] William Gay and his son, Matthew Gay, were onboard the Interislander ferry and claimed they saw *Blade* in the Cook Strait at 4.00 to 4.30 pm.

[966] William Gay contacted the police after seeing *Blade* on television. At trial, he described seeing the vessel wallowing near the entrance to the Tory Channel. He described the boat as a single-masted yacht with a white hull, a terracotta-coloured cabin and a canvas tarpaulin around the stern. Under cross-examination, he agreed he thought the boat was "more brownish rather than reddish" and described the redder colour of *Blade* in a photograph he was shown as "slightly different, … it's a photographic difference". He was "positive" that *Blade* was the boat he saw.

[967] Matthew Gay described the boat as a single-masted yacht, with a white hull a "brownie/orangie" cabin. He recalled the boat in less detail than his father, saying the sighting was not something you made a "mark in your mind about". He said the boat he saw "was similar" to *Blade* but he "wouldn't say for sure whether it was [*Blade*] or not".

[968] These sightings were important in the Crown submission because they raised the question of what Mr Watson was doing at that time of the afternoon in the deep water off Tory Channel in the Cook Strait — a good place, it was suggested, "if you had something you wanted to dump".

[969] The reliability of the identification of *Blade* by the two Mr Gays was disputed by the defence who relied upon Mr Watson's logbook entry of a previous journey to submit that it was impossible for *Blade* to have travelled from Cook Strait to arrive in Erie Bay at the time it was next sighted.

Erie Bay — the hours unaccounted for

[970] As mentioned, Mr Watson told police he arrived at Erie Bay between 9.00 and 10.00 am. This was initially supported by Mr L (who said Mr Watson arrived between 10.00 am and 12.00 pm), but Mr L ultimately settled on an arrival time of 5.00 pm.

He said he made an "honest mistake" and fixed the 5.00 pm time by reference to a horse race he was betting on, which took place just before 5.00 pm.

[971] Samuel Edwards saw *Blade* again, this time moored at Erie Bay, at around 5.00 to 6.00 pm.

[972] Mr van Wijngaarden visited Erie Bay with his family on New Year's Day. He arrived around 2.00 pm and estimated that he left between 5.00 and 5.30 pm. He did not see *Blade* at Erie Bay. Mr van Wijngaarden was not cross-examined on this aspect of his evidence.

[973] Brett Hall had been in the Erie Bay area during the day and saw no other boats there apart from a small runabout. However, as he conceded in cross-examination, it was not until 30 March when he was interviewed by police and had to think back to 1 January.

Submissions to the jury on the evidence of Mr Watson's movements on New Year's Day

[974] In closing, the Crown prosecutor submitted to the jury that the timings of Mr Watson's movements on New Year's Day left five to six hours unaccounted for. This was a piece of circumstantial evidence that showed Mr Watson had the opportunity and the time to dispose of the bodies.

[975] The defence took no issue with Mr Watson's presence at Marine Head at 9.00 am, but refuted the Crown's suggestion that it was for the purposes of seeking privacy, pointing out that there were around 150 boats in the area, with a number of them coming out of Endeavour Inlet. The defence also accepted the sighting of Mr Watson at Kurakura Point around 10.15 am but said there was nothing sinister about that.

[976] Trial counsel suggested that the variety of other sightings did not mean much at all and there was no dispute that Mr Watson arrived at Erie Bay around 5.00 pm. He reminded the jury that extensive police searches were undertaken in the areas where Mr Watson had been seen on 1 January but nothing was located.

[977] In their respective closing addresses and the summing up, the Crown, the defence and the Judge all addressed the impossibility or otherwise of the Gays' identification of *Blade*, giving particular attention to the feasibility of *Blade* travelling from where the Gays claimed to have sighted it to Erie Bay by the time Mr Watson arrived at Erie Bay. The issue of the Gays' identification of *Blade* was also addressed by this Court at the 2000 appeal.[299]

[978] The Crown prosecutor invited the jury to find that Mr Watson lied when he told the police about his movements on New Year's Day. The evidence showed that Mr Watson left Furneaux Lodge somewhat earlier and arrived at Erie Bay much later. He submitted that those lies pointed towards Mr Watson's guilt.

[979] The Crown prosecutor pointed out to the jury that Mr Watson's statement to the police on 8 January 1998 was made at 6.30 pm, after, as established by evidence, he had used a pay phone to call Mr L at 6.02 pm from Christchurch, where Mr Watson was staying. The Crown prosecutor suggested the telephone call to Mr L was an attempt to set up a false alibi.

[980] Mr L said Mr Watson told him to expect a visit from the police. Mr Watson asked Mr L about an alibi — with Mr Watson saying that he was at Furneaux on 1 January and 2 January — and then Mr Watson asked what time he had arrived on New Year's Day. Mistakenly, Mr L said, 10.00 am or 12.00 pm.

[981] The Crown prosecutor suggested that when Mr Watson went to see the police, he took the earlier time given by Mr L because it meant there was less time he had to account for as to his whereabouts on 1 January. He observed that Mr Watson's logbook showed no entries over that period until they started again on 4 January, in contrast to Mr Watson's apparent diligence prior to the period.

[982] As far as Mr Watson's call to Mr L on 8 January was concerned, trial counsel pointed out that, when Mr Watson spoke to police on 8 January, he did not mention

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[299] 2000 appeal, above n 2, at [28]–[29] and [49]. This Court accepted that it would have been preferable for the Judge to have given attention to the reliability of the identification in respects other than timing, but considered it was impossible to conclude that this omission had itself caused a miscarriage.

his arrival time at Erie Bay. Mr Watson did not tell the police about it until four days later on 12 January. And, as to what Mr Watson said on 12 January, trial counsel submitted that his statement saying he left around dawn was perfectly understandable because, like many other people who were spoken to by police about their movements on New Year's Eve, his recollections were imprecise and he could not be certain.

[983] The Judge gave an orthodox lies direction. He explained that the jury had to be satisfied the alleged lies told by Mr Watson were in fact lies, rather than a misunderstanding, misstatement, exaggeration or even a half-truth. He reminded the jury that people tell lies for a variety of reasons, such as to divert unnecessary attention from themselves even though they have not committed any crime. He cautioned the jury about rushing to the conclusion that because a person has lied, they must be guilty.

Mr Watson's changes to Blade's appearance

[984] Turning back to Erie Bay, on 2 January, Mr Watson asked Mr L whether he still had a pot of paint that Mr Watson had considered acquiring from Mr Cassels, the owner of the Erie Bay property, some two to three months prior. Mr L gave the paint to Mr Watson who proceeded to paint the cabin of *Blade* a blue colour, changing it from its previous reddish brown.

[985] At trial, the Crown prosecutor submitted that, unlike when Mr Watson had previously obtained some items from Mr Cassels, there was no communication between Mr Cassels and Mr L about Mr Watson taking the paint. In addition, when Mr Watson described his boat to the police on 12 January, he did not say it had just been painted but said it was blue and white, not the red colour it was on New Year's Eve.

[986] The Crown prosecutor also acknowledged that, when at Momorangi Bay prior to New Year's Eve, Mr Watson had discussed painting *Blade* but suggested it was the fact he obtained the paint at Erie Bay which was something that needed to be considered by the jury. That apparently overlooked the evidence that the pot of blue paint Mr Watson used was the particular pot that he had previously discussed with Mr L.

[987] Indeed, trial counsel described the painting of *Blade* as a "classic case" of misuse of circumstance. He emphasised the painting was planned before New Year's Eve — also having been discussed with Mr L on Boxing Day — and that it was Mr L's own suggestion that the blue paint be used on the upper areas of the boat.

[988] As to the removal of the wind vane from *Blade*, another change to *Blade*'s appearance raised at trial, there was nothing in this according to trial counsel. He submitted that the wind vane was used for offshore sailing and it was hardly surprising that it would be removed when the boat was painted because it was of no use when sailing around the Marlborough Sounds.

[989] On 3 January, Mr Watson returned to Picton. He and his sister Sandy then went sailing into the Marlborough Sounds. There was no evidence from Sandy Watson.

The cleaning of Blade's interior

[990] Fingerprinting officers Mervyn Davis and Ian Harrison were called by the Crown and gave evidence that various surfaces of *Blade*'s interior had wipe marks ("marks left after a contact with a wet cloth or rag, that have since dried"). These marks were visible in several photographs of *Blade*'s interior that were taken after it was powdered by the fingerprinting officers.

[991] Mr Davis explained that wipe marks were more likely to be left behind on smooth, shiny, non-porous surfaces, with glass at one of the spectrum and something like carpet at the other end. In relation to *Blade*'s interior, he said that "almost without exception all the surfaces where such marks could be expected to be left behind did display such marks". However, he conceded under cross-examination that he could not say that "literally every square centimetre" of the inside of the boat had been wiped.

[992] Mr Harrison was referred to a photograph of *Blade*'s interior showing the forward part of the cabin, including the entrance to the main sleeping area. He described there being wipe marks visible on the walls and the seats, the ceiling and the surface of the table. He observed wipe marks in less obvious locations too. For example, he noticed them on the underside of the wood laminate surface of a shelf.

He also noticed them on cassette tapes that were stored on *Blade*. He said that, from memory, all of the walls, doors and ceilings had wipe marks — with the surface area covered by visible wipe marks ranging from 30 per cent to 70 per cent, approximately, depending on the surface.

[993] Mr Watson's former girlfriend gave evidence she had never seen him wipe down the interior of *Blade*.

[994] The Crown prosecutor accepted there may have been a genuine need to wipe down the interior of *Blade* and that there was evidence there had been a storm between 10 and 12 December 1997. He referred to the evidence that boat mats were hung out to dry at Sandy Watson's property some time prior to Christmas and suggested the cleaning following the storm had taken place then.

[995] Two witnesses gave evidence they saw *Blade* at Ratimera Bay on 5 and 6 January 1998, one saying he did not see anyone outside the boat's cabin the whole time it was present in the Bay. About 10 minutes before the boat left, he saw a man and a woman on the boat.

[996] It is reasonably clear that *Blade* was the boat the two witnesses saw, with Mr Watson and Sandy Watson on board, and this does not appear to have been challenged at trial. In the Crown prosecutor's submission, it was a further opportunity (following that between 1 and 3 January) to act privately, to clean up and tidy up.

[997] The Crown prosecutor noted there was evidence of seven fingerprint lifts. While he accepted it might have been a coincidence, the Crown prosecutor suggested it might have been because the wiping down was so thorough that all other fingerprints were removed leaving only those made after the cleaning was completed. He suggested the jury could infer that the only people who had been on *Blade* since the wiping down had been Mr Watson and his sister.

[998] The Crown prosecutor then queried the areas which had been cleaned, namely those away from the dirty galley and main entrance where water might be expected to have come in. He submitted the area wiped was consistent with the area where visitors

might come in contact with things on *Blade*. He referred to the wiping of the cassette covers and cassettes, noting those were the sorts of things people pick up, and pointing out the cassettes were up on a shelf. He asked the jury to consider whether it was just a coincidence those items had been wiped, emphasising the absence of any fingerprints in the boat.

[999] Trial counsel submitted the Crown "seriously overstated" its case. He referred to Mr Harrison's evidence that the wipe marks' coverage was as low as 30 per cent for some surfaces. As well, the evidence revealed there were 22 fingerprints, not seven as the Crown prosecutor said. 18 were attributed to either Mr Watson or his sister, two were unsuitable for comparison and two were unidentified. Further studies showed Mr Watson's mother's prints were on a guidebook and more of Sandy's prints were on some logbooks.

[1000] Mr Harrison had said there was nothing significant or remarkable about the number of fingerprints found. There was, in any event, a perfectly plausible explanation for the cleaning — *Blade* was caught in a storm in mid-December and there was, therefore, every reason to clean the inside of the boat. The conditions were confirmed by a meteorologist and the importance of wiping down the interior of *Blade* was explained by defence witness Bruce Askew.

[1001] Trial counsel also pointed out that there was a trail of blood on the carpet which, in his submission, was consistent with the evidence that Mr Watson had cut his foot at Erie Bay on 2 January. The significance of this, he argued, was that it meant the carpets were not cleaned after that date. He also made a related point about the tiger blanket not having been cleaned or shaken.

Wipe marks on the hull of Blade

[1002] On 12 January 1998, *Blade* was lifted from the water and subsequently forensically examined. The local boat club president, Ian Michel, gave evidence that *Blade*'s hull had wipe marks at the rear on the starboard side where green slime had been wiped clean and this was unusual. He recalled the first mark, which was highest on *Blade*'s hull, as being about one foot wide and two metres in length. The second mark down was only about six inches wide with a "wee bit less" length. The marks

lower down became narrower and their length became shorter. He was of the firm opinion "that something went over the side, what it was I have no idea, but something went over the side and bumped off down the side of the boat".

[1003] Mr Michel conceded in cross-examination that the marks could have been made in a deliberate attempt to clear away growth that was slowing *Blade* down ("to keep it in racing trim"). The defence showed Mr Michel an enhanced photograph of the marks and it was put to him that "you can see little areas have been missed and other areas appear to have been concentrated on more", consistent with the marks having been produced with a scrubbing brush. Mr Michel replied that explanation was "possible" but, if so, there had not been "a good attempt" given "quite a lot" had been missed. Mr Michel clearly regarded the wipe marks as distinct in appearance from other areas of *Blade*'s hull that the defence suggested may have been wiped. Mr Michel nevertheless agreed that, at some stage, Mr Watson may have scrubbed the hull with the exception of the very bottom of *Blade* (where there was more growth than on other parts of the hull).

[1004] In re-examination, Mr Michel was asked how often he would wipe down a boat to keep it in racing trim with just one or two strokes, rather than wiping down the whole hull, and he replied "[n]ever at all".

[1005] As noted above, the Crown prosecutor in closing pointed out that the location of the marks was consistent with the area where, according to Zane Edwards, Mr Watson was directing his attention while at Marine Head on the morning of New Year's Day. He asked the jury to consider the resources available to Mr Watson to dispose of Olivia and Ben's bodies: a sleeping bag that Olivia and Ben brought with them, potentially a second sleeping bag that Mr Watson's former girlfriend had seen him with, chains or weights, and ropes. He suggested Mr Watson may have hung the bodies over the side of *Blade* until he could drop them, perhaps off Tory Channel.

Holes in the squabs and squab covers on Blade

[1006] One of the squab covers from *Blade* was completely missing. The forward berth squab was missing a piece of its cover, having a hole in it, and the edges of the hole were singed. There was a corresponding hole in the foam underneath it.

Mr Watson's former girlfriend gave evidence the squab was not damaged when she was on *Blade* in November 1997. Mr Watson told her that the squab had been damaged by a cigarette but subsequently said it was caused by a hot pot.

[1007] Mr Watson also told his former girlfriend he cut material out of a squab because some paint had got onto it and he wanted to dig it out.

[1008] In closing (at trial), the Crown prosecutor noted that there was no trace of any paint but also questioned how paint could have got there if the painting took place on deck. He also pointed out that the rear berth squabs were covered with paint but nothing appeared to have been done about them.

[1009] We note that the Crown expert conceded that the edges of the hole in the cover had been burned. He also conceded Mr Watson's claim about paint seeping into the particular foam squab.

[1010] The Judge gave the jury a lies direction in respect of the squabs.

Scratches on the interior foam lining of Blade's forward hatch

[1011] The Crown called evidence that the main hatch into the cabin of *Blade* had 176 scratch marks on its interior foam lining, consistent with an adult-sized fingernail. However, some of the scratch marks were located in places which were not accessible when the hatch was closed.

[1012] Mr Watson's former girlfriend said the scratch marks were not on *Blade* in the latter part of 1997 and she knew that because she liked to run her hands over the hatch lining and said it was smooth. In March 1998, Mr Watson volunteered to her that his nieces (Sandy's children) made the scratches.

[1013] Trial counsel reminded the jury that when *Blade* was first examined in mid-January the police attached no significance to the scratches and that they were only noted by Mr Watson's former girlfriend when she was onboard in early March 1998.

[1014] In trial counsel's submission, the evidence was not capable of supporting an inference that Ben or Olivia had scratched the cover. There was no method to secure the hatch, and some of the scratches were around the outside area that could not be reached from inside the boat unless it was partially open. Trial counsel also questioned whether the marks were made by fingernails in any event and said they could be consistent with other objects. He referred to Mr Watson's comment that they had been made by his two nieces but submitted that Mr Watson did not say the marks had been made by their fingernails.

[1015] We interpose that, although Mr Watson told his former girlfriend the scratches had been made by his nieces, there was no direct evidence to that effect at trial. There was also no evidence the nieces were on the boat between the time Mr Watson's former girlfriend said the hatch was smooth and it being seized. We add that the nieces were aged around two and four in early 1998. This, coupled with the expert evidence about the width of some of the scratches, makes the proposition that all of the scratches were made by Mr Watson's nieces difficult to accept.

Mr Watson's missing shirt

[1016] The denim Country Road shirt Mr Watson was wearing on New Year's Eve was never recovered. Mr Watson did not mention this shirt when he described what he was wearing on New Year's Eve in his 8 January statement to the police, saying:

> I was wearing blue jeans, white and black Bianchi shoes. I was wearing a grey jersey with two red stripes across the chest. I also had a grey t-shirt. It had ocean spirit written on it.

[1017] In Mr Watson's 12 January statement, he mentioned the possibility that he put a shirt on over his tee-shirt but focused on his jersey. He said he "put some jeans on, kept [his] teeshirt on, grabbed a shirt or jersey. A jersey I think a grey one."

[1018] When Mr Watson was being driven to Huntly Police Station on 7 April 1998, he told Detective Fitzgerald that "you have got my shirt mate" but was told that he (Detective Fitzgerald) did not have the shirt Mr Watson was wearing on New Year's Eve. There were also suggestions at trial that Mr Watson still had the shirt in March

and that Mr Watson's former girlfriend had told this to Detective Sergeant Landreth. But she could not recall saying that.

[1019] The police also executed various search warrants and found no sign of the shirt, including at the home of Mr Watson's parents, *Blade*, and Sandy Watson's home.

Mr Watson's statements to his former girlfriend

[1020] Mr Watson's former girlfriend gave evidence of discussions she had held with Mr Watson.

[1021] One example was a statement Mr Watson made in respect of a feature about the Hope family shown on television. Mr Watson commented to her "that Olivia hated her father and couldn't wait to get away from him". In her evidence-in-chief, she said she asked him how he knew that and he replied that Olivia's "friends had *told him*".[300] She confirmed that Mr Watson never spoke to her about speaking with Olivia's friends.

[1022] Cross-examination referred the witness to a previous statement she had made, suggesting Mr Watson had said "that's what her friends said anyway" — with trial counsel suggesting that different wording did not necessarily imply that Mr Watson had himself spoken to Olivia's friends. She accepted she interpreted Mr Watson's comment to mean Olivia's friends had spoken to him personally, whereas he could simply have been referring to rumours that may have been going around.

[1023] While it is just one strand of evidence, we note that, in his statement to police, Mr Watson said he could not recall seeing Ben or Olivia at Furneaux Lodge on New Year's Eve. If Mr Watson did speak to Olivia, the obvious inference is that he did so on *Blade*.

The "Three Es" and the prison informants

[1024] We turn now to consider the evidence of Mrs and Mr E and Mr EM (the Three Es), along with the evidence of Mr J and Mr K, two prison informants. The admissibility of this evidence was not a ground of appeal but the evidence was

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300 Emphasis added.

challenged by Mr Chisnall in the context of whether this Court should apply the proviso to s 385 of the Crimes Act. Although we do not need to consider whether the proviso should be applied, we will address Mr Chisnall's criticisms in any event.

The Three Es

The evidence and its treatment at trial

[1025] Mrs E's evidence was that Mr Watson had come to her house in November 1997, after being at the pub with Mr E. The men discussed a girl at the pub who had been annoying them. Mrs E recounted that Mr Watson said "he should have killed them, they should have killed her and got rid of them". At one stage, Mrs E said it sounded like Mr Watson was just talking about that particular girl but she thought he had been talking about other people as well. Mrs E further recounted that Mr Watson continued "talking about killing people" and "asked me whether there was anybody I didn't like … that I would like killed and he said it would be no problem to do it", saying "he knew how he could do it and he went on quite specifically about [it]". Mr E corroborated his wife's evidence, saying Mr Watson raised the topic of killing people out of the blue and persisted when Mr E tried to change the subject.

[1026] Separately, Mr EM's evidence was that, sometime between March and November 1997, Mr Watson expressed "almost like a hatred towards women". He was said to have expressed this through talk of "killing" — albeit not a particular woman, just a woman. When Mr EM told Mr Watson not to talk rubbish, Mr Watson's retort was "keep an eye on the papers then".

[1027] The Three Es' evidence was originally ruled inadmissible but, after having heard most of the Crown case, the Judge revisited his ruling and admitted it as evidence of motive.[301]

[1028] It had become plain, the Judge said, that the Crown would need to explain why, on its case, Mr Watson went back to shore after returning to *Blade*.[302] That could be to

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[301] *R v Watson* HC Wellington T2693/98, 19 August 1999 (ruling 6) at 2–3; and *R v Watson* HC Wellington T2693/98, 25 August 1999 (ruling 8) at 2.

[302] *R v Watson* HC Wellington T2693/98, 11 October 1999 (further reasons) at 4.

find a woman to take back (as the Crown had advanced from the start) or it could be to commit a random killing, something that might be inferred from the Three Es' evidence. The Judge explained that Mr Watson's conversations with Mrs E about the ability to "avoid detection" gave it cogency because it explained how he carried out the killings without leaving a great deal of forensic material.[303] He explained the evidence "did not require many more probative factors to tip the balance" in favour of admission and he found the balance had indeed been tipped in favour of admission in light of how the case had developed.[304]

[1029] The Crown prosecutor referred to the Three Es' evidence in closing. He suggested Mr Watson harboured an intention to kill a woman and had done so for some time prior to 31 December 1997. He said the evidence assisted to identify the lone man because not all the men at Furneaux Lodge would have expressed an intention such as that. That intention was, the Crown said, not directed at any individual woman but one selected at random who happened to be in the wrong place at the wrong time.

[1030] The evidence, the Crown contended, showed that the topic of killing was still very much in Mr Watson's mind late in 1997, a matter of weeks before New Year's Eve.

[1031] We do not have a full record of the defence closing on motive but, given the tenor of the rest of trial counsel's closing address, we can be sure the evidence and its relevance was comprehensively challenged.

[1032] In order to frame this issue, the Judge's directions as to motive bear recounting. Mr Chisnall levelled various criticisms at these directions.

[1033] In his summing up, the Judge began by stating that, although Mr Watson's behaviour at Furneaux Lodge did not bring his character into "good repute", the jury was not to be "deterred or distracted" by such things. The issue, the Judge explained, was whether the Crown had sufficient evidence to involve Mr Watson in the murders (if that is what the jury found to have occurred). His bad character was only of

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303 At 4.
304 At 4.

importance as a potential mode of identification. The Judge was referring to Mr Wallace's evidence of hearing the words "you [Olivia] can come … but he [Ben] can't" but he then turned to discuss the Three Es' evidence.

[1034] Having referred to the Crown and defence submissions on the Three Es' evidence, the Judge explained that it was a matter for the jury whether weight should be placed on it in concluding that the person last seen with Ben and Olivia was Mr Watson. His "note of caution", however, was that although the information went to motive, it would be of no use as an "identifying consideration" unless the jury were sure it was Mr Watson who was with Ben and Olivia when they were last seen.

[1035] The Judge went on to remind the jury that such motives or thoughts (if they were found to exist) may not have been in Mr Watson's mind at all that evening and that they had to be satisfied Mr Watson was in fact with Olivia and Ben when they were last seen. He repeated his point that the Three Es' evidence was not a "substitute for satisfactory evidence of identity" and that, if there were a reasonable doubt as to whether Mr Watson was with Olivia and Ben at the relevant time, then he moved out of the frame. On its own, the statement did nothing. It could assist as background but the jury still had to be satisfied Mr Watson was with Olivia and Ben at the last known stage.

Submissions

[1036] Mr Chisnall submitted that the decision to admit the Three Es' evidence was an outlier amongst the authorities in that it lacked any specific linkage between Mr Watson and his alleged victims. He also criticised the Judge's directions as to this evidence. He submitted the evidence of the Three Es was readily categorised as alcohol-induced bravado but was "as prejudicial as tangential evidence could possibly be" (which is how the Judge originally characterised the evidence).[305] He submitted the evidence was vague and that there were significant differences between the evidence of Mr and Mrs E, and the evidence of Mr EM. He further argued that the Judge's directions were confusing, unbalanced and (at times) wrong. He said the directions would not have deflected the possibility of the jury adopting general propensity reasoning.

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[305] *R v Watson* HC Wellington T2693/98, 24 June 1999 (ruling 3) at 117.

[1037] Mr Chisnall took no issue with the direction that the Three Es' evidence was irrelevant unless the jury were satisfied it was Mr Watson who was last with Olivia and Ben. Rather, he took issue with the confusion created by the Judge's subsequent directions that Mr Watson's statements could not be used as a substitute for "satisfactory evidence of identity" and that, on their own, they did nothing.

[1038] He also took issue with the Judge commenting that the statements were "extraordinary" and that the jury might find that the attitude expressed could have affected Mr Watson's resolve to plan the crime with "determination and care", and to perhaps create opportunities if they arose. Mr Chisnall argued these comments exacerbated the risk of unfair prejudice and that the Three Es' evidence did not suggest this. Indeed, he further submitted that the theory of a determined and careful crime contradicted the Crown's thesis that the murders of Olivia and Ben were opportunistic.

[1039] Finally, Mr Chisnall submitted that the Judge failed to direct the jury that it was required to decide whether the evidence demonstrated the tendency relied upon by the Crown and to explain the legitimate way in which the evidence might be used. The Judge failed to warn the jury against treating the evidence as if it demonstrated a willingness to *act on* the statements made, and not to let it predispose the jury against Mr Watson.

Our assessment

[1040] This Court (at the 2000 appeal) upheld the admission of the Three Es' evidence on the basis there was a "sufficient discernible link to make the evidence admissible on the question of identity", saying:[306]

> The killer was a lone male yachtsman who had been at Furneaux Lodge, who fortuitously offered a young woman and her male companion sleeping accommodation on his vessel. Shortly before boarding the yacht, he had indicated that the woman was welcome but that the male was not, although he did not persist in that attitude. Within a comparatively short period of time, the two young people were killed and their bodies disposed of without trace. There is no apparent reason for the killings, other than an inference that they may have been associated with a sexual attack on the woman. The enquiry is whether the evidence assists in identifying the person responsible for opportunistic murder in those circumstances.

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306 2000 appeal, above n 2, at [16].

[1041] The Three Es' evidence was not admitted or used to establish a behavioural propensity. This Court made a similar point in the 2000 appeal. The enquiry, as the Court put it, was whether the evidence assisted in identifying the person responsible for the murders.[307] And, based on the unusual circumstances of the murders, as well as the extreme nature of Mr Watson's comments (notwithstanding the defence's arguments about how they should be construed), this Court held that the Three Es' evidence was admissible on the basis of a sufficiently discernible link between what he said and what he was alleged to have done.[308] This Court determined that the risk of illegitimate prejudice would only arise if the jury "was to treat the evidence as purely evidence of propensity and nothing more".[309] It held that the evidence "did not in the overall equation result simply in blackening his character without adding in some substantive way to the total picture".[310]

[1042] That was how this Court decided the admissibility question at the 2000 appeal and we would not decide it differently now. The jury was, as the Crown submitted, entitled to weigh whether the fact Mr Watson had made such statements in the year and months prior to the disappearance of Olivia and Ben was another unfortunate coincidence, or part of the mix of factors tending to point towards him as the lone man who invited Ben and Olivia onto his boat.

[1043] We agree that the Judge's directions were somewhat muddled but not in a way that would have prejudiced Mr Watson. The Judge told the jury that the Three Es' evidence could not be used to establish identity but that it was "background material" which they might find relevant to motive, or to whether events unfolded as the Crown said. He also clearly warned against seizing upon any evidence of motive, or bad character, as going to Mr Watson's guilt. That approach, in our view, did not disadvantage Mr Watson.

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307 At [16].
308 At [19].
309 At [20].
310 At [20].

Mr J and Mr K

[1044] Mr Chisnall suggested there was a third plank of the appeal which was not the subject of its own ground but, in his submission, reinforced that Mr Watson's trial miscarried: the Crown led evidence from two prison informants, J and K.

The evidence and its treatment at trial

[1045] Mr J's evidence was that sometime around July and August of 1998, he was placed in a cell with Mr Watson. Mr J claimed Mr Watson would scream in his sleep, saying "they have got nothing on me". He said Mr Watson talked about police getting "the wrong boat" and the "wiping of tapes". He also claimed Mr Watson said something about a hair that was found and was "sort of freaked out on that" and was planning to say "it was planted there". Mr J said he asked Mr Watson how "he [had] done it" and claimed Mr Watson said "the bitch kept on punching and kicking him" and "she was fighting back heaps". Mr J said Mr Watson showed him "how he pulled her down" by grabbing him, "using his hip to push [him] up against the wall … [and performing] a sort of strangulation thing". Mr Watson is also claimed to have said that "they won't find them".

[1046] However, the first time police spoke to Mr J about Mr Watson, Mr J told that police officer that "Mr Watson had never come out and admitted it all".

[1047] Mr K, a member of a white supremacist gang, said he and another would "joke" with Mr Watson about the murders and ask Mr Watson if he did it. Mr Watson said, "you know I can't tell you that, but I am still having wet dreams about it". Mr K claimed Mr Watson admitted killing Ben and Olivia, saying "they've got jack shit on me". Mr K said Mr Watson told him the bodies were in "the Sounds", that the "sea lice would have them", and that they would "be fucked, [being in] deep water … [l]iterally the Cook Strait".

[1048] Mr N, a cellmate of Mr Watson for a time who was called as a witness by Mr Watson, gave evidence that Mr Watson told him nothing about the case.

[1049] Trial counsel reminded the jury that Mr J had an extensive list of criminal convictions and a lengthy psychiatric history, saying there was never an opportunity for such a confession to have been made because there was no opportunity for Mr Watson and Mr J to be together for the time required for a trusting relationship to develop.

[1050] The copy of the defence closing address available to us is incomplete but it can fairly be assumed the evidence of Mr K was similarly criticised. We also infer, from the Judge's direction we set out next, that trial counsel extensively discussed the potential inducements there might have been for the two witnesses to give the evidence they did.

[1051] The Judge directed the jury as follows:

> Prisoner's evidence
>
> [Trial counsel] directed your attention to the provision in the law relating to witnesses who have some purpose of their own to serve. Section 12FC of the Evidence Act says:
>
> > "Where in any criminal proceeding it appears to the Judge that the witness may have some purpose of his or her own to serve in giving evidence and for that reason there is a risk that the witness may give false evidence that is prejudicial to the accused, the Judge shall consider whether or not it would be appropriate to instruct the jury on the need for special caution in considering the evidence given by the witness."
>
> As counsel for the defence more eloquently than I can do, have pointed out, that it would be appropriate to give you that direction and I do give it in respect, certainly, of the second of the two prison witnesses. It seems that he received a considerable amount, to put it neutrally, in terms of reduction of charges, bail and other benefits and so on that you should have some regard to that. That does not mean to say that you should entirely disregard his evidence. You have some regard to it but you do so against that warning and caution that I give you that this was somebody who had a lot to gain.
>
> As to the first witness that you heard, well there did not seem to be quite the same benefits or advantages in that respect and you will no doubt give that evidence the weight you think is appropriate, and I will have something to say about that when dealing with counsel's submissions on that particular evidence. In general, it would seem that there were two incidents of the kind that were described by this witness. His claim that they were celled up together is capable of some challenge. The evidence is not entirely clear on that and you have to say to yourself is this some chink in his armour, he has confided in the dark of night with a cell-mate after he woke and you heard the evidence about sleep patterns and so on. You just have to give that some

> weight, bearing in mind the background of this man, his overall intellectual capacity as you might have seen it, whether that was something that Mr Watson would have confided to this particular person. That is something very much for a jury. That is a jury matter if ever there was one. The question is whether you accept that evidence. As citizens you have to use your common sense and knowledge of human affairs.

Submissions

[1052] Mr Chisnall contended that Mr J and Mr K were both incentivised to lie. Trial counsel exposed the more obvious motivations but the possibility that there were some less tangible or possible downstream benefits was not explored, he suggested. He said it was known that Mr K had serious charges dropped (of injuring with intent to cause grievous bodily harm), was given bail and was given a phone by police as well as the use of a car. In respect of Mr J's evidence, plain inconsistencies and implausibilities emerged. His evidence contrasted with his first statement to police, evolved over time and was internally inconsistent. It was also known that he was to be paroled shortly after Mr Watson's trial.

[1053] Looked at through a modern lens, Mr Chisnall submitted there was a serious argument the jury had heard inadmissible evidence from Mr J and Mr K and that the Judge's direction fell well short of mitigating the risks it carried as required under *Jetson v R*.[311] He submitted that it was highly doubtful that their evidence would fulfil the heightened admissibility tests described by the Supreme Court in *W (SC 38/2019) v R* and *Roigard v R*.[312]

[1054] Mr Chisnall referred to the fact that linkage between the use of this kind of evidence and miscarriages of justice has crystallised since Mr Watson was tried in 1999.[313] He characterised witnesses like Mr J and Mr K as tending to be incentivised and inveterate liars whose evidence is often incapable of corroboration and the Judge's directions provide little protection against the problem.[314] He referred to the Supreme Court's recent discussion of the discernibility of incentives in *Jetson*:[315]

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311 *Jetson v R* [2023] NZSC 150, [2023] 1 NZLR 629.

312 *W (SC38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [88] per Glazebrook, O'Regan and Ellen France JJ; and *Roigard v R* [2020] NZSC 94, [2020] 1 NZLR 338 at [53]–[55].

313 *W (SC38/2019) v R*, above n 312, at [76] per Glazebrook, O'Regan and Ellen France JJ.

314 At [83]–[85].

315 *Jetson v R*, above n 311, at [53] (footnotes omitted).

> Incentives are not necessarily something directly traded for the evidence, as jurors may think, and as the Crown's closing in this case implied. Jurors need to consider whether, regardless of any express discussion (and denial on the part of the witness), mere expectations or aspirations for future advantage or privileges may be motivating the giving of the evidence … Experience simply teaches us that cellmate confession evidence may be driven by non-specific hope or expectation of advantage in the witness' future engagement within the criminal justice sector …

Our assessment

[1055] We accept Ms Laracy's submission for the Crown that there is no evidence of undisclosed incentives beyond those that were identified, or alluded to, at the trial. As much was confirmed by the enquiries of the IPCA, following its own investigation into the allegations of improper police conduct or pressure on Mr J and Mr K, and the nature of any incentives they may have received.

[1056] The admissibility of this evidence was not a ground of appeal. There is no presumption that inmate evidence is inadmissible.[316] We consider that, even assessing the evidence's admissibility through present day eyes, the evidence would be admissible. There were significant factors pointing against the evidence's reliability but the potential unfair prejudice associated with those factors was properly addressed through careful judicial direction rather than exclusion. Therefore, we do not consider the admission of the evidence was an error giving rise to a miscarriage of justice.

[1057] The criticisms of Mr J and Mr K were well-canvassed in front of the jury, and the Judge warned the jury that "special caution" was needed when considering the evidence of a witness who may have "some purpose of his or her own to serve in giving evidence" as there may be a risk that they give false evidence that is prejudicial to the accused. The Judge suggested that risk was particularly applicable to Mr K and, later in his summing up, told the jury they "may think that [trial counsel] has got a point when he says you should treat that evidence with a great deal of care and caution and probably overall disdain".

[1058] It is clear that the trial Judge and counsel were acutely alive to the risks associated with the evidence of Mr J and Mr K. While Mr Chisnall can point to aspects

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316 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36]–[37].

of the directions that might have been improved, we consider the omission of those aspects falls well short of amounting to a miscarriage of justice. The key factors suggesting that evidence could not be relied upon were well exposed to the members of the jury. The weight to be attributed to the evidence of Mr J and Mr K, in light of those issues, was a matter for the jury.

The adequacy of the directions as to the burden and standard of proof

[1059] The final point to address is Mr Chisnall's criticisms about the "generally inadequate" way the Judge directed the jury on the meaning of "beyond reasonable doubt" affirming that a miscarriage of justice arose.

[1060] Mr Chisnall's complaint was that the Judge told the jury it had to be "satisfied" of guilt but provided no explanation of what that meant. He submitted that, even before *R v Wanhalla*,[317] a jury had to be "sure" of guilt to convict, not merely "satisfied". He argued that to be "satisfied" was a lower threshold and did not, without more, suffice.[318] Moreover, he submitted that the Judge, at no point in the summing up, referred to Mr Watson's right to be presumed innocent. It follows, in Mr Chisnall's submission, that the Judge erred in his directions on the standard and burden of proof.

[1061] We do not accept these criticisms. It is important to consider the adequacy of the summing up as a whole, as it is the overall effect of the summing up that matters.[319] Here, the effect of the Judge's summing up was clear. When explaining the onus and standard of proof, the Judge made clear that the onus rested on the Crown "from beginning to end". He repeated the phrase "beyond reasonable doubt" many times throughout, and his introduction of the word "satisfied" was in the context of saying the jury had to be "satisfied" to the standard of "beyond reasonable doubt".[320] The

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317 *R v Wanhalla* [2007] 2 NZLR 573 (CA).

318 Citing *R v White* [1988] 1 NZLR 264 (CA) at 267. We do not, however, give much weight to that decision as it concerned the meaning of the phrase "satisfied" in a statutory context, and removed from any references to the standard of "beyond reasonable doubt". It was only in those circumstances that this Court determined that the word "satisfied" denoted a lower standard than beyond reasonable doubt.

319 *Ross v R* CA224/98, 18 March 1999 at [18], citing *R v Kritz* [1950] 1 KB 82 (CA) at 89.

320 In *Kaki v R* CA394/92, 29 March 1993 at 5 this Court said that it was not a misdirection to tell the jury they must be "satisfied" or "sure" where the words were used in conjunction with the direction that proof must be beyond reasonable doubt. See also *Shire v R* CA400/05, 3 July 2006 at [23]–[25].

Judge explained that, to be proved beyond reasonable doubt, required that the evidence be "inconsistent with any reasonable hypothesis other than … guilt". He used phrases similar to that at least five times. The Judge also explained to the jury that if there was "any reasonable explanation which [was] consistent with innocence", "the matter [was] not proved beyond reasonable doubt".

Overall assessment

[1062] The only real issue at trial was whether Mr Watson was the lone man on the Naiad.

[1063] The proposition that the lone man ashore at Furneaux Lodge was the same as the lone man who Mr Wallace transported on the Naiad was accepted by both the Crown and the defence at trial.

[1064] The defence comprehensively challenged the Crown case but accepted Mr Wallace's evidence that the man he served in the bar was the same man as on the jetty and in the Naiad with him. The defence used Mr Wallace's description of the lone man, seeking to establish that the lone man could not be Mr Watson.

[1065] Relying primarily on Mr Wallace's evidence, the defence case was that the lone man was scruffier than Mr Watson, had longer hair, had more cash, had visible stubble, wore a Levi's shirt not Mr Watson's Country Road one, looked like the compusketches and had a ketch.

[1066] Mr Wallace's identification of Mr Watson from Montage B was described by the defence as so "pitifully weak" as to be no identification at all — in fact, it was said to exclude Mr Watson.

[1067] Importantly, however, the Crown identification evidence was expressly not based on the evidence of any single witness. The Crown was aware from depositions that there were significant challenges with Mr Wallace as a witness and those challenges, including those that undermined Mr Wallace's identification of Mr Watson from Montage B, were well ventilated before the jury.

[1068] The Crown prosecutor explicitly told the jury that the Crown had not "just hung its case" on Mr Wallace's evidence and his identification of Mr Watson from Montage B. Mr Wallace could not be right about the identification of Mr Watson and also right about the boat he saw. But the positioning of the boat to which Mr Wallace transported the victims, as described by him, was highly consistent with distinctive features of where *Blade* was positioned. The issue of whether Mr Wallace was correct in respect of his identification of Mr Watson but incorrect in respect of his identification of a ketch, was fully canvassed before the jury. Defence counsel in effect made the inverse point — Mr Wallace was wrong about the man but right about the ketch.

[1069] The circumstantial identification evidence against Mr Watson included descriptions of his interactions with numerous other partygoers at Furneaux Lodge throughout the night of 31 December 1997. There were strong consistencies between the descriptions of and behaviour by Mr Watson and the lone man, as discussed in Part II, to support the conclusion the lone man and Mr Watson were one and the same. The inconsistencies in various witnesses' descriptions were placed in context by the descriptions of witnesses we know were talking about Mr Watson. Mr Watson's behaviour towards women that night at Furneaux Lodge and on *Bianco* was an important link with the lone man's comment towards Olivia in the Naiad, supporting the Crown's theory of a sexual motive.

[1070] The circumstantial evidence included significant inconsistencies between Mr Watson's own explanation of his movements on New Year's Day and the sightings (and non-sightings) of *Blade,* tending to show Mr Watson had lied about his movements and had engaged in suspicious behaviour, such as his alleged presence in the Cook Strait on New Year's Day. The Crown was entitled to rely on those lies and that behaviour as circumstantial evidence of guilt.

[1071] The circumstantial evidence included the forensic evidence that immediately after New Year's Day, Mr Watson repainted and sanitised his boat (but when speaking to police referred only to the colour he had repainted it), the evidence about the missing squab cover and damaged squabs, his missing Country Road shirt and the evidence about the wipe marks on *Blade*'s hull in a location consistent with where Mr Watson

was seen directing his attention at Marine Head. The scratches on the hatch lining, consistent with an adult-sized fingernail, were similarly of note. Though the defence offered alternative explanations, Mr Watson's conduct from daybreak and in the following days was consistent with the actions of someone intent on avoiding detection and concealing incriminating evidence.

[1072] The evidence of conversations Mr Watson had with the Three Es prior to New Year's Eve, which was suggestive of a general animosity towards women and a willingness to discuss murder, was also relevant circumstantial evidence. Some of the statements Mr Watson made after New Year's Eve could likewise be viewed as pointing towards his guilt.

[1073] The Crown case was that, by elimination, Mr Watson was likely the murderer. The murderer had to be a man who attended Furneaux Lodge and had a yacht moored in the inlet on 31 December 1997 in the location described by the witnesses, and who was in all probability the yacht's sole occupant.

[1074] Approximately 160 witnesses gave evidence as to the location of their boats, and who was aboard, in order to account for each of the more than 100 other boats moored in the vicinity of Furneaux Lodge on 31 December 1997. This was done to narrow the pool of those fitting the description of a lone man on a yacht moored at Furneaux to just two. The other was a 46-year-old man on a 40-foot ketch — *Waves* — which was moored a good distance to the right of the jetty, and close to the shoreline. He gave evidence that he spent time at Furneaux Lodge and rowed back to his boat at 12.30 am. That evidence was not challenged in cross-examination.

[1075] The defence submitted that the jury could not rule out the possibility another lone man came to Furneaux Lodge on a mystery ketch that may have come in late and left early. The defence relied on evidence from people who said they had seen ketches in the Marlborough Sounds area and wider vicinity. The Crown acknowledged it could not completely rule out that possibility but questioned its likelihood in light of all the other evidence in the case.

[1076] The Crown did not rest its case on the two Hairs but that evidence was important. The nuclear DNA analysis of Hair 13 provided very strong support for the proposition that it came from Olivia and the mitochondrial DNA analysis of Hair 12 provided strong support for the proposition it came from Olivia or someone maternally related to her. The possibility of lab contamination or secondary transfer was explored at trial but remained speculative.

[1077] The strands of circumstantial evidence we have traversed were extensively addressed during witness questioning and in the closing addresses. The prosecution sought to emphasise the incriminating effect of each of the strands. In contrast, the defence sought to offer explanations for the strands consistent with Mr Watson's innocence.

[1078] The extent to which each of the strands had residual value as inculpatory evidence, despite the defence's challenges, was ultimately a matter for the jury. In our view, the incriminating value of some of the strands remained very much intact, whereas the incriminating value of other strands was shown to be relatively minimal. However, taken cumulatively, there is no doubt the jury was entitled to treat the strands of circumstantial evidence we have outlined as consistent with, and indeed pointing strongly towards, Mr Watson's guilt.

[1079] We do not suggest there were not errors and misstatements made during the course of the trial or in respect of aspects of the evidence. That is hardly surprising in a trial (and police investigation) the length and complexity of Mr Watson's. However, there was nothing in these errors and misstatements, either individually or cumulatively, which amounted to a miscarriage of justice.

[1080] Ultimately, the Crown presented a compelling circumstantial case to show that only Mr Watson could have been the lone man. The evidence was carefully presented, challenged, and subjected to submission and analysis. It was a fair trial.

Decision

[1081] The application to adduce further evidence is granted in respect of the evidence of the witnesses listed at [85] and the evidence in the first part of the Report by Drs Wells and Quigley-McBride.

[1082] The application to adduce further evidence is declined in respect of the evidence of Mr Ruhfus and the second part of the Report by Drs Wells and Quigley-McBride.

[1083] We find there was no miscarriage of justice. We accordingly decline to exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act 1961 to quash Mr Watson's convictions for the murders of Olivia Hope and Ben Smart.

[1084] We make an order prohibiting publication of this judgment, the media release, and any information therein, until the judgment is made publicly available at 12.00 pm on Wednesday 10 September 2025.

Solicitors:
K3 Legal Ltd, Auckland for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

APPENDIX A

Governor-General's Reference

NEW ZEALAND GAZETTE

Reference to the Court of Appeal of the Question of the Convictions of Scott Watson for Murder

PATSY REDDY, Governor-General

ORDER IN COUNCIL

At Wellington this 10th day of August 2020

Present:

HER EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Her Excellency the Governor-General, acting under section 406(1)(a) of the Crimes Act 1961 and on the advice and with the consent of the Executive Council, refers to the Court of Appeal the question of the convictions of Scott Watson for murder, entered in the High Court at Wellington on 11 September 1999.

The background to and reason for the reference appear in the Schedule.

Schedule

1. Interpretation

In this schedule,—

applicant means Scott Watson

DNA means deoxyribonucleic acid

ESR means the Institute of Environmental Science and Research Limited.

Background

2. Trial

(1) On 11 September 1999, the applicant was convicted in the High Court at Wellington of the murders of Olivia Hope and Ben Smart, who had attended New Year's Eve celebrations at Furneaux Lodge, Endeavour Inlet, in the Marlborough Sounds.

(2) They were last seen boarding a yacht at the Furneaux Lodge anchorage in the early hours of 1 January 1998 in the company of a male person.

(3) Neither their bodies nor any trace of their belongings have been found.

(4) The prosecution case was circumstantial and included reliance on—

(a) evidence relating to the applicant's behaviour on the night in question; and

(b) evidence relating to the description and identity of male persons seen at Furneaux Lodge, including the male person last seen with Ms Hope and Mr Smart; and

(c) evidence relating to the applicant's behaviour in the days immediately following the last sighting of the pair; and

(d) evidence relating to the number, type, and mooring positions of boats moored in the vicinity of Furneaux Lodge on New Year's Eve 1997 and movements to and from those boats; and

(e) evidence about the recovery and forensic examination of hairs found on a blanket on the applicant's yacht and other bodily material.

(5) The evidence mentioned in subclause (4)(e) included evidence that—

(a) two head hairs recovered from the blanket were examined by way of high-powered microscopic comparison, and were subjected to 5 types of DNA testing, conducted by the ESR in New Zealand and by forensic scientists in Australia and the United Kingdom; and

(b) the results of those tests tended to support the proposition that 2 of the hairs found on the blanket were from the head of Olivia Hope.

(6) The defence cross-examined the prosecution witnesses who gave evidence about the matters mentioned in subclauses (4)(e) and (5) but did not call any forensic evidence of its own.

3. Appeals

(1) The applicant appealed against his convictions to the Court of Appeal in December 1999.

(2) The Court of Appeal considered seven grounds of appeal, including one submission of fresh evidence.

(3) The fresh evidence related to a ministerial report, dated 30 November 1999, concerning probable accidental contamination of DNA extracted from scene samples at the ESR laboratory in another case.

(4) The Court of Appeal held that the circumstances of the two cases had no common features, and there was no new evidence in the applicant's case that would tend to throw doubt on the accuracy or reliability of the DNA testing

results as they were placed before the jury.

(5) The appeal was dismissed on 8 May 2000.

(6) In November 2003, the Privy Council declined to grant special leave for the applicant to appeal against his convictions.

4. First Application for Exercise of Royal Prerogative of Mercy

(1) The applicant first applied to the Governor-General in 2008 for the exercise of the Royal prerogative of mercy in respect of his murder convictions.

(2) The application was declined in July 2013 on the advice of the Minister of Justice.

5. Second Application for Exercise of Royal Prerogative of Mercy

(1) On 20 November 2017, the applicant made a second application to the Governor-General for the exercise of the Royal prerogative of mercy in respect of his murder convictions.

(2) The Governor-General sought the advice of the Minister of Justice on the application.

(3) The Minister of Justice appointed a Queen's Counsel to advise him on the application.

(4) Among other matters, the applicant submitted that 2 reports, dated 18 September 2017 and 19 March 2018, by a forensic scientist, Sean Doyle, provide new expert opinion evidence concerning the reliability of the forensic evidence at trial regarding the hairs recovered from the applicant's yacht that were said to be from Olivia Hope.

(5) In particular, it was submitted that the reports raise questions concerning—

(a) ESR's adherence to relevant quality standards relating to the collection, handling, and forensic examination of those hairs and other bodily material; and

(b) the reliability of the results obtained from the DNA testing of the hairs conducted in New Zealand, Australia, and the United Kingdom; and

(c) the fairness and accuracy of the evidence given at trial about the DNA testing and the results obtained from it.

Reason for Reference

6. Reason

(1) The matter referred to in clause 5(4) and (5) indicates that evidence has become available since the applicant's trial and appeal against conviction that may raise doubts about the reliability of an important aspect of the prosecution case, namely the forensic evidence referred to in clause 2(4)(e) and (5).

(2) The question of the applicant's convictions is referred to the Court of Appeal so that it may—

(a) consider evidence about the matter referred to in clause 5(4) and (5); and

(b) consider whether any of the evidence given at the applicant's trial should be reconsidered in the light of evidence about the matter referred to in clause 5(4) and (5); and

(c) determine, in the light of its consideration, whether a miscarriage of justice may have occurred.

MICHAEL WEBSTER, Clerk of the Executive Council.

2020-ps3636 13-08-2020 09:30

APPENDIX B

IPCA Report extract

The IPCA's summary of the heads of complaint and its findings: (12.1–12.12)

12.1 **Photograph Identification** (Pages 6 – 10) you say that the Police team under the command of Detective Inspector Pope used inappropriate photograph identification techniques. In particular, you say the officers used poorly constructed photograph montages during the investigation, including by choosing and including a 'trick' photograph as an identification tool, knowing that it promoted an untrue impression of Scott Watson's appearance (Scott Watson being the only person depicted in the montage with half closed eyes). You further say that Police acted inappropriately by showing prime witnesses a single photograph of Scott Watson in the early stages of the inquiry.

12.2 **Finding:** The construction of the montages, the methods used for presenting the montages to witnesses, and the showing of a single photograph to Guy Wallace were all highly undesirable practices, particularly given the critical importance of suspect identification in this case. Compounding those departures from best practice is the limited nature of any useful documentation about witness' responses to the montages in the Police files examined by the Authority; and the absence of any information to indicate how decisions about the timing or construction of the montages were made or by who. There is no information about what instructions if any might have been given to the officer(s) who compiled the montages or to the officer who showed a single photograph to Mr Wallace. This dearth of information makes it difficult for the Authority to determine whether there was any deliberate misconduct on the part of any individual officers in the approach taken to the photographic identification. The Authority does however find the methods employed were highly undesirable and fell far short of best practice.

12.3 **The Mystery Ketch** (Pages 10 – 11) You allege that Detective Inspector Pope gave orders to cease searching for the 'mystery ketch' 'within a week' of taking command of the inquiry, and then informed the press and the public that the ketch did not exist, despite receiving numerous eyewitness accounts of it over an extended period of time. **Finding:** There is no evidence on which to conclude that Detective Inspector Pope and his team deliberately ignored relevant evidence about vessels or vessel sightings. On the contrary, it is apparent that Police went to considerable lengths to identify, locate and eliminate all vessels in the vicinity of Furneaux Lodge on the night Ben and Olivia disappeared, and their actions seem eminently reasonable in this regard.

12.4 **Tunnel Vision** (Pages 12 – 13) – You allege that Detective Inspector Pope formed the view within five days that Scott Watson was guilty of the murders and from that point he and his officers ignored any evidence or indication to the contrary. **Finding:** While there were some deficiencies in the inquiry, a close examination of the investigation files satisfies me that on the whole Operation Tam was conducted reasonably and rationally and that its leaders remained open-minded throughout.

12.5 **False Rumours** (Pages 13 – 19) – You allege that Detective Inspector Pope created and circulated false rumours about Scott Watson and then refused to comment on the tumours when questioned by the press. **Finding:** I can find no basis for this allegation. What is apparent is that a number of the so-called 'rumours' were circulated by the press themselves or by others, contrary to the urgings of Police. In other instances the information circulated was either true or was based on beliefs that were not unreasonably held by Police. The provision of a 'suspect profile' of Scott Watson to a group of civilians by a member of the investigation team was however highly undesirable.

12.6 **The Strategic Lie** (Pages 19 – 22) – You allege that Detective Inspector Pope deliberately told the press and the public that Scott Watson was not a suspect, whilst at the same time telling journalists unofficially that Scott Watson was the prime suspect: his purpose being to create a situation where the press could identify, attack and malign Scott Watson without risking '*sub judice*' contempt of court proceedings.

12.7 **Finding**: Having examined Detective Inspector Pope's actions and his public comments I find them entirely consistent with the view that he was extremely concerned by media speculation and identification of Scott Watson, and that he sought to avoid any statements that might compromise the investigation or prejudice any subsequent trial. Importantly, there is no evidence of a 'strategic lie', or of a breach of the *sub judice* rule, or breach of the Police Manual of Best Practice in this regard. Detective Inspector Pope did not publicly name Scott Watson as a prime suspect. To have done so would have been not only inappropriate, but contrary to Police guidelines, and clearly prejudicial to Scott Watson's interests. There is no evidence of misconduct in Detective Inspector Pope's dealings with the media during Operation Tam.

12.8 **False Information in Sworn Affidavit** (Pages 22 – 27) – It is alleged that Detective Inspector Pope swore multiple false oaths in an affidavit filed in support of applications to obtain interception and search warrants. Finding: I find there are errors in the affidavit, which cause the document as a whole to fall short of the high standard of accuracy required in applications for warrants to search or intercept private communications. There is, however, no evidence that Detective Inspector Pope, or any other officer intended to mislead the Court; nor is there any evidence that when Detective Inspector Pope swore the affidavit he knew that any part of it was inaccurate. The errors do not strike at the heart of the affidavit; nor render its central purpose false. Singly or cumulatively, they do not constitute misconduct or neglect of duty by Detective Inspector Pope or any other person responsible for compiling the affidavit.

12.9 **Secret Witnesses** (Pages 27 – 30) – It is alleged that Detective Inspector Pope 'bought' the testimony of two prison inmate 'secret witnesses' by offering them favourable treatment in return for giving false evidence that Scott Watson had confessed to them in prison. **Finding:** Contrary to what has been suggested, there is no evidence that Police acted unlawfully or improperly in their interaction with either secret witness prior to, during, or after they gave evidence at Scott Watson's trial. The use of 'secret witnesses' is always fraught with obvious risk but those risks are usually exorcised through challenge at any subsequent trial, as was the case here.

12.10 **Coercion of witness** – (Pages 30 – 33) – You say that Detective Inspector Pope coerced a witness (Mr. Erie), who had been found by Police to have 250 cannabis plants, into giving false evidence, by threatening his access to his children and promising him that he would be charged only with cultivation of cannabis if he complied. Further, that Detective Inspector Pope approved for publication a report that Mr Erie had been charged with possession for supply as a 'cover-up'. **Finding:** I find no evidence to support these allegations and am satisfied Police acted professionally and appropriately in all respects in terms of their dealings with Mr Erie.

12.11 **Blade Duration Test** – (Page 33) – It is said that Detective Inspector Pope did not test the duration of a voyage by *Blade* from Cook Straight to Erie Bay because he knew it would contradict any case against Scott Watson. Police were not obliged to carry out a reconstruction and there is no basis for the criticism of the failure to do so given the very limited evidential weight any such test would have had. Indeed, it is highly unlikely the reconstruction postulated in this case would have been admissible in evidence. This is because of the impossibility of replicating the wind conditions, tide and weather on New Year's Day 1988. In assessing the relevance and probative value of reconstruction evidence, a court must consider e.g. whether the evidence is able to **accurately replicate** the **conditions** in the case: *R v Kingi* (HC) Palmerston North, CRI-2005-054-305, 17 February 2006, Wild J); and whether the evidence **effectively recreates an entire event or series of events**: *Stratford v MOT* [1992] 1 NZLR 486.

12.12 **DNA Contamination** – (Pages 33 – 34) – It is alleged that possible contamination of evidence occurred either by hairs recovered from a 'Tiger' blanket seized from Scott Watson's boat, Blade, and identified as belonging to Olivia, having been 'planted'; or that poor Police practices resulted in accidental cross-contamination. **Finding:** I find no evidence that police deliberately contaminated the evidence by placing Olivia's hairs on the blanket, either while the blanket and sample hairs were within the custody of Police, or once the exhibits had been sent to the laboratory. Nor is there any evidence of accidental contamination or 'secondary transfer' of this evidence.